Judicial remedies for individuals before the highest jurisdictions, a comparative law perspective

The United Kingdom
JUDICIAL REMEDIES FOR INDIVIDUALS BEFORE THE HIGHEST JURISDICTIONS, A COMPARATIVE LAW PERSPECTIVE

The United Kingdom

STUDY
October 2017

Summary
The study presented below forms part of a larger project whose aim is to provide a comparative analysis of the rights of individuals in law proceedings before the highest courts of different States and before certain international courts. The objective is to describe the various remedies developed under domestic law that are available through the UK courts including the Supreme Court which, though not a constitutional court in the classic Kelsenian model, does sits at the apex of the appellate court structure in the UK.

The study commences with an historical introduction which stresses the absence in domestic law of a clearly delineated sense of what counts as ‘constitutional’. In traditional accounts of the UK Constitution there is no hierarchy of higher order ‘constitutional’ and ‘ordinary’ Acts of Parliament. Neither has a separate court structure developed to handle exclusively constitutional claims, although specialised ad hoc tribunals do exist in public law contexts. The underpinning principles remain (i) the doctrine of parliamentary sovereignty and (ii) the rule of law.

After this introduction, a review is provided of the main remedies and procedures used for the redress of grievances against public bodies. In a subsequent section of materials, a table of the main sources of individual rights against the state is provided. The domestic status of constitutional conventions and international law are dealt with in this part. Then, an account of the substantive norms informing the standards of effective protection for the individual is given, including some critical commentary on the operation of key provisions.

The concluding section compares the benefits and drawbacks of specialised tribunal adjudication, the ‘politicised’ nature of certain judicial review proceedings against a background of increasing privately-owned provision of services to the public and the continuing relevance of private law tort claims where compensation for mistreatment at the hands of the state is sought.
AUTHOR

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The United Kingdom

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<td>Appeal Cases</td>
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<td>Admin LR</td>
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<td>All ER</td>
<td>All England Law Reports</td>
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<td>Ch</td>
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<td>Civ</td>
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<td>Env LR</td>
<td>Environmental Law Reports</td>
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<td>Court of Appeal (Civil Division)</td>
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<td>EWCA Crim</td>
<td>Court of Appeal (Criminal Division)</td>
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<td>EWHC</td>
<td>England &amp; Wales High Court (Administrative Court)</td>
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<td>Scotland Court of Criminal Appeal</td>
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<td>HLC</td>
<td>House of Lords Cases</td>
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<td>How St Tr</td>
<td>Howell's State Trials</td>
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<td>ILEA</td>
<td>Inner London Education Authority</td>
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<td>Law Reports, King's Bench (High Court)</td>
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<td>QB</td>
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<td>Statutory Instrument</td>
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<td>Scots Law Times</td>
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<td>TEU</td>
<td>Treaty of European Union</td>
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UKHL  United Kingdom House of Lords
UKPC  United Kingdom Privy Council
UKSC  United Kingdom Supreme Court
WLR   Weekly Law Reports
Executive Summary

The UK lacks a generalised set of propositions in a formal constitutional document stating the duties and powers of governing institutions and declaring the rights and freedoms of the citizens.

Consequently there is no universally agreed account of what is truly ‘constitutional’ in the UK legal system.

The overarching features of the UK legal system comprise instead the doctrines of (i) parliamentary sovereignty; and (ii) the rule of law.

A statement of the rights and freedoms of the citizens is to be found across a wide range of statute law and judicial decisions (common law).

Conventions do not play a significant role as a source of citizens’ constitutional rights.

Unless incorporated by Act of Parliament into domestic law, the dualist understanding of International legal obligations means that treaties with other nations/international organisations do not play a significant role as a direct source of citizens’ constitutional rights.

The UK does not have a system of designated/specialist constitutional law (Kelsenian) courts. Disputes with a constitutional content are heard in the ordinary courts and tribunals.

Exceptionally, two instances where UK courts do act as a constitutional court occur in respect to (i) competence disputes arising from the various settlements of devolved power in the constituent elements of the United Kingdom (Scotland, Wales and Northern Ireland). These disputes are heard in the UK Supreme Court; and (ii) the national constitutions of the UK’s overseas territories and Crown dependencies. These disputes are heard by the Judicial Committee of the Privy Council.

The major remedies available to citizens who allege that their rights have been infringed by public bodies are provided by (i) rights of appeal to specially created statutory tribunals in respect of particular acts/omissions of selected public authorities; (ii) actions for judicial review at common law to contest the legality of acts/omissions of the Executive and other bodies with a public function; (iii) civil actions in tort to secure compensation for any rights infringement.

Each of the above sets of remedies follow their own distinct set of procedures. The limitations of judicial review remedy should be noted in particular since a successful action for review merely sets aside an impugned decision. It does not prevent the public body from reaching the same substantive outcome in any subsequent re-taking of the original decision. All that is required is that the error, into which the initial process fell, is avoided. This is compared to (i) monetary compensation (in the case of a successful action in tort) and (ii) a reversal of the original decision and its substitution by a correct decision in respect of successful appeal to a statutory tribunal.

In recent years judicial review has played an important role in (i) enforcing standards of good administration upon executive bodies and (ii) ensuring protection of Convention rights.

Compensatory actions in tort such as those remedying unlawful infringements of personal liberty and privacy have likewise been revised by the courts to reflect Convention jurisprudence.

There have been very few cases where Article 19(1) TEU has been invoked in the higher national courts.
Similarly, Article 47 of the EU Charter on Fundamental Rights has been cited infrequently in the higher courts in England and Wales. When it is referred to, it has been discussed alongside Article 6(1) ECHR.

Domestic rulings make clear the virtually coterminous effect of Article 47 of the Charter and Article 6(1) ECHR. The latter though has a broader reach since it refers more broadly to all rights in civil law as compared to Article 47’s more focused concern on questions of EU law and the rights of persons derived under EU treaties, directives and regulations.

There is a close conceptual link between the notion of access to the courts in Article 6(1) of the Convention (and brought into domestic law under the Human Rights Act 1998) and the right to an effective remedy set out in Article 13 of the Convention although Article 13, unlike Article 6, has not been incorporated into domestic law.
I. Brief historical background

I.1. Introduction

“There is in the English constitution an absence of those declarations or definitions of rights so dear to foreign constitutionalists. Such principles, moreover, as you can discover in the English constitution are like all maxims established by judicial legislation, mere generalisations drawn from either the decisions or dicta of judges, or from statutes which, being passed to meet special grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament.” A V Dicey An Introduction to the Study of the Law of the Constitution

As is widely appreciated, the UK lacks a set of generalised propositions in an authoritative, constituting document that delimits the powers of governing institutions and declares the values underpinning our institutional arrangements (such as the rights of citizens). Instead the twin overarching features of our constitutional settlement as originally set out by Dicey in 1885 comprise the doctrines of (i) parliamentary sovereignty - taken here to mean the omnipotence or unlimited legal sovereignty of each successive Parliament to make and unmake laws and (ii) the rule of law - whereby the ordinary courts (rather than specialist tribunals) determine whether the government has exceeded its lawful powers just as they decide whether an ordinary citizen has acted lawfully. In so doing, the courts play a significant role in articulating the personal freedoms of citizens.

One consequence of not having an entrenched founding, authoritative text is that there is no clear consensus about the range of matters that are properly considered constitutional. Following Dicey, the dominant view has been that all laws duly passed by the Queen in Parliament must enjoy equal status. On this perspective, there can be no difference in the constitutional status between the Dangerous Dogs Act 1991 and the Human Rights Act 1998. Each must be interpreted and applied by the Courts until a later statute expressly or impliedly contradicts a provision(s) of the earlier Act. In this way, the legislative will of the current Parliament is given effect. There is no constitutional review of Acts of Parliament since this would wholly undermine the sovereignty of Parliament to make whichever laws it chooses.

Given (i) the absence of an entrenched and positive statement of human rights and (ii) the primacy accorded to Acts of Parliament, the freedoms of the individual under the Constitution are said to be ‘residual’, meaning that the correct (though complex) response to the question ‘Does the citizen have a constitutional entitlement to do X?’ is ‘Yes, provided there is no legal prohibition on doing X.’ Thus for example the extent of any person’s freedom of expression under the UK Constitution hinges crucially upon an understanding of a long list of statutory and judge-made rules that limit freedom of expression. To name but a few of the relevant statutory laws relating to freedom of expression, we would need to take into account inter alia the Administration of Justice Act 1960, the Bill of Rights 1689, Children and Young Persons Act 1933, Contempt of Court Act 1981, the Official Secrets Act 1989, the Copyright, Design and Patents Act 1988, the Data Protection Act 1998, Defamation Acts 1996 & 2013, the Education Act 1986 (No. 2), Highways Act 1980, Human Rights Act 1998, Obscene Publications Act 1964,

1 The significance of implied repeal is set out later in the briefing paper. For the time being, it can be noted that it means that where the provision(s) of a later Act of Parliament is(are) inconsistent with an earlier Act, the later Act is deemed to repeal the earlier Act’s inconsistent provisions even if the later Act fails to mention the earlier Act.

I.2. Inductively determined personal freedoms

In normative terms, Dicey defended this approach to the determination of personal freedoms. He contrasted the deductive method of determining rights on continental Europe in which the rights of the individual are deduced from a general statement of a principle or norm in an entrenched constitutional document with the inductive method he found in England. Any ‘principles’ of personal freedom in the domestic constitution were inductively arrived at from particular decisions arrived at in the Courts. This methodological difference for protecting rights did not matter, Dicey argued, ‘provided the rights of the individual are really secure.’ In empirical terms however, he observed that the broad declarations of rights favoured by the drafters of foreign constitutions were prone to two weaknesses. First, the focus on matters of high principle tended to mean that insufficient attention was paid to the ‘absolute necessity for the provision of adequate remedies by which the rights they proclaimed might be enforced.’ The pragmatic English in contrast had focused upon the practical matter of providing remedies for infringements of personal freedoms. The Habeas Corpus Acts, Dicey famously declaimed ‘declare no principle and define no right, but they are for practical purposes worth a hundred constitutional guarantees.’ Remedies developed by the judges in tort law have also protected the citizen from unlawful state action and in this way have vindicated the rule of law.

Second, where a right to individual freedom was deduced from declared constitutional principles, Dicey maintained that ‘the idea readily occurs that the right is capable of being suspended or taken away.’ Whereas in England, where the right to individual freedom is found as part the ordinary laws of the land, any attempt to suspend the general freedoms of citizens via say an abolition of the rule of law would instantly provoke a revolution. Of course what Dicey omits to say is that incremental incursions into the range of UK citizens’ personal freedoms can be (and regularly have been) secured by Executive. Acting through its dominant position in Parliament to secure legislative curtailments upon rights, Governments of all colours have managed to avoid contravening Dicey’s formalistic notion of the rule of law by

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2 See further Section III Sources below.
4 Ibid. Noting for example that the French Declaration of the Rights of Man in 1791 ‘proclaimed liberty of conscience, liberty of the press, the right of public meeting … But there never was a period in the recorded annals of mankind when each and all of these rights were so insecure, one might say so completely nonexistent, as at the height of the French Revolution.’
5 Ibid. at p.199. Dicey did not go so far as to suggest that a written constitution with declarations of rights would necessarily rule out an accompanying set of remedial procedures for the enforcement of those rights, citing the US Constitution as an example of a constitution that contained both.
6 (1765) 19 Howell’s *State Trials* 1029.
7 Dicey acknowledges here that the modification would need to follow the special procedure laid down for constitutional amendment but does not seem to think this amounts to much of an obstacle to a proposed reduction of constitutional rights, see ibid., at p.200.
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I.3. Devolution in the UK\textsuperscript{8}

The devolved administrations in Scotland, Wales and Northern Ireland enjoy decision-making powers whose exercise can infringe citizens’ rights. It is worth noting that the various devolution settlements across the United Kingdom are however asymmetrical. The grant of powers from the centre never sought parity of law-making powers across the various parts of the United Kingdom. Particularly noteworthy is what Dickson has called the ‘black hole’ in the devolution project - the lack of any scheme of devolved powers in England between the shires and regions of England and Westminster.\textsuperscript{9} Unlike a federal system where the allocation of powers between the centre and the regions is invariably set out in a formal constitutional document and unalterable except via a prescribed procedure of constitutional amendment, the grant of powers from Westminster to the devolved administrations may as a matter of legal theory be revoked by the UK Parliament.\textsuperscript{10}

I.3.1. Scotland

The process of devolution to Scotland entails a binary divide between ‘unreserved matters’ and ‘reserved constitutional matters.’ The Edinburgh (Holyrood) Parliament is deemed to have the competency to pass laws (unreserved matters) unless matters are expressly reserved to Westminster under Schedule 5 of the Scotland Act 1998. Schedule 5 of the 1998 Act lists both General Reservations\textsuperscript{11} as well as Specific Reservations.\textsuperscript{12} The former include laws relating to the Constitution,\textsuperscript{13} political parties, defence, foreign affairs and public service. Specific reservations exist across a number of areas and include fiscal and economic policy, public expenditure and regulation of the Bank of England, immigration and asylum laws, drugs laws, data protection laws and competition rules. Note however that the Edinburgh Parliament does have the power to levy local taxes and vary income tax.\textsuperscript{14}

It is perhaps also worth pointing out a further reserved matter namely the ‘continued existence of the High Court of Justiciary as the criminal court of first instance and of appeal,’ and ‘the continued existence of the Court of Session as a civil court of first instance and of appeal.’\textsuperscript{15}

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\textsuperscript{9} B Dickson, ‘Devolution’ in Jeffrey Jowell, Dawn Oliver, and Colm O’Cinneide (eds), The Changing Constitution (8th Edition, OUP 2015) 250, 268. There has been a process of devolution to Greater London initiated under the Greater London Authority Act 1999. A programme of intra-English devolution initiated by the Cameron administration is proceeding on a city-region basis with elected city mayors taking over certain powers previously enjoyed by metropolitan councils.

\textsuperscript{10} This is though to omit consideration of the effective political constraints on any such repatriation of powers to the centre.

\textsuperscript{11} Scotland Act 1998, sch. 5 lists reserved matters under the sub-headings of General Reservations (Part I) and Specific Reservations (Part II). Crucially, Part I of Sch. 5 reserves matters under the following headings, “The Constitution”, “Political parties”, “Foreign affairs etc”, “Public service”, “Defence”, and “Treason”.

\textsuperscript{12} Scotland Act 1998, sch 5 Part II.

\textsuperscript{13} For the independence referendum in September 2014, the Westminster Parliament passed an amendment to the Scotland Act devolving competence on Edinburgh to hold the referendum, see Scotland Act 1998 (Modification of Sch. 5) Order 2013 (SI 242).

\textsuperscript{14} Scotland Act 1998, s.25 (as amended by the Scotland Act 2012, s.80).

\textsuperscript{15} SCA 1998, sch. 5, para 1.
I.3.2. Wales

Devolution in Wales has occurred through the conferral of competences. Thus in 1998 the Government of Wales Act permitted the Welsh Assembly to make secondary legislation in eighteen fields where the Westminster Parliament had conferred express authority via an Order in Council upon it. Unless matters are listed as conferred upon the Assembly in a Government of Wales Act, then a presumption exists that the matter in question is reserved to the Westminster Parliament. Alongside this arrangement exists a general presumption of reservation if matters are not listed as “conferred” in the successive Government of Wales Acts. At the time of writing, further reforms to Welsh devolution proposed by the Silk Commission are pending that propose a closer approximation to the system of devolution in Scotland.

I.3.3. Northern Ireland

In Northern Ireland a hybrid system of ‘reservation,’ ‘exception,’ and ‘transferral’ of law-making powers exists. This reflects the atypical political and historical context of Northern Ireland. For specific legislative competences to be transferred to the Stormont Assembly, there needs to be a degree of cross-party consensus across the nationalist and loyalist communities. This is currently in some jeopardy given the Democratic Unionist Party’s role in providing ‘confidence and supply’ to the minority Conservative administration of Mrs May following the indecisive UK General Election of June 2017.

16 Government of Wales Act 1998, s 22(2) and Schedules 2 and 3 as amended by the Government of Wales Act 2006.
17 See the amendments to the Government of Wales in 2006 & 2011.
18 Northern Ireland Act 1998, s 4(1) - (2).
19 See in particular the provisions that facilitate the formation of a power-sharing executive across loyalist and nationalist communities and the acceptance by the UK Parliament that Northern Ireland could leave the United Kingdom after gaining majority support in a referendum endorsing departure, Northern Ireland Act 1998, s 1 (1) - (2).
20 For example, under NIA 1998, s 4(3) a “policing and justice matter” cannot cease to be a reserved or transferred matter unless ‘the Assembly has passed with cross-community support a resolution praying that the matter concerned should cease to be or, as the case may be should become a reserved matter.’
II. Forms and types of remedy in cases of violation of constitutional rights

Lacking (i) a distinct set of procedures and (ii) specialised Kelsenian courts for the enforcement of the range of what may be called ‘constitutional’ rights\textsuperscript{21}, the citizen who has a complaint against a public body (or non-public body entrusted with the carrying out of public functions) must pursue his/her remedies through the ordinary courts. These remedies comprise (a) statutory rights of appeal to a tribunal created by an Act of Parliament; (b) an action for judicial review and (c) civil law claims in tort. The relevant procedures and types of relief available to the citizen are detailed below.

Before setting out the main forms and types of remedy against public bodies, two settings where UK courts do explicitly act as constitutional courts must be acknowledged. First, the UK Supreme Court has a constitutional function in determining whether proposed legislation from the devolved legislatures falls within the powers conferred upon them by Westminster. It is thus open to an individual who claims that his/her constitutional rights will be adversely affected by a measure to be enacted by the devolved legislature to contest the constitutionality of the measure before the United Kingdom Supreme Court. A good illustration of the role played by the UK Supreme Court in safeguarding the European Convention rights of suspects in the criminal justice system occurred in \textit{Cadder v HM Advocate} where the prosecution’s practice of leading evidence at trial that had been obtained by the Scottish police from the suspect in the absence of a legal representative was held unanimously to be in breach of the suspect’s rights under Article 6(1), (3) of the Convention.\textsuperscript{22} A previous ruling in \textit{HM Advocate v McLean}\textsuperscript{23} was set aside, provoking a critical reaction from politicians north of the border.\textsuperscript{24} The Scotland Act 2012 followed and cut back on the jurisdiction of the UK Supreme Court in Scottish criminal appeals. As one leading criminal practitioner put it, ‘the statutory changes reflect a growing unease about the role of the Supreme Court in Scots cases.’\textsuperscript{25} The effect of the reforms is to ensure that the Scottish criminal courts have the final say on the merits of criminal cases whilst preserving review by the UK Supreme Court on ancillary matters (such as those relating to criminal procedure in the Scottish courts) that engage rights protected under ECHR and EU law. The most recent indications from the UK Supreme Court in \textit{Macklin v HM Advocate} suggest a significant rowing back from its earlier more interventionist stance.\textsuperscript{26} In \textit{Macklin}, the Supreme Court indicated that it would not intervene with the decisions of any Scottish court on the \textit{interpretation} of Convention and EU law rights to the facts of the case. Instead, the UK Supreme Court would confine itself to asking merely if the Scottish court had \textit{identified} the correct legal test from ECHR/EU law.

\textsuperscript{21} Recalling the fact that, in the absence of a codified or written constitution, there is no agreed definition of what counts as a ‘constitutional right’ in UK law.
\textsuperscript{22} [2010] UKSC 43.
\textsuperscript{23} [2009] HCJAC 97.
\textsuperscript{24} See further \textit{Fraser v HM Advocate} [2011] UKSC 24 for a subsequent ruling that Scots criminal law violated Convention standards. In response see the exasperated remarks of the Scottish Cabinet Secretary for Justice Kenny MacAskill that Scottish legal system was; “undermined routinely by a court that sits in another country and is presided over by a majority of judges who have no knowledge of Scots law, never mind Scotland … a court in London that is made up of a majority of judges … who may have visited here for the Edinburgh Festival”, cited by Clare Montgomery QC in \url{http://ukscblog.com/case-comment-macklin-v-her-majestys-advocate-2015-uksc-77/}.
\textsuperscript{25} See Clare Montgomery QC \textit{ibid}.
\textsuperscript{26} [2015] UKSC 77.
The second sense in which a domestic court operates as a constitutional court relates to the Judicial Committee of the Privy Council’s jurisdiction to rule on constitutional disputes arising in Crown dependencies (Jersey, Guernsey, Isle of Man), Commonwealth realms (Antigua, Barbados, the Bahamas, Grenada, Jamaica) New Zealand associated states (Cook Islands, Niue) and British overseas territories (Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, St Helena, Turks and Caicos Islands). In these dependencies and territories, the Privy Council functions as a constitutional court by interpreting national constitutions that confer rights on citizens. Bradley and Ewing note for example that decisions of the Judicial Committee of the Privy Council have done much to ‘temper the harshness and injustice of death row conditions in the Caribbean.’ In 2017, the Judicial Committee of the Privy Council sits at the apex of the court structure for 31 jurisdictions.

II.1. Statutory Appeals before a tribunal created by Act of Parliament

Parliament has created a set of specific appeals procedures against the decisions of inferior public bodies so that aggrieved individuals can challenge the correctness of outcomes before statutory tribunals. Prominent tribunals include the Asylum and Immigration Tribunal, Special Immigration Appeals Commission, Information Tribunal, Investigatory Powers Tribunal, Proscribed Organisations Appeal Commission and Social Security and Child Support Tribunal. In respect of the aforementioned tribunals the materials below provide a brief statement of (i) jurisdictional aspects; (ii) further appeal routes. In 2007 the Tribunals Courts and Enforcement Act replaced the varying structures of a number of separate tribunals (some had operated under a single tier system with appeals/judicial review to the ordinary courts; others functioned with a first instance body from which appeal was possible to a second tier tribunal) with a unified structure. The reforms produced two generic tribunals: a first tier Tribunal and an Upper Tribunal. The First tier tribunals are grouped within 7 chambers (War Pensions and Armed Forces Compensation); Social Entitlement Chamber; Health, Education and Social Care Chamber; General Regulatory Chamber; Tax Chamber; Immigration and Asylum Chamber; Land, Property and Housing Chamber. As will be seen below, some of the appellate bodies created by statute to hear appeals from decisions of Ministers and other public bodies and which function in effect as tribunals in all but name remain outside the structure of the 2007 act reforms.

II.1.1. First Tier Asylum and Immigration Care Chamber

This tribunal hears appeals against denials of entry clearance/asylum taken by Border Agency staff and Immigration officials using powers conferred by the Nationality, Immigration and Asylum Act 2002. Appeals against officials’ decisions to the tribunal occur at a high rate and have been described as amounting to a ‘culture of pervasive challenge.’ The basis of appeals is set out in s.84 of the 2002 Act and includes the following grounds:

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29 Ibid.
30 Ibid. Tribunals, Courts and Enforcement Act 2007, s.30.
31 Nationality, Immigration and Asylum Act 2002 (and associated regulations) including decisions to revoke citizenship.
The decision contravenes the immigration rules;

is unlawful under the terms of s.19 of the Race Relations Act 1965;

breaches the appellant’s Convention rights contrary to the Human Rights Act 1998;

breaches the appellant’s EU law rights because they or a family member are an EEA national;

that the decision is not otherwise consistent with legal rules;

involves an unlawful exercise of discretion by the original decision maker to remove the appellant from the UK would violate his/her rights under the Refugee Convention.

An appeal from a first tier ruling is available on a point of law to the Upper Tribunal on a point of law provided the Upper Tribunal grants permission. A further appeal may be taken to the Court of Appeal with the permission of the Upper Tribunal or the Court of Appeal.33

II.1.2. Special Immigration Appeals Commission (sits outside 2007 Act reforms)

Hears appeals from decisions made by Home Office on national security grounds to deport persons, deprive persons of citizenship and deny entry to EEA nationals.34

The Home Secretary has a power to deport or refusal of an application for citizenship or asylum on national security grounds by deeming a person ‘not to be of good character’.35 The burden lies on the applicant to show that he is of good character.36 The grounds of appeal closely resemble those available in judicial review proceedings discussed in greater detail below. Thus an appellant may argue that the decision is flawed in law because for example he/she has been denied a fair hearing (including not being given an adequate opportunity to address objections to his/her application; not being given an adequate statement of reasons to enable the appellant to challenge the decision).37

Appeals lie on a point of law to the Court of Appeal and require permission of either the Commission or the Court of Appeal.38

II.1.3. Information Tribunal (sits outside 2007 Act reforms)

Hears appeals from decisions of the Information Commissioner regarding access to official information and decision/enforcement notices against public bodies under the Freedom of Information Act 2000.39 Appeals on points of law from the Tribunal are heard in the High Court.40

Data protection cases involving national security are heard by the Administrative Appeals Chamber of the Upper Tribunal.

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33 Tribunals, Courts and Enforcement Act 2007, s.17.
34 Special Immigration Appeals Commission Act 1997.
35 British Nationality Act 1981 s.6(1) and Schedule 1.
36 Ibid.
38 Ibid. s.7.
39 Freedom of Information Act 2000, s.57.
40 Ibid. s.59.
Under the Freedom of Information Act 2000, individuals and groups enjoy on payment of a fee qualified rights of access to certain classes of government information. This Act broke with the deeply embedded culture of secrecy among Ministers and civil servants in British Government. It applies to over 100,000 public authorities including central and local government, schools, universities, police and the national health service. Absolute exemptions from complying with access requests exist in relation to information supplied/obtained by the intelligence services, court records, information provided in confidence. More narrowly, non-absolute public interest exemptions exist in relation to disclosure of cabinet and ministerial discussions (and more generally defence, internal relations, economy-related records). The test for disclosure here in any particular case is whether the public interest in maintaining the exemption outweighs the public interest in disclosure. Where an access request is initially refused by the body holding the information, an appeal can be taken to the Information Commissioner.

Controversially under s.53 of the 2000 Act, the Executive may override decisions by the Information Commissioner and the Tribunal in favour of disclosure.

II.1.4. Investigatory Powers Tribunal (sits outside 2007 Act reforms)

Hears claims that (i) the intelligence services conduct in relation to the appellant has breached the latter’s Human Rights Act 1998 (invariably Article 8 ECHR privacy interests around personal data collection and retention); (ii) miscellaneous other complaints against the intelligence services (including the intelligence services of foreign governments). In determining whether a violation has taken place, the tribunal ‘must apply the same principles as a court would on an application for judicial review.’ In the first ten years of its operation, the tribunal found in favour of appellants on ten occasions.

Investigatory Powers Tribunal rulings are not subject to appeal or liable to be quashed in any court (judicial review is not available). On a day yet to be appointed the Secretary of State will be placed under a duty to create an appeal mechanism by which persons may appeal against a ruling of the tribunal to the Court of Appeal (or Court of Session in Scotland). Remedies that may be granted by the Tribunal include the award of damages and the quashing of any warrant authorising interception of communications.

II.1.5. Mental Health Review Tribunal (First Tier Health, Education and Social Care)

Hears applications by (or on behalf of patients by nearest relatives) compulsorily detained under mental health legislation that at the time of the hearing the detainee ought no longer to be compulsorily detained. The burden of proof rests on those arguing for continued detention. This represents a change in the law following a Human Rights Act challenge in R v Mental Health Review Tribunal (North and East London). The reverse onus of proof in tribunal procedure that required detained persons to show why continued detention is not justified.

43 Ibid.
44 Ibid., s.67(8) and see R (on application of Privacy International) v Investigatory Power Tribunal [2017] EWHC 114 (Admin).
45 Ibid., at s.83(2).
was deemed by the Court of Appeal to violate Article 5(1) & (4) of the Convention. In response, Parliament altered the law to the present position and the Secretary of State set up an ex gratia compensation scheme for those who had been adversely affected under the previous rule.

In certain circumstances, hospital managers must refer patients to the tribunal to assess whether detention is still necessary. The conditions for continued detention are that the detainee is suffering from a mental disorder of a nature or a degree that makes it appropriate for him to receive treatment in hospital; and he remains a danger to himself and/or others; and necessary treatment for the patient can only be provided if he remains under detention.

Release back into the community under supervised conditions will depend upon the resources available to offer adequate supervision. Where such resources are not available, it is arguable that the state does not breach the detainee’s right to liberty under Article 5 of the European Convention on Human Rights where it continues to detain.

Appeals from the First tier Tribunal are available to the Upper Tier on a point of law.

II.1.6. **Proscribed Organisations Appeal Commission (sits outside the 2007 Act reforms)**

Hears appeals from organisations that have been proscribed under the Terrorism Act 2000 on the basis of Secretary of State’s belief that the organisation is ‘concerned in terrorism’. The proscribed body or a person affected by the proscription may appeal to the Secretary of State for deproscription. Where this is unsuccessful, the body/person may take an appeal to the Proscribed Organisations Appeal Commission. The Commission shall allow an appeal where it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.

A further appeal lies to the Court of Appeal or in Scotland the Court of Session. The permission of either the Commission or the Court of Appeal/Court of Session.

In *Lord Alton of Liverpool and others v Secretary of State for the Home Department* the Court of Appeal upheld a decision of the Proscribed Organisations Appeals Commission allowing an appeal against the Home Secretary’s decision to add the *People’s Mojahdeen Organisation of Iran* to the list proscribed bodies under Schedule 2 of the Terrorism Act 2000. The Court of Appeal could find no fault with the Proscribed Organisations Appeal Commission finding that the *People’s Mojahdeen Organisation of Iran* had not possessed for a period of around five years any military apparatus capable of engaging in terrorist activity. Moreover there was no evidence of any preparatory steps to engage in terrorism or encouragement of others to

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46 *R (H) v London North and East Mental Health Review Tribunal* [2002] QB 1. The infringing provisions were ss.72-3, Mental Health Act 1983.


48 See Lord Phillip of Worth Matravers MR in *R(K) v Camden and Islington Health Authority* [2001] EWCA Civ 240.

49 Terrorism Act 2000, s.3(4). According to s.3(5) an organisation is concerned in terrorism if it—(a) commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism.

50 Terrorism Act 2000, s.4(2).

51 Terrorism Act 2000, s.5(2).

52 Terrorism Act 2000, s.5(3).

53 Terrorism Act 2000, s.6(1).

54 Terrorism Act 2000, s.6(2).
engage in acts of terrorism. In such circumstances, the Secretary of State’s belief that this inactivity/incapacity amounted to a mere adjournment - rather than a renunciation and cessation - of terrorist activities was rightly characterised as unreasonable.

II.1.7. Social Security and Child Support Tribunal (Social Entitlement Chamber)

Hears appeals from decisions of executive agencies responsible for deciding on eligibility for a range of welfare benefits such as income support, tax credits, child support maintenance, housing benefits, social fund and incapacity benefit. The appeal must normally be made within a month of the decision (or its confirmation). In terms of caseload volume is the most heavily used tribunal system. In 2013 for example the tribunal heard over 400,000 appeals. The grounds of challenge will usually entail a claim that the decision-maker has applied the law wrongly to the facts of the appellant’s case and has accordingly come to an incorrect conclusion. In the particular case of discretionary payments (as opposed to rule-based entitlements) arguments will likely centre upon the lawfulness of the exercise of discretion (and thus mirror grounds deployed in judicial review actions – see further below).

A further appeal on a point of law lies with leave to the Upper Tribunal Administrative Appeals Chamber and from there on a point of law to the Court of Appeal/Court of Session with leave of either of the Upper Tribunal Administrative Appeals Chamber or the Court of Appeal/Court of Session.

II.2. Judicial Review

Administrative law in the United Kingdom refers to the body of rules that govern the exercise of public functions by public bodies such as government departments, local authorities, executive agencies entrusted with the delivery of specific aspects of government programmes. The rules may also apply to private bodies such as limited companies where such organisations carry out tasks that are essentially public in nature. Judicial review is the name given to the legal procedure through which challenges are taken to the conduct of bodies entrusted with public functions and tested in the courts. Unlike the statutory appeals system described above which focuses upon the correctness of an inferior body’s decision, judicial review is concerned with the legality of decision-making. That is to say the Court is asked whether the impugned decision/conduct lies within the permitted range of lawful stances that was open to the respondent authority/body. It does not allow the Court to substitute its preferred policy stance/decision. Viewed thus, it can be seen that judicial review is supervisory in nature and allows a margin to the decision maker seeking only to confine the latter to a decision which it was empowered by law to take. It follows that where a court finds that a body with public functions has acted unlawfully, it is required to take the decision again. It would be perfectly entitled as a matter of law to reach the same substantive outcome as before (say in terms of an adverse resolution for the affected citizen) provided the decision-making processes revealed no further issues of unlawful conduct.

55 Social Security Act 1998, s.12.
56 Figure cited by T Endicott, Administrative Law 3rd edn (OUP 2015) at p.450.
58 Social Security Act 1998, s.15.
59 For the purposes of accuracy, it must be noted that the procedures by which judicial review actions are brought vary across the United Kingdom in ways that reflect the distinctive legal histories of public law remedies. The discussion which follows focuses exclusively on procedures that exist in England and Wales. For a brief overview of Scottish procedures, see The Judge Over Your Shoulder (2016 Government Legal Department) pp.79-80.
Recognising the public interest in the regular flow of administrative decision-making, judicial review procedures impose a series of strict procedural requirements on litigants seeking to challenge a decision of a body with public functions. These include the need to establish permission to apply, standing, the grant of permission to apply, rules on time limits, the exhaustion of alternative remedies and the discretionary nature of relief.\(^6\)

II.2.1. Permission to apply

An applicant must seek the permission of the court before the substantive nature of his/her grievance is examined by the court.\(^6\) The criterion on which permission is granted is whether on the papers submitted by the applicant, he/she has shown an ‘arguable case’.\(^6\) The purpose of this requirement is to filter out wholly unmeritorious/frivolous claims. The phrase ‘arguable case’ is understood to mean that the applicant is able to show without going into detailed argumentation, that he/she has a ‘realistic prospect of success’.\(^6\) Permission will not normally be granted if an alternative remedy is available to the litigant.\(^6\)

Finally, it should be noted by virtue of amendments introduced to the Senior Courts Act 1981 by the Criminal Justice and Courts Act 2015, a court is now able to effectively disregard a technical breach of the law if it appears to the court that it is ‘highly likely’ that the outcome for the applicant would not have been ‘substantially different’ had the authority not committed the technical breach. In these circumstances, the court has no discretion but to refuse permission for a judicial review action.\(^6\)

II.2.2. Exclusivity of public law procedure

The courts are alive to the possibility of essentially public law claims being ventilated via ordinary private law actions that wholly circumvent the procedural requirements facing litigants going down the CPR Part 54 route. In *O’Reilly v Mackman* for example the House of Lords held that the use of ordinary writ procedure to challenge a decision of prison disciplinary authorities cancelling remission entitlements of four prisoners was an abuse of the processes of the court.\(^6\) The applicants had no private law claims but were instead asserting a legitimate expectation of certain treatment at the hands of the disciplinary body. This was entirely a public law claim and could only be heard through judicial review procedures. The difficulty that English law found itself in after *O’Reilly v Mackman* was predictable enough. Lacking a clear sense of the defining characteristics of a ‘public’ law claim (or its ‘private’ law equivalent), led *post O’Reilly* to a series of cases in which the procedural aspects of grievances took centre stage. A particular problem focused upon the position of persons engaged in public sector work (nurses, doctors and prison officers). Thus in *R v East Berks Health Authority ex parte Walsh*, a senior nursing officer was dismissed by the health authority (a public body) for alleged

\(^{60}\) The set of procedural rules are contained in the ‘White Book’ more formally known as the Civil Procedure Rules Part 54.4, see [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54](https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part54).

\(^{61}\) Civil Procedure Rules Part 54.4.

\(^{62}\) Where less commonly there is an *inter partes* hearing, the ‘arguable case’ criterion is more onerous for the applicant to satisfy, see Mass Energy v Birmingham City Council [1994] Env LR 298.

\(^{63}\) Antoine v Sharma [2006] UKPC 57.

\(^{64}\) R v Secretary of State ex parte Swati [1986] 1 WLR 477.

\(^{65}\) Senior Courts Act 1981, s.31(2)A unless there are ‘reasons of exceptional public interest’. The authors of *The Judge Over Your Shoulder* suggest that such reasons might include cases where the public sector equality duty is engaged and the public body has breached a procedural requirement such as duty to consult affected parties, see ibid. at p.75.

\(^{66}\) [1983] 2 AC 237.
misconduct.\textsuperscript{67} Seeking to avoid the trap that the prisoners had fallen into in O’Reilly, Walsh submitted his claim as an application for judicial review. The Court of Appeal held however that he could not contest the decision by way of judicial review. Where (as on the facts here) there was an insufficient statutory underpinning of the litigant’s relationship with the respondent authority, the matter could proceed under the ordinary writ procedure as would be the case for employer/employee disputes.\textsuperscript{68} By 1992, the House of Lords in \textit{Roy v Kensington & Chelsea & Westminster Family Practitioner Committee} signalled that these rather technical arguments about whether a claim was to be heard under public or private law procedure should not be allowed to prevent the court from hearing the substance of the litigant’s arguments unless the procedure invoked by the aggrieved party was ‘ill-suited’ to dispose of the matter in hand.\textsuperscript{69} Some 25 years on, the steer in \textit{Roy} away from an undue emphasis upon procedural issues continues to encapsulate the courts’ approach.\textsuperscript{70} Judicial review is not considered particularly suitable to the determination of detailed factual issues (for example whether an arrest by police officers is lawful under s.24 of the Police and Criminal Evidence Act 1984).

\textbf{II.2.3. Standing}

The rules relating to standing determine who gets to pursue an action for judicial review in the courts. The Senior Courts Act 1981 states that the applicant must have a ‘sufficient interest in the matter to which the application relates’.\textsuperscript{71} This somewhat unhelpful phrase has required judicial clarification through case law. Before examining the current state of the law, it is helpful to consider some underlying issues. A range of litigants may wish to come before the courts in judicial review applications. These include i) sole/individual applicants (representing their own interests say as householders in planning law); ii) Associational applicants – groups representing their members’ interests (as say the environmental campaigning group Greenpeace or a trade union acting on behalf of its members);\textsuperscript{72} and iii) Surrogate applicants – where an individual/group represents the interests of others (see for example CPAG - the Child Poverty Action Group). Of course, in reality a group may have associational and surrogate features. The organisation Greenpeace for example could be associational (as in representing the concerns of its members) or surrogate (as say in representing interests of future generations as yet unborn or representing an area affected by pollution but lacking members in that part of the country).

Each of above litigant may have either a) a personal interest in the litigated matter (he/she is affected directly economically, or in health terms in ways that the rest of the general public are not) or b) a general interest - that is having no greater interest than other members of the general public, as where the interest is ideological for example concerning the environment, animal welfare, cultural such as preservation of Shakespearean theatre sites.

The rules of standing adopted by any system of public law invite consideration of the function of judicial review and role of the citizen within it. At the two polar extremes of the spectrum of

\textsuperscript{67} [1985] QB 554.

\textsuperscript{68} For a public sector employment law decision going the other way see \textit{R v Secretary of State for the Home Department ex parte Benwell} [1985] QB 554.

\textsuperscript{69} [1992] 1 AC 624.


\textsuperscript{71} S.31(1) Senior Courts Act 1981.

\textsuperscript{72} E.g. \textit{R Secretary of State for the Home Department ex parte Fire Brigades Union and others} [1995] 2 AC 513.
possible approaches to standing are the models of (i) citizen standing conferring broad access to the courts and (ii) vindication of private rights - a much narrower account of access.

The basis of citizen standing conceives the courts positively as a surrogate quasi political process that affords access to citizens who may have enjoyed little or no access to political structures/decision-making processes leading up to the challenged decision. Broad rules of standing allow an additional forum for policy debate in which decisions of the Executive may be contested. As such, judicial review may permit the airing of substantive arguments that were not heard previously leading perhaps to improved policy making. Moreover, relaxed standing rules may lead to greater levels of acceptance/legitimacy of any final decision since a greater range of potential objectors will have had their say and been seen to have had their say.

Narrow accounts of standing object to the citizen standing model outlined above on a number of related grounds. It is said that in a representative democracy in which executive authority can claim a mandate from the people (and resubmits itself on a regular basis for re-election in fair and free elections), unelected courts and judges lack democratic legitimacy to set aside matters resolved in the political sphere. Once a decision has been reached after full and open debate (and interest groups and others given a chance to lobby their elected representatives) it is undesirable to allow the re-opening and re-staging of that debate by pressure groups and individuals who are effectively self-appointed guardians of the public interest. Courts should be reserved for individuals and groups who can point to a direct and substantial interest in proceedings to determine the legality of a public body’s conduct. Courts and legal processes are additionally institutionally ill-suited to the complex task of policy analysis that is often raised in executive decision-making. They lack the expertise needed to understand the complexities of the policy-making process and may fail to comprehend the full set of consequences that flow from their interventions. Moreover, there are separate practical arguments for preferring more restrictive rules on standing. Where relaxed rules of standing exist they might increase the volume of cases before the courts, thereby interrupting the regular execution of government policies until each particular application is judicially resolved.

Domestic case law on standing is generally thought to be settled in terms of taking a reasonably relaxed approach to standing, both at the permission stage of any action and the full substantive hearing on the merits. There is recognition that a court’s approach to the question of standing may be influenced by the strength of applicant’s substantive claim. Thus where the litigant sought to halt unlawful conduct of a non-trivial nature, it is thought to be wrong of the courts to refuse to consider the application on the basis that the applicant before the court lacked a sufficient interest in the matter. 73 Additionally, in relation to pressure/campaigning groups, the courts have generally preferred to grant standing to associational and surrogate groups with long-standing commitments to their respective causes and who can demonstrate proven expertise in bringing legal challenges on behalf of persons affected by governmental decisions. Individuals by contrast may well lack such organisational competences, making it less likely that any illegality could be successfully challenged in court proceedings.74

73 R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses [1982] AC 617 see especially the remarks of Lord Diplock.
74 See thus R v Inspectorate of Pollution ex parte Greenpeace (No. 2) [1994] 4 All ER 329. For an earlier and much criticised approach adopting a narrow approach to pressure groups, see R v Secretary of State for the Environment ex parte Rose Theatre Trust [1990] 1 QB 504. For general discussion see C Hilson & I Cram, 'Judicial Review and Environmental Law - Is there a coherent view of standing?' (1996) 16 Legal Studies 1.
A factor that has sometimes weighed in favour of such an approach is the absence of another group/person who might contest the legality of official conduct. In *R v Secretary of State for Foreign and Commonwealth Office ex parte World Development Movement* a reputable pressure group sought standing to challenge a government decision to fund a controversial overseas development scheme. In deciding to grant the World Development Movement standing, Lord Justice Rose expressed the concern that, in the event of a ruling to refuse standing to the group, there might be no other litigant willing/able to challenge the decision.\(^{75}\) The ruling emphasises the importance attached by the courts to upholding the rule of law.

Where a person is alleging that a public authority has breached the Human Rights Act 1998, the requirements of standing are more stringent. Section 7 of the 1998 Act permits claims only in those cases where a person is a ‘victim’ of an unlawful act. Class actions on behalf of others do not satisfy this test. The litigant must be directly affected by the alleged unlawful conduct of a public authority.\(^{76}\)

### II.2.4. Time limits

An application for judicial review must be brought ‘promptly’ and ‘in any event not later than 3 months after the grounds to make the claim first arose.’\(^{77}\) Whether the application has been brought ‘promptly’ is to be assessed by reference to the specific factual context of the claim. It is possible for a claim to have been brought within the 3 month time limit and yet deemed not to have been made ‘promptly.’\(^{78}\) This conclusion may be reached because of evidence of damage to the respondent authority and/or third parties caused by any re-opening of the legal basis of a decision whose implementation is already well in train.\(^{79}\) As can be seen, notions of fairness and the demands of good administration underpin the obligations placed on the applicant. A failure to act promptly may in the absence of exceptional circumstances\(^{80}\) lead to the refusal of permission to bring the application.\(^{81}\)

### II.2.5. Need to exhaust other available remedies

Outside of exceptional circumstances, the remedies offered in judicial review are available only when all other remedies (such as statutory appeals) have been exhausted. The latter rule was stated in *R v Chief Constable for Merseyside ex parte Calveley*.\(^ {82}\) The rationale for this rule is that where Parliament has provided specific appellate machinery to resolve particular disputes between the citizen and public administration, those appellate structures ought not to be circumvented via an application for judicial review. In some exceptional circumstances, the courts will allow an action for judicial review to commence even though the alternative avenues have not been exhausted. The courts have been unwilling to define what counts as an ‘exceptional’ circumstance however.\(^ {83}\)

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\(^{75}\) [1995] 1 WLR 386.

\(^{76}\) *R (on application of Core Issues Trust) v Transport for London* [2013] EWHC 651.

\(^{77}\) *Civil Procedure Rules* Part 54.5. See also Senior Courts Act 1981, s.31(6).

\(^{78}\) *R v Hammersmith & Fulham LBC ex parte Birkett* [2002] UKHL 23 referring to the ‘immense practical difficulties’ of allowing unprompt applications.

\(^{79}\) See thus the remarks of Sedley J in *R v Chief Constable of Devon & Cornwall ex parte Hay* [1996] 2 All ER 711, 732 ‘the practice … is to work on the basis of the three month time limit and to scale it down whenever the features of that particular case make that limit unfair to the (defendant) or third parties…’

\(^{80}\) *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 All ER 434.

\(^{81}\) *R (Rajput) v Waltham Forest LBC* [2011] EWCA Civ 1577.

\(^{82}\) [1986] QB 424.

\(^{83}\) See for criticism of the rule T Bingham, ‘Should Public Law Remedies be Discretionary’ [1991] Public Law 64.
II.2.6. Type and discretionary nature of judicial remedies

Actions for judicial review usually seek one or more of three principal remedies. These are (i) quashing orders (formerly certiorari); (ii) mandatory orders (mandamus) and (iii) prohibiting orders (prohibition). Quashing orders have the effect of nullifying the decision under review. The decision maker is required to re-take the decision. Mandatory orders direct the public authority to fulfil its legal duties where it has so far failed to do so. An example would be where a public authority has failed, contrary to its legal duties under disability laws, to make an assessment of a disabled person’s needs. Prohibiting orders work prospectively to tell a public body not to do something that it may have contemplating. In this way, prohibition orders can be seen as a prospective version of quashing orders which look back to a decision that has already been taken.

Since reforms to public law procedures in 1978 adding two remedies from private law, litigants in judicial review have been able to request both (i) declarations from the court that state the respective rights and obligations of the parties without directing any of them to act/refrain from acting in a particular manner; and (ii) interim relief in the form of a temporary injunction may also be sought by a party to proceedings whereby, pending any final hearing, the court seeks to preserve the present position of the parties.

Damages may also be available where the unlawful conduct by the public body has breached a private law right (such as rights under contract and tort law) or where the applicant’s human rights or European Union law rights have been infringed. In the case of a violation of a Convention right, the Court has the power to award damages but only where ‘the court is satisfied that the award is necessary to afford just satisfaction.’

As with the permission stage of proceedings, the amended Senior Courts Act 1981 directs a judge to refuse relief to a victim of unlawful conduct where it is highly likely that the outcome for the applicant would not have been substantially different had the unlawful conduct not occurred.

II.2.7. Ultra vires

Judicial review serves to enforce parliamentary sovereignty and the rule of law. The court’s role in judicial review actions is to ensure that the administrative body keeps within the limits of the powers delegated to it by a sovereign Parliament. Where a body is found to have exceeded those limits, the court’s role is to enforce the will or intention of Parliament (and safeguard individual liberty) by declaring unlawful the excessive action. This accords with a positivist, value-free account of court interventions that conceives judicial review in essence as an exercise in statutory interpretation; viz, has Parliament expressly or by virtue of necessary implication empowered the decision-maker to act in the way challenged by the applicant. On this view the various tests that are used to ascertain whether an ultra vires decision has been

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85 Section 8(3)(b) Human Rights Act 1998. It is possible that the finding of a violation alone will trigger the award of damages. At the same time it is more likely for damages to be forthcoming when there is a demonstrated financial loss that flows directly from the violation.
86 For the first recorded use of the power to refuse relief on these terms, see R (Hawke) v Secretary of State for Justice [2015] EWHC 3599 where a declaration was refused under this provision. The fact that the judge went on to issue a ‘declaratory judgment’ may reasonably be thought to amount in substantive terms to much the same thing, namely a formal setting out by the judge of the legal rights and obligations of the parties. For comment see M Elliot, ‘Declarations, quashing orders and declaratory judgments’ at https://publiclawforeveryone.com/2015/12/15/declarations-quashing-orders-and-declaratory-judgments-the-hawke-case-and-section-84-of-the-criminal-justice-and-courts-act-2015/.
made (such as ‘Wednesbury unreasonableness’, improper purposes discussed further below) are judicial constructs that keep public bodies within the scope of the authority conferred on them by Parliament.

Some problems with the idea of ultra vires as the foundation for judicial review include the fact that the term itself and its indicators (‘Wednesbury unreasonableness’ etc.) do not point conclusively in specific cases to definitive, uncontroversial conclusions as to whether a body has acted unlawfully in particular disputes. The language is inherently indeterminate. It cannot by itself explain the basis of judicial intervention/non-interventions. As such, some critics argue that ultra vires is at best a ‘fig-leaf’ intended to cover up instances of judicial creativity. An entire separate criticism is that ultra vires cannot provide a satisfactory account of the basis of judicial supervision when a public body acts under prerogative powers. Here there is by definition no statutory basis for the exercise of public power and accordingly resort to statutory interpretation will prove unhelpful.

A rival account of the rationale for judicial review more openly acknowledges that the judges themselves create the substantive principles by which the legality of exercises of public power is determined. The ‘common law’ model of judicial review justifies the courts’ oversight of public power by reference to overarching principles including ‘fairness’, ‘consistency, and equality’. These are said to be values that inhere in the English common law tradition and fit with the broader remit of the courts’ role of securing individual justice, reflecting in normative terms an underlying rights-basis for judicial review. Critics of the common law model observe that, as in the case of the ultra vires alternative, it too is vulnerable to the charge of indeterminacy. Is it seriously being suggested that the criteria of ‘fairness’ etc. point more unequivocally at decisive outcomes in cases? Moreover, like its ultra vires counterpart, the common law model is open to the accusation that it provides a judicial smokescreen behind which the judges may impose their policy preferences. More recently, the idea that judicial review is primarily concerned to promote standards of good administration has gained prominence, not least because successive governments have endorsed it. The UK Government’s Legal Department’s guide to civil servants entitled The Judge Over Your Shoulder is subtitled ‘a guide to good decision making’ and makes clear that ‘all public bodies should aim to practise “good administration”’.

II.2.8. Amenability to judicial review proceedings (public bodies; bodies carrying out public functions)

Prior to the decision of the Court of Appeal in R v Take-Overs and Mergers Panel ex parte Datafin, the test for whether a decision-making body was subject to judicial review was the source of powers test. Put simply, if the body in question powers came from statute or statutory instrument then its decisions were amenable to judicial review. In Law v National Greyhound Racing Club a decision of club to suspend a greyhound trainer’s licence was held not amenable to judicial review. Any remedies the trainer possessed against the club were entirely governed by the contract between the parties. As far as prerogative powers (those

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88 The Judge Over Your Shoulder (2016 Government Legal Department) p.25.


involving the exercise of discretionary powers held exclusively by the Crown) were concerned, cases from the seventeenth century such as like Darnel (The Five Knights)\(^91\) and R v Hampden (The case of the Ship Money)\(^92\) declared that whilst the courts might ask whether the king possessed a prerogative power to imprison (Darnell) or raise taxation (Hampden) the judges were not able to scrutinize the actual exercise of these powers in particular circumstances.

Today however the courts have ceased to place an exclusive reliance upon the source of powers. Take first the prerogative cases where the old orthodoxy from Darnell and Hampden has been displaced by the House of Lords’ ruling in Council of Civil Service Unions v Minister for the Civil Service concerning a government order to prohibit trade union membership at the UK’s intelligence headquarters.\(^93\) Council of Civil Service Unions is significant because the speech of Lord Roskill announces that the exercise of some prerogative powers will in specific instances be reviewable. Somewhat teasingly, Lord Roskill does not reveal which prerogative powers are reviewable. Instead he provides us with a non-exhaustive list of scenarios where the exercise of a prerogative power will definitely not be reviewable. This list includes the Crown’s actions in declaring war, the defence of the realm, the making of treaties, granting honours, the prerogative of mercy, the dissolution of Parliament and the appointment of ministers. Outside that list however, the possibility of judicial review is conceded and the mere fact that the source of a power is the prerogative will not render the exercise of that power immune from judicial review.

Secondly, the policy preference in UK Government circles in the 1980’s for voluntary self regulation across the City of London’s financial sector obliged the court to re-examine the binary divide between statutory and contractual powers affirmed in Law v National Greyhound Racing Club. In Datafin it was held that the decisions of a non-statutory body - the City Panel on Take-Overs and Mergers were amenable in principle to judicial review. This is a remarkable decision because the Panel lacked any statutory powers and only enjoyed a power to regulate the conduct of take-overs and mergers because of a voluntary agreement among those who traded in the City of London that parties would submit themselves to the decisions of the Panel. The Panel’s decisions bound in practice, if not in law, all those who wanted to do business in the City. Despite lacking a statutory basis for its decision-making powers, Lord Donaldson giving the leading judgment of the Court of Appeal said that the Panel was judicially reviewable. By way of justification, he stated that the Panel "operates wholly in the public domain...performing a public duty and an important one... The rights of citizens are indirectly affected by its decisions."

Undoubtedly a factor in this ruling was the absence of other legal mechanisms of control over the Panel’s activities. No contract existed between the Panel and those regulated and so there could be no possibility of a contractual action against the Panel. If judicial review did not lie against the Panel’s decisions, it would in effect become a law unto itself. The decision to grant the principle of review was greeted warmly by the commentators as recognising the realities of regulatory power. Indeed, it is clear that the Panel operated with the approval of central government. Not only was it part of the government’s regulatory strategy for the financial sector, in cases where the Panel’s findings were not acted upon a government department (the Department of Trade and Industry) Govt Dept had statutory powers to intervene and achieve in practice the same result as the Panel.

\(^91\) (1627) 3 How St Tr 1.
\(^92\) (1637) 3 How St Tr 825.
\(^93\) [1985] AC 374.
Unsurprisingly, *Datafin* sparked off further test cases to ascertain the reviewability of other non-statutory organisations. A summary of the relevant case law can now be stated.

(i) The decisions of bodies exercising statutory powers remain reviewable. See for example *R v Somerset County Council ex parte Fewings* concerning a local authority’s decision to ban stag hunting.94

(ii) The decisions of bodies whose powers are derived exclusively from contract remain unreviewable.95

(iii) The decisions of voluntary, self regulatory bodies performing some kind of public function are judicially reviewable. This includes other financial regulators in the City of London,96 the Advertising Standards Authority,97 the Bar Council.98

(iv) Private bodies performing services previously undertaken by public bodies may or may not be judicially reviewable. Arguably this area has assumed much greater significance in the present era of contracted out public services. The question arose in *YL v Birmingham City Council* on whether a private-owned care home (Southern Cross) contracted by Birmingham City Council to fulfil the latter’s duties to arrange care for the elderly poor in Birmingham was carrying out ‘public functions’? A slender majority in the Supreme Court ruled that the care home was not performing a ‘public function.’100 Lord Mance for the majority found that Southern Cross was in the position of a private contractor. It charged a commercial fee for its services in same way as a private laundry or catering company would have a contract with a local authority run care home to deliver services. Southern Cross was simply carrying on a business with a customer who happened here to be a public authority. This did not make Southern Cross a body carrying out public functions. A joint dissent from Baroness Hale and Lord Bingham concluded that ‘public function’ was to be given a broad definition. The state had been involved in and paying for care of elderly poor for past 60 yrs. A statutory duty had been imposed on the city council to provide care for the

95 *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan* [1993] 1 WLR 909.
96 *R v LAUTRO (Life Assurance Unit Trust Regulatory Organisation Ltd) ex parte Ross* [1993] QB 17.
97 *R v ASA ex parte Insurance Service plc* (1990) 2 Admin LR 77. The necessary ‘public element’ was found in the fact a public officer - the Director of Fair Trading - had a power under statutory regulations to intervene in cases of misleading advertisements where the ASA had failed to deal properly with the complaint. Like the Take-over Panel, the ASA played an indirect role in the Govt’s regulatory strategy.
100 [2007] UKHL 27.
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elderly although this could be met either by local authority run homes or private suppliers of care homes via a contract with the local authority. The state continued to pay for the whole or part of the costs of private care in respect of persons who could not afford the costs themselves.

North of the border, Scots public law does not accept the Datafin test for deciding whether a body comes under the controlling jurisdiction of the Court of Session. After the landmark decision in West v Secretary of State for Scotland, Scots law approaches the issue of reviewability in the following manner (overhead): instead of asking whether there is a sufficient 'public element', judicial review is available whenever a decision-making power is conferred on some body which results in a tri-partite relationship between the body conferring the jurisdiction - the body exercising it and the citizen affected by it.

Finally, it is worth recalling that public bodies, like public figures in theory at least, have private lives. There is a zone of public bodies' activities which may not be judicially reviewed because the conduct in question relates to an area which is part of that body's private law activities, conduct that cannot be traced back to the fact that it is a public body. It is in fact conduct such as other non-governmental bodies/persons engage in. Examples include when a public body acts as an employer or when it commits a breach of the duty of care it owes to others. In these cases judicial review is not available and the adversely affected party must pursue remedies (if any exist) in private law proceedings. As was noted in a previous section of materials dealing with procedural exclusivity, where a public sector employee's terms and conditions of work are set out in the contract of employment rather than any statutory framework, any disputes between the parties will be resolved by the ordinarily applicable principles of contract law. This much was confirmed in R v East Berks Health Authority ex parte Walsh. Mr Walsh, a senior nursing officer was dismissed by his employers - a public body - for alleged misconduct. It was held that he could not contest the decision by way of judicial review proceedings.

II.2.9. Grounds of challenge

A number of grounds exist by which the exercise of discretionary powers by public bodies/bodies carrying out public functions may be contested by persons/groups possessing sufficient interest in the matter complained of. The principal grounds tackled in this section are i) errors of law/fact; ii) failure to exercise a discretion; iii) improper purposes; iv) failure to take account of relevant considerations/taking account of irrelevant considerations; v) Wednesbury unreasonableness; vi) proportionality; vii) legitimate expectations; viii) rule against bias; ix) right to a fair hearing; x) failure to give reasons; xi) discrimination.

Some of the foregoing grounds overlap. One judge's irrelevant considerations may be treated by another as an instance of improper purposes or Wednesbury unreasonableness. So it is perhaps important not to become overly concerned with the conceptual purity of the categorisation and retain instead a focus upon essence of the executive conduct at issue in the litigation.

II.2.9.1 Errors of law/errors of fact

Where a public body misunderstands its legal powers and acts upon that misunderstanding, the decision reached by the body is a nullity. Errors of law such as these will always lead a court to quash a decision. Errors of fact on the other hand may lead to the quashing of decisions but this is not automatic in the way that it is for errors of law. Where the factual error is said to

101 1992 SLT 636.
be on a collateral question, then the error will be treated as going to the jurisdiction of the decision maker and result in a quashing of the impugned decision. For example in R v Home Secretary ex parte Khawaja immigration officers were empowered to detain persons who were ‘illegal entrants’ under the Immigration Act 1971. The term ‘illegal entrant’ was defined in the Act as ‘a person entering or seeking to enter unlawfully’. In ex parte Khawaja, the applicant was detained on the basis of the belief of immigration officers that he was an illegal entrant. The House of Lords ruled that belief wasn’t sufficient. Whether the applicant was an ‘illegal entrant’ was a jurisdictional or precedent fact which the Immigration Officer had to establish to the court’s satisfaction. Where insufficient evidence existed to establish illegal entry, it followed that the immigration officers had acted outside their powers in detaining the applicant. Not all errors of fact are however jurisdictional. This reflects the belief that Parliament has allowed the decision maker some margin to reach conclusions (including possibly erroneous ones) that do not destroy the legality of the original determination. Sometimes the distinction between an error of fact and one of law is not clear. However in the recent ruling of the Supreme Court of Jones (by Caldwell) v First Tier Tribunal a pragmatic approach was preferred in which the Court cautioned against an over-readiness to classify matters as issue of law when in fact they were ‘really best left for determination by the specialist appellate tribunals.

**II.2.9.2 Failure to exercise a discretion**

Where a discretion is conferred upon a person/body, it is unlawful for that decision-maker to effectively surrender their discretion - either by delegating to another person/body to take the effective decision or by applying a rigid policy that prejudices how the discretion will be exercised in particular case. The general rule is that the decision-maker whom Parliament has nominated (rather than anyone else) must consider anew in each case before it how to exercise the discretion conferred on it.

Take first the rule of non-delegation. In Ellis v Dubowski a county council was empowered to impose such conditions as it thought fit when granting a licence to cinemas to show films. Instead of making up its own mind as each licence application came up, the council decided to licence a cinema provided that the cinema show no film which had not been certified by the British Board of Film Censors - a self regulatory body set up by the film industry. The licensing decision was quashed by the court because the council had effectively delegated its decision-making powers to the British Board of Film Censors - the latter not being authorised by Parliament to take such decisions. A similar result was reached in Barnard v National Dock Labour Board when striking dock workers were suspended under statutory powers. Under the statutory scheme, the power to suspend was vested in the local Dock Labour Board. In

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104 For another example see White & Collins v Minister of Health [1939] 2 KB 838 where a local authority had the power to take land compulsorily for housing provided that it was not ‘part of any park, garden or pleasure ground.’ An order which was made by the local authority and confirmed by the minister taking the land compulsorily was later quashed by the Court of Appeal on the basis that the land was in fact parkland. The minister had argued it was exclusively a matter for himself and the local authority and to determine the facts concerning the type of land being acquired. The court rejected this view and held that the court was the final arbiter of questions relating to the type of land since they were collateral and hence jurisdictional.
105 See also R(A) v Croydon LBC [2009] UKSC 8 for a non-collateral factual matter. Here the question of whether a person if intentionally homeless under housing legislation is treated as a question of fact to be determined by the local authority as duty holder unless it can be shown that the authority acted wholly unreasonably.
107 [1921] 3 KB 621.
Barnard’s case, the suspensions were made by the Port Manager, the person to whom the Board had purportedly delegated its disciplinary powers. The suspensions were declared invalid because the local Board had no power in law to delegate its functions and had to suspend the dockers itself.

When Parliament confers a power upon a minister to act, it is not expected however that in all cases at all times that the Minister him/herself will exercise the power. In some cases, civil servants, acting in the name of the minister will act. These realities were recognised by the courts in Carltona v Commissioners for Works when a factory owner challenged an order made on behalf of the Commissioners by the senior civil servant in charge of the matter. The actual order was never discussed by the Commissioners. The factory’s owners challenge was that the order was invalid as only the Commissioners had been given the power to act. The Court of Appeal rejected the claim. Constitutionally, the decision of the civil servant was the decision of the Minister. The business of government could not be carried out otherwise.109

Decision makers typically structure their respective exercises of discretion by adopting in advance policies that guide how in general terms that discretion is to be used. A legal problem that can arise in this context is when a decision-maker rigidly follows a policy in each and every case to come before it without giving consideration to the individual circumstances of the case. This is sometimes referred to as the problem of self-imposed fetters. The critical question here is when a discretion amounts to an illegal fetter upon discretion? Relevant guidance is available from R v Port of London Authority ex parte Kynoch110 where two contrasting stances were outlined. In the first, the public authority adopts a policy and informs a party whose case comes up for consideration that this policy will be applied to his/her case unless after representations from that party, an exceptional case has been made out for not applying the policy to the individual concerned. In the second, the authority adopts a certain policy and decides that it will not consider the specific circumstances of individual cases. Kynoch holds that the first stance is lawful since the discretion to not apply the policy has been retained.111 The second stance is unlawful since there is no prospect of the policy not being applied to each and every single case.112

II.2.9.3 Improper purposes

When a discretionary act of the executive is challenged on the grounds of improper purposes, what is being alleged is that the decision maker has used statutory powers to frustrate or undermine the policy of the legislation. In Backhouse v Lambeth LBC, a local authority was given statutory powers to raise the rents of council tenants.113 Lambeth, which did not want to impose the increase rent on its tenants, decided to charge the whole of the required increase onto a single vacant house. This had the effect of raising its rent from £7 p.a. to £18,000 p.a. This action was clearly done to frustrate the objects of the legislation and was accordingly struck down as abuse of Lambeth’s discretion.

The general principle is that any discretionary powers conferred on a decision-maker must be used to advance (and not frustrate) the objectives of the law. In Padfield v Minister of Agriculture a parliamentary Act of 1958 created a committee to investigate complaints from milk

109 [1943] 2 All ER 560.
110 [1919] 1 KB 176, 184.
111 For examples see Schmidt v Home Secretary [1969] 2 Ch 14; In re Findlay [1985] 1 AC 318.
112 For examples see R v Secretary of State for Environment ex parte Brent LBC [1982] QB 593; R v Home Secretary ex parte Hindley [1998] QB 751; R v Secretary of State for Home Department ex parte Fire Brigades Union [1995] 2 AC 513.
113 (1972) The Times October 14.
producers ‘if the Minister in any case so directs’. \[114\] When milk producers from Kent complained about the prices they obtained from the Milk Marketing Board, the Minister refused to direct their complaint to the committee of investigation. In the House of Lords it was held that in exercising his discretion to refer a complaint, the Minister would have to use his powers to further the policy of the Act. If it could be shown that the Minister was using his powers to thwart or frustrate the policy of the Act, this would be an improper purpose and hence unlawful. Here Kent milk producers alleged that the Milk Marketing Board was not paying them a fair price, and the court ruled that the Minister came under a duty to have the allegation investigated. On the facts, the minister could show no good reason why he chose not to refer the complaint. Indeed, the House of Lords went so far as to suggest that his refusal was based on a fear of the political consequences (a hostile parliamentary reaction to a decision to refer) and as such was unlawful.

In determining whether the authority has acted for a proper or improper purpose, a court will need to understand the parliamentary intention(s) behind legislation. In \[115\] Porter v McGill Conservative-controlled Westminster City enjoyed a power to dispose of land held by it for purposes including the raising of revenues. Westminster City Council used its statutory powers under the Housing Act 1985 to sell off council owned homes in marginal wards where a small number of votes separated the rival political parties. It did this to promote the chances of the Conservatives gaining council seats in the future since it calculated that homeowners were more likely to vote Conservative than council tenants. The House of Lords ruled that the Housing Act 1985 did not however extend to allowing the use of the power to dispose of council owned land for the purpose of securing a party political advantage and the decision was struck down.

One of the problem which has been ignored until now is what happens when the decision-maker’s motives in acting are a combination of both good and bad reasons. The answer is that the action will be lawful where the dominant purpose is a lawful purpose. The problem was raised in \[116\] Westminster Corporation v London & NW Railway where Westminster Corporation built a subway in order to allow access to public toilets. Westminster had the power to build the toilets but not the subway. The court upheld the legality of the subway (even though its construction was not authorised). The dominant purpose was held to be the construction of the toilets which was an authorised and hence lawful act. The building of the subway was incidental to the siting of toilets without which the public could not enjoy access. A contrasting example is found in \[117\] R v ILEA ex parte Westminster CC. Westminster Council challenged the expenditure by the Inner London Education Authority of money on a publicity campaign against cutbacks in ILEA’s budget imposed by central government. Whilst ILEA did enjoy the power in law to spend money to inform the public about its role in local government, this did not extend to a power to mount a publicity campaign to persuade the public that it had been treated badly by central government. The publicity campaign was held to be comprised of two purposes. One purpose was to inform the public about ILEA’s local government role. The other purpose was to persuade the public to support ILEA in their campaign against the government. This latter purpose was an improper one and the dominant one behind the expenditure. Another way of reaching the same conclusion is by reference to the idea of irrelevant considerations. It could be said that the decision to mount

\[116\] [1905] AC 426.
the publicity campaign was influenced to a significant degree by the irrelevant consideration of wanting to persuade the public that ILEA was being treated unfairly.

**II.2.9.4 Taking account of irrelevant considerations/Failure to take account of relevant considerations**

A public body may have a decision set aside in judicial review proceedings where it has taken irrelevant considerations into account when exercising its discretion. In such circumstances it is said to have abused its discretionary powers. In politically charged cases, this type of judicial interventions have proved controversial. Consider for example *Roberts v Hopwood* in which Poplar Council in London was empowered by section 62 of the Metropolis Management Act 1855 to pay its workers 'such wages as it thought fit'. Poplar decided to pay its low grade workers £4 per week - a figure well in excess of the going rate for this kind of labour. The House of Lords struck the decision down as an abuse of the Council's discretionary powers placing it in breach of its fiduciary duty to ratepayers. The Council had wanted to act as a 'model socialist employer'. Perhaps the clearest instance of an irrelevant considerations type case is *R v Ealing LBC ex parte Times Newspapers Ltd.* Certain local authorities refused to stock newspapers produced by Rupert Murdoch's companies in their public libraries because of the Mr Murdoch's decision to dismiss striking workers. This desire to demonstrate sympathy and solidarity with the dismissed workers was held to be irrelevant to the local authorities' statutory duty to provide a comprehensive library service.

An instance of a failure to take account of relevant considerations occurred in *Bromley LBC v Greater London Council.* The House of Lords ruled that in implementing its election manifesto promise to London voters to subsidise public transport fares, the Greater London Council had failed to have proper regard to the financial burden it was placing on its ratepayers.

**II.2.9.5 Wednesbury Unreasonableness/Irrationality**

The term 'Wednesbury unreasonableness' is derived from the case *Associated Picture Houses Ltd v Wednesbury Corporation* and stands for the proposition that if a decision maker acts in a way which no other decision maker acting reasonably would have acted, then the decision maker has acted unreasonably and hence unlawfully. Lord Greene MR gave an example in that case of a Wednesbury unreasonable decision where a red-haired teacher was dismissed from her job 'on account of her red hair.' This action is clearly unreasonable because no other employer who acted reasonably would behave in such a way. The dismissal is also open to challenge because you might say an irrelevant consideration has been taken into account. A reformulation of the test by Lord Diplock in *Council of Civil Service Unions* sought to recast the test as one of irrationality, defined as where as decision is 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

This reformulation has been criticised by judges and academics alike. Speaking extra-judicially, Lord Carnwath (a current member of the UK Supreme Court) doubted whether notions such as ‘outrage’ ‘logic’ and ‘moral standards’ could ever be a part of any judicial test. If Lord

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118 [1925] AC 578.
119 (1986) 85 LGR 316.
120 [1983] 1 AC 768.
121 [1948] 1 KB 223.
123 ‘From Judicial Outrage to Sliding Scales: Where next for Wednesbury’ speech given on November 12, 2013, see
Diplock’s remarks were intended to signal the demise of ‘Wednesbury unreasonableness’ it is clear that they failed in this attempt.

II.2.9.6 Proportionality

Under the Human Rights Act 1998, Articles 8-11 of the European Convention on Human Rights have been brought into domestic law. These rights (to privacy, freedom of expression, religion, association and assembly) are qualified rights (as opposed to absolute rights found elsewhere in the Convention (such freedom from torture and inhuman or degrading treatment (Article 3), freedom from slavery (Article 4)). Absolute rights can never be modified or curtailed under any circumstances (including public emergencies). Qualified rights on the other hand may be removed altogether or limited for purposes enumerated in the Convention Articles. These purposes commonly include national security, public safety, the prevention of crime and disorder and the rights of others. When a public body limits a qualified Convention right for one of these enumerated purposes, the limitation has to be ‘necessary in a democratic society’ according to the wording of Articles 8(2), 9(2), 10(2), 11(2). The concept of proportionality constitutes the basis on which the court performs this assessment. It entails asking a series of questions.

– Is a Convention right engaged by the conduct complained of?
– Is the infringement of the right a necessary and proper response to a legitimate objective?
– Is the objective behind infringement sufficiently important to justify a breach of the right?
– Is the breach rationally connected to the objective?
– Is the breach of the right no more than is necessary to achieve the objective? 124

Thus where it is shown that the legitimate objective behind the public authority’s restriction could have been secured via a less restrictive measure, the interference will be judged to be disproportionate and hence unlawful. 125 This part of the test was recast by Lord Sumption in Bank Mellat v HM Treasury (No. 2) in the following way: having regard to these matters (the previous questions) and to the severity of the consequences, has ‘a fair balance been struck between the rights of the individual and the interests of the community.’ 126

Lord Steyn in Daly noted that proportionality based review went beyond the less intense Wednesbury review in the following terms:

First the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R. v. Ministry of Defence, Ex P. Smith [1996] Q.B. 517, 554 is not necessarily appropriate to the protection of human rights. 127

124 This comes from R v Secretary of State ex parte Daly [2001] 2 AC 532.
125 Daly above provides an example of a disproportionate interference with prisoners’ Article 8 privacy rights in respect of their legal correspondence.
126 [2013] UKSC 39, see also Miranda v Secretary of State for Home Department [2014] EWHC 255.
127 [2001] 2 AC 532, 547.
Questions remain about the appropriate intensity of judicial scrutiny under the proportionality test and whether in the examination of the public body’s reasons for its decisions, there is a danger that where the court applies an exacting standard of scrutiny (as suggested by Lord Steyn in \textit{Daly}) it effectively steps into the role of primary decision maker. The courts are alive to this possibility\textsuperscript{128} and have sought to take a more relaxed approach to cases involving the allocation of scarce resources or economic policy more widely,\textsuperscript{129} foreign policy\textsuperscript{130} and national security /immigration controls.\textsuperscript{131} Additionally, it is not clear whether proportionality has replaced Wednesbury unreasonableness as a ground of challenge. Judges in the UK Supreme Court are themselves divided about the desirability of such a replacement.\textsuperscript{132}

\textbf{II.2.9.7 Legitimate Expectations}

In certain circumstances, the courts will also hold public bodies to honour express or implicit promises of future conduct as to both procedural matters (e.g. a promise to consult adversely affected parties before reaching a decision or allow them to make oral representations) and substantive matters (e.g. promise of an specific outcome at the end of the decision-making process). Implicit promises will arise where, absent an express promise, the decision maker has as a matter of regular practice tended to follow certain procedures (e.g. consult in advance with affected parties).\textsuperscript{133} Where an express/implied promise of future conduct is not fulfilled, an adversely affected party may challenge the failure under the doctrine of legitimate expectations.

In \textit{Attorney General for Hong Kong v Ng Yuen Shiu}, the Hong Kong authorities published the procedures it said it would adhere to when deporting persons thought to be illegal entrants. In the applicant’s case, it failed to adhere to the procedures (including an undertaking to interview alleged illegal entrants) before issuing a removal order against him.\textsuperscript{134} The failure to adhere to these procedures was held to be unlawful. The authorities had created a procedural legitimate expectation that the applicant would be treated in a certain way, and he had not been so treated. More controversially, the doctrine of substantive legitimate expectations has developed so as to enforce promises of a substantive benefit. The promise in \textit{R v North and East Devon Health Authority ex parte Coghlan} concerned a statement voluntarily made by a health authority that severely disabled patients living in accommodation which was built purposely for them could live there ‘as long as they chose’.\textsuperscript{135} Subsequently, the Health Authority changed its mind and proposed to close that accommodation and move the patients to alternative accommodation. The court held that if on the particular facts of a given case, a

\textsuperscript{128} \textit{Kennedy v The Charity Commission} [2014] UKSC 20 where Lord Mance noted that the ‘nature of judicial review in every case depends on the context.’ at para 51.

\textsuperscript{129} \textit{R (Hurley) v Secretary of State for BIS} [2012] EWHC 201.

\textsuperscript{130} \textit{R (on application of Al-Haq) v Secretary of State for Foreign and Commonwealth Affairs} [2009] EWHC 1910.

\textsuperscript{131} \textit{R (Farrakhan) v Secretary of State for the Home Department} [2002] EWCA Civ 606 — emphasis placed on control and accountability mechanisms in the political sphere in respect of a decision to deny entry to the UK to a controversial speaker from the United States. See further Lord Hope in \textit{R v Director of Public Prosecutions, ex parte. Kebelene and Others} [2000] 2 AC 326 where he stated that ‘in some circumstances, it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer on democratic grounds to the considered opinion of the elected body or person whose act or decision is to be incompatible with the Convention… It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified…’

\textsuperscript{132} See the contrasting remarks of Lord Neuberger (at para 133) and Lord Kerr (paras 271-83) in \textit{Keyu v Secretary of State for the Foreign and Commonwealth Office} [2015] UKSC 69.

\textsuperscript{133} \textit{Council for Civil Service Unions v Minister for the Civil Service} [1985] AC 374.

\textsuperscript{134} [1983] AC 629.

\textsuperscript{135} [1999] EWCA Civ 1871.
public authority failure to honour that promise was so unfair as to amount to an abuse of power in its dealings with affected persons, a failure to honour that promise would be deemed unlawful, unless there were overriding reasons to allow the public body to resile from its earlier promise. The attempt to resile from the promise in Mrs Coughlan’s case was so unfair as to amount to an abuse of power without any overriding reasons.

Following Coughlan, the courts have clarified that for an applicant to successfully invoke the doctrine, it needs to be shown that the applicant was aware of the promise and that it was ‘pressing, focused and made to a small group of people’\(^\text{136}\) When an authority fails to bear in mind that a pressing and focused promise of an actual benefit has been made to an appropriately small number of persons, this failure may be treated as an error of law resulting in the nullification of any subsequent decision.\(^\text{137}\)

**II.2.9.8 Rule against Bias**

Along with the right to a fair hearing, the rule against bias represent the rules of natural justice in public law. Both may be said to represent English common law's version of Article 6(1) of the European Convention on Human Rights guaranteeing ‘a fair ...hearing within a reasonable time by an independent and impartial tribunal established by law.’ The rule against bias is treated as comprising two distinct heads.

First where the decision-maker is in fact a party with an interest in the outcome of the process, either because of a direct financial interest\(^\text{138}\) or because he/she is in fact a party to the litigation. An example of the latter occurred in *In re Pinochet* where one of the judges in an extradition hearing before the House of Lords involving the former President of Chile was Lord Hoffman.\(^\text{139}\) At the time of the hearing Lord Hoffman was a director of a branch of *Amnesty International* who were one of the parties before the House of Lords arguing for the extradition of the former President to Spain. The court ruled 3-2 in favour of allowing extradition to Spain (Lord Hoffman forming part of the majority view). When Lord Hoffman’s connection to the case emerged, the House of Lords reconvened and declared a nullity its earlier ruling. Once it had been shown that Lord Hoffman was a party to the case, he was disqualified automatically without the need to show that he was actually biased or that there was a likelihood or suspicion of bias.

The second aspect of bias arises where the judge/decision-maker is not a party to the proceedings/decision and does not have a direct financial interest in the outcome. The suspicion of bias will arise here because say of a friendship or other, non-pecuniary relationship with an interested party. In these circumstances the courts ask whether a fair-minded observer knowing the relationship between the parties would reach the conclusion that the judgment/decision outcome revealed ‘a real possibility of bias’.\(^\text{140}\) According to Lord Hope in another ruling the ‘fair-minded’ observer referred to in *Porter v McGill* is not complacent nor unduly sensitive or suspicious.\(^\text{141}\) The test has been applied to administrative

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\(^{136}\) *R (on the application of Bhatt Murphy) v The Independent Assessor* [2008] EWCA Civ 755.

\(^{137}\) *R (Bibi) v Newnham LBC* [2001] EWCA Civ 607. See also *R (on the application of BAPIO Action Ltd) v Secretary of State for Health* [2008] UKHL 27 later Government guidance contradicting earlier official assurances to foreign medical graduates about visa renewals and employment opportunities struck down.

\(^{138}\) As in *Dimes v Grand Junction Canal* (1852) 3 HLC 759 where a judge hearing a dispute held shares in the Grand Junction Canal company. Even though it was not shown that the judge had been influenced in his ruling by the fact of his shareholding, the ruling was nonetheless struck down.

\(^{139}\) [1999] UKHL 1.

\(^{140}\) *Porter v McGill* [2001] UKHL 67.

\(^{141}\) *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2.
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decision makers such as local authorities entrusted by statute with planning consents. The problem can be acute here because councillors are elected politicians publicly committed to certain policies (sometimes as a result of manifestoes on which they have been elected) and may be seen to have predetermined views on certain matters that require adjudication. In *R (Island Farm Development) v Brigend County BC* Justice Collins took the more relaxed view that, absent evidence to the contrary, local councillors could be trusted to ‘abide by the rules that the law lays down.’ Less generously, an earlier High Court ruling in 2002 laid down the proposition that, provided councillors can show that they are open to departing from a predetermined position, as opposed to sticking with a ‘corporate determination’ to a previously agreed position, then they ought not to fall foul of the ‘real possibility of bias’ test.

II.2.9.9 Right to a Fair Hearing

This is a variable, highly context-specific protection for individuals subject to public bodies’ decision-making processes. Some commentators see the right to a fair hearing as part of broader duty on decision-makers to act fairly. Some example may give a flavour of how the protection has operated in discrete settings. In *Ridge v Baldwin* the Chief Constable of Brighton was dismissed by the police authority after being acquitted on a criminal charge of conspiracy to obstruct the course of justice. During the criminal trial, the judge twice made adverse comments about the Chief Constable’s conduct. The subsequent dismissal then occurred without the Chief Constable having been given notice in advance of the decision to dismiss that they were planning to do this, or to give him a hearing before taking their decision. The House of Lords held that the failure to give the Chief Constable notice of the charges against him and a hearing was in breach of natural justice. The dismissal was declared a nullity in law.

Other features of the right to a fair hearing include the degree of notice of the case against affected party, the extent to which there is a right to make oral and/or written representations and whether it requires the provision of legal representation.

The first issue we can look at is the degree of notice of the case to be met. What emerges is that sometimes the law places a limit on the degree of information a decision-maker will have to reveal to the applicant simply in order to safeguard the purpose of the Act under which the decision-maker acts.

The point arose in *R v Gaming Board of GB ex parte Beniam & Khaida* in which the applicants had applied for a licence from the gaming Board to run a casino. The Board in deciding whether to grant a licence would check police files and other confidential sources before making its decision. Whilst it was held that the Board did not need to reveal its sources (as this would deter sources from confiding in the Board in the future), the Court of Appeal did say that the notion of a fair hearing required that the applicants be given in outline form the nature of the objections against them since the objections would go to the issue of the

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142 [2006] EWHC Admin 2189.
144 [1964] AC 40.
applicants’ characters. Disclosure would enable the applicants to respond to the doubts raised by the objections.146

Sometimes the requirements of fair hearing will be satisfied by providing an opportunity to make written representations. An oral hearing is not always demanded. In *Lloyd v McMahon* 49 councillors from the controlling Labour group on Liverpool City Council failed to set a valid rate and were charged with wilful misconduct.147 The auditor gave the councillors full details of the allegations against them and an opportunity to make written representations on the charges. No oral hearing took place. The House of Lords held that the procedure adopted by the auditor was fair, noting in passing that none of the councillors had asked to be heard orally.

A major source of the current body of rules we have about fair hearings stems from actions brought by prisoners. In *ex parte Hone* 148 and the earlier case of *ex parte Tarrant*149 the court was being asked whether the absence of legal representation meant that an oral hearing could not be fair. Again, the answer is depends upon the context in which the decision is made. In the case of prisoners’ disciplinary hearings which are thought to need a rapid hearing, the general rule is that legal representation is not required for the proceedings to be fair.

Within the category prisoners’ disciplinary hearings, certain situations may nevertheless demand that the prisoner be given some legal representation. In *ex parte Hone*, the House of Lords agreed with the earlier ruling in *ex parte Tarrant* and said that the following factors were relevant to the decision whether to allow legal representation:

(a) seriousness of the charge, likely penalty  
(b) whether points of law likely to arise in the hearing  
(c) capacity of the prisoner to present his/her own case  
(d) the need for speed  
(e) the need for fairness between the parties.

The content of ‘fair hearing’ entitlements is greater when there is an interference with fundamental freedoms such as those found in the European Convention.150

Aside from common law rules, a decision-maker may be under statutory duties to follow certain procedures prior to the taking of any decision (such as consulting with affected parties, making due inquiries into relevant matters, considering objections from interested parties). Where the procedural requirements imposed by statute are considered to significant (that is non-trivial, non-technical) the courts will treat the statutory procedure as mandatory meaning that a failure to adhere to the stated procedure will make any resulting decision legally invalid.151

**II.2.9.10 Failure to Give Reasons**

There is no general rule at common law for public bodies to give reasons for their decision. Some statutes may require that reasons are provided. This occurs typically in the context of

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146 See also *Bank Mellat v HM Treasury* [2013] UKSC 39 for a failure to give proper advance notice to an Iranian bank of a Treasury order that denied the bank access to UK financial markets.
147 [1987] 1 All ER 1118.
151 *Bradbury v Enfield LBC* [1967] 1 WLR 1311.
planning and environmental law. Exceptionally, the common law does recognize situations where a duty does exist to provide reasons. These exist where the requirements of fairness demand that reasons be given. In *Doody v Home Secretary* a duty was imposed on the Home Secretary to disclose to a prisoner the reasons behind the latter’s determination of the tariff (or period of incarceration) to be served by the prisoner. Where a decision of a public body is aberrant on its face,153 Where however a decision-maker’s judgment calls for the articulation of impressionistic ‘sometimes inexpressible value judgments’ as in a governmental body’s rating of research quality in the university sector, then no duty will arise.154 Where there is an established practice of giving reasons in a particular type of case, the failure to do so in an individual instance may disappoint a legitimate expectation and therefore nullify the decision. Finally, where a decision engages an applicant’s Convention rights, the courts may be more inclined to require the decision-maker to state the reasons behind its decision. Thus in *Re Cooley’s Application for Judicial Review* an applicant claimed that she had suffered mental trauma as a result of living in an area of sectarian violence in Northern Ireland.155 On one occasion she had found a bullet in her hallway. She now sought financial help in finding a new home. Her application was dismissed on the basis that she was not considered to be at risk of serious injury or death. The Court of Appeal in Northern Ireland held that the extent of any obligation on the part of the decision-maker to give reasons for its determination should be assessed in the light of the public authority’s obligation to respect the applicant’s Convention rights (here Article 8 the right to a private and family life). The refusal letter made reference neither to the incident involving the bullet in the hallway, nor any detail of the how the authority had assessed the risk to the safety of the applicant. There was no means of challenging the decision of the authority other than by judicial review. Accordingly, the applicant was held to be entitled to a statement of reasons behind the refusal of financial assistance so that there could be an effective opportunity to detect whether any errors had been made by the authority.

**II.2.9.11 Discrimination**

A policy or decision made by a public body may be unlawful under Article 14 of the ECHR if it infringes the exercise of other Convention rights. Legislation that cannot be given a meaning other than one that is incompatible with the discriminatory treatment of the applicant’s rights may be the subject of a declaration of incompatibility under s.4 of the Human Rights Act 1998.156

**II.3. Civil law remedies in tort**

A range of remedies in civil law exist whose primary purpose is to compensate the victims of others’ misconduct and, where appropriate, to order the defendant to cease his/her unlawful action. With the exception of the torts of misfeasance in a public office and malicious prosecution, the fact that the wrongdoer is the state or an agent of the state is irrelevant as each of the forms of action described below are available against both private

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152 [1994] 1 AC 531.
153 *R v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310.
154 *R v HEFCE ex parte Dental Institute* [1994] 1 All ER 651.
156 *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53 – section 4 declaration of incompatibility issued in respect of a provision of immigration law requiring persons other than those being married in a Church of England ceremony to seek the prior consent of the Home Secretary.
individuals/bodies and public bodies. Some of the remedies described below overlap offering an injured citizen a choice of remedy.

II.3.1. Habeas Corpus

De Smith identified the writ of habeas corpus is “the most renowned contribution of the English common law to the protection of human liberty... It is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention.”\(^{157}\) and is available in all cases of wrongful deprivation of personal liberty.\(^{158}\) The remedy is typically used to seek the release of persons purportedly being held under immigration and extradition powers. Applications for the writ are made to the High Court (Administrative Division) and can be dealt with by a High Court judge either on the papers or by an oral hearing. After release, a citizen may commence an action for damages for the tort of false imprisonment. This tort allows a citizen to recover damages for any period/periods of detention which have not been authorised in law. Common examples include where a police officer arrests a suspect but lacks under the Police and Criminal Evidence Act 1984 a ‘reasonable suspicion’ that the arrested person is involved in the offence. The lack of reasonable suspicion renders the arrest unlawful and allows the detainee to recover damages in the County Court usually before a judge and jury.\(^{159}\) The writ may be used in cases of false imprisonment and the victim may be entitled to sue for damage to reputation that flows from his incarceration in addition to other damages that have already accrued on account of the loss of liberty for a period of time.\(^{160}\)

II.3.2. Privacy – trespass to the person/property; breach of confidence; misuse of personal information

Citizens’ rights to privacy can be protected via claims in the torts of (i) trespass to the person/property; and (ii) misuse of personal information. The state may be liable under these torts when it lacks legal authority (whether under statute or at common law) to interfere with the claimant’s privacy interests. Individual interests in bodily integrity can be separately protected by the tort of battery. Famously in Entick v Carrington (1765), the Court of Common Pleas could find no recognition in earlier case law of the Government’s claimed power to execute general search warrants and ruled that, in the absence of lawful authority to search Entick’s property and seize his papers, the Government had committed a trespass upon Entick’s property and personal papers and Entick was awarded damages.\(^{161}\)

The remedy for trespass to land is an award of damages.\(^{162}\) Claims under this tort are heard in the High Court (Queens’ Bench or Chancery Division) or the County Court depending upon the value of damages sought.

Where an action for trespass to the person is brought by a claimant who has been convicted of an imprisonable offence arising from events at the time the imprisonable act is alleged to have been committed, the claimant may only bring civil proceedings for trespass to the person after permission of the court has been obtained. Where unlawful, non-consensual physical

\(^{158}\) Civil Procedure Rules Part 87.
\(^{159}\) County Courts Act 1984, s.66.
\(^{161}\) (1765) 19 Howell’s State Trials 1029.
\(^{162}\) Atkin’s Court Forms 40(1).
force is used on the citizen, an action for the separate tort of battery will lie and be heard in either the High Court or the County Court.\textsuperscript{163}

Actions for breach of confidence are today more commonly brought as tortious claims for misuse of personal information\textsuperscript{164} where the claimant seeks damages and/or injunctive relief against the defendant. From the privacy claimant’s perspective, the new tort has the advantage of not requiring it to be shown that there has been the breach of an existing relationship of confidence. Instead, following the House of Lords ruling in \textit{Campbell v MGN}, the claimant will be entitled to a remedy if (i) he/she has a reasonable expectation of privacy in respect of the personal information; and (ii) on balancing the claimant’s interest in keeping material private against recipient’s interest in publishing it,\textsuperscript{165} the weight of competing interests comes down on the claimant’s side.\textsuperscript{166} In conducting this balancing exercise it should be borne in mind that neither right (to privacy and to freedom of expression) has automatic precedence over the other.\textsuperscript{167} A particularly salient issue here concerns the availability of injunctive relief prior to publication.

Depending upon the level of damages sought claims will be heard either in the High Court (Queen’s Bench Division, or Chancery) or for lower claims the County Court.\textsuperscript{168}

\section*{II.3.3. Misfeasance in a public office}

Public bodies or their members may commit the tort of misfeasance in a public office when (i) the conduct of the body or its members is intended to injure another or, action is taken knowing or being reckless to the fact that there was no power to do so and (ii) that the action will probably injure the claimant. Where for example a council passes a resolution that causes harm to another and council members know of the lack of legal authority to act but nevertheless approve the resolution knowing that the resolution will in all likelihood adversely affect another, the council as a whole may incur liability.\textsuperscript{169}

The writ can be heard in the High Court, Queen’s Bench Division and a successful claimant who can show that actual harm resulted from the misfeasance of a public official (such as loss of employment or some other economic loss, reputation loss) is eligible for the award of special damages. Exemplary and or aggravated damages may also be available. The exacting evidential requirements of this action (in particular the need to show malice towards the claimant or knowledge of unlawful conduct and likelihood of claimant harm on the part of the official) have severely limited the number of successful actions.

\section*{II.3.4. Malicious prosecution}

This remedy is available where a defendant is acquitted at the end of criminal proceedings brought by the police and can show that the police acted with malice in bringing the case against the defendant, rather than seeking in good faith to bring an offender to justice. Malice

\begin{flushleft}
\textsuperscript{163} Atkin’s Court Forms 40(1).
\textsuperscript{164} See now \textit{Campbell v MGN} [2004] UKHL 22.
\textsuperscript{165} The wider the audience to whom a publication is disclosed, the greater the justification needed to support such as disclosure.
\textsuperscript{166} [2004] 2 AC 457.
\textsuperscript{167} For analysis of more recent developments under this tort see Tugendhat & Christie (eds N Moreham & M Warby) \textit{The Law of Privacy and the Media} 3rd edn. (2016, OUP) chs.5, 8 & 11.
\textsuperscript{168} Atkin’s Court Forms 11(1).
\textsuperscript{169} \textit{Dunlop v Woollahra Municipal District Council} [1981] 1 All ER 1202. See \textit{Jones v Swansea City Council} [1990] 1 WLR 1453 for analysis of the position when only one councillor is motivated by malice.
\end{flushleft}
is defined for the purposes of this tort as being motivated by spite, ill-will or any wrong rationale against the claimant.\textsuperscript{170} The claimant has the burden of proving malice and must show that he/she has suffered damage either to reputation\textsuperscript{171} or to his physical safety/liberty or property. Damage to property may occur where the claimant has had to sell property in order to defend himself in the criminal proceedings.\textsuperscript{172} Malice might be shown where police officers manufacture ‘evidence’ against the defendant.

Successful actions for malicious prosecution are rare but where an action succeeds, the claimant will recover damages in the County Court usually before a judge and jury.\textsuperscript{173} Exceptionally, a claim may be brought to the Royal Courts of Justice in London under Part 29 of the Civil Rules of Procedure again before a judge and jury unless the trial will involve a prolonged examination of documents or scientific evidence.\textsuperscript{174}

\begin{footnotesize}
\begin{enumerate}
\item Brown v Hawkes [1891] 2 QB 718, 723.
\item See thus Calix v AG of Trinidad & Tobago [2013] UKPC 15.
\item Berry v British Transport Commission [1962] 1 QB 306.
\item County Courts Act 1984, s.66.
\item Practice Direction 29 The Multi-Track para 2.6.
\end{enumerate}
\end{footnotesize}
III. Legal sources of constitutional rights

III.1. Statutory laws

- Magna Carta 1215
- Justice of the Peace Act 1361
- Union with Scotland Act 1707
- Union with Ireland Act 1800
- Official Secrets Act 1911
- Crown Proceedings Act 1947
- Administration of Justice Act 1960
- Parliamentary Commissioner Act 1967
- European Communities Act 1972
- House of Commons Disqualification Act 1975
- Senior Courts Act 1981
- Mental Health Act 1983
- Representation of the People Act 1983
- Police and Criminal Evidence Act 1984
- Public Order Act 1986
- Official Secrets Act 1989
- Criminal Justice and Public Order Act 1994
- Police Act 1996
- Data Protection Act 1998
- Human Rights Act 1998
- Northern Ireland Act 1998
- Scotland Act 1998
- Freedom of Information Act 2000
- Political Parties, Elections and Referendums Act 2000
- Terrorism Act 2000
- Anti-terrorism Crime and Security Act 2001
- Constitutional Reform Act 2005
- Prevention of Terrorism Act 2005
- Terrorism Act 2006
- Criminal Justice and Immigration Act 2008
- Constitutional Reform and Governance Act 2010
- Equality Act 2010
- European Union Act 2011
- Fixed-term Parliaments Act 2011
- Parliamentary Voting System and Constituencies Act 2011
- Police Reform and Social Responsibility Act 2011
- Terrorism Prevention and Investigation Measures Act 2011
- Legal Aid, Sentencing and Punishment of Offenders Act 2012
- Protection of Freedoms Act 2012
- Scotland Act 2012
- Defamation Act 2013
- Crime and Courts Act 2013
- Electoral Registration and Administration Act 2013
- Justice and Security Act 2013
- Marriage (Same Sex Couples) Act 2013
- Mental Health (Discrimination) Act 2013
- Anti-social Behaviour, Crime and Policing Act 2014
- Data Retention and Investigatory Powers Act 2014
- Immigration Act 2014
- Intellectual Property Act 2014
- Northern Ireland (Miscellaneous Provisions) Act 2014
- Wales Act 2014
- Criminal Justice and Courts Act 2015
- Counter Terrorism and Security Act 2015
- European Union Referendum Act 2015
- Modern Slavery Act 2015
- Recall of MPs Act 2015
- Serious Crime Act 2015
- Immigration Act 2016
- European Union (Notification of Withdrawal) Act 2017
- Policing and Crime Act 2017
- Scotland Act 2017
- Wales Act 2017
III.2. Common Law

In the absence of a written constitution, judge-developed protections (remedies) for the individual citizen vis à vis the Executive continue to provide an important source of rights for persons. A list of the leading judge developed protections is provided below:

- **Judicial review** – where the legality of administrative bodies’ conduct is reviewed by the courts on the basis of criteria developed by the courts themselves.

- **Actions in tort** – offers civil law remedies (including damages and injunctions) for infringements of individual rights such as liberty (writs of habeas corpus), privacy (writ of trespass to the person/property; breach of confidence, misuse of personal information), for use of excessive/unlawful force by agents of the state (writ of battery) for damage to reputation (writ for defamation/slander); deliberate misuse by public office holder of powers with intent to injure citizen causing actual injury (writ for misfeasance in a public office).

III.3. Conventions

Conventions cannot be regarded as a source of citizens’ constitutional rights for three separate reasons. In the first place, conventions as rules of political practice do not enjoy any formal legal status. Failure to follow a convention does not of itself entail the breach of any legal rule. Secondly, in terms of subject matter conventions in the UK Constitution regulate relationships between the Executive and Parliament and Judiciary. For example the convention that requires the monarch to assent automatically to Bills passed through both Houses of Parliament. Any interests that citizens do have in the working of conventions may be said to be wholly represented by elected representatives in the House of Commons. There is no direct involvement of citizens in the application and development of conventions. Finally, the content of conventions is often unclear, resting upon a perceived or actual political consensus at particular moments. The lack of clarity attending the precise content of conventions makes them especially ill-suited to ground claims of citizens’ constitutional rights.

III.4. International Law

The United Kingdom has a dualist approach to obligations and entitlements accruing from international law. This means that unless incorporated by Act of Parliament into national law (as has occurred with European Union law\(^{176}\) and the majority of provisions of the European Convention on Human Rights\(^{177}\)) then individual rights arising under treaties and other international agreements have no direct legal force in the United Kingdom. Where national

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172 This position pertains even when a Convention is recognised by Act of Parliament. See *R (on application of Miller & Dos Santos) v Secretary of State for Exiting the EU* [https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf](https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf) where the UK Supreme Court unanimously decided that the statutory recognition of the Sewel Convention (governing relations between the Westminster Parliament and devolved legislatures requiring the latter bodies’ consent to Westminster legislation on devolved matters) in the Scotland Act 2016 was considered to remain outside the remit of the judiciary. Any attempt to enforce a convention in the courts would embroil the Courts in hotly contested political matters into which the Court could not be drawn. Judges, the Supreme Court in *Miller* said ‘are neither the parents nor the guardians of political conventions: they are merely ‘observers’.’

176 European Communities Act 1972.

law is ambiguous however, a canon of statutory interpretation requires a domestic court to prefer where reasonably possible an international law compatible reading of domestic law.\footnote{Salomon v Commissioners of Customs and Excise [1967] 2 QB 116. Since Salomon, some senior judges have not insisted upon ambiguity but have sought conformity when international law touches upon the same subject matter as a domestic statute. See thus Lord Diplock's remarks in Garland v BREL [1983] 2 AC 751.}
IV. The right to effective judicial protection in the case law of the UK

IV.1. Article 19(1) TEU and Article 47 EU Charter on Fundamental Rights

There have been very few cases where Article 19(1) TEU has been invoked in the higher national courts. A glance at EU Law textbooks in the UK reveals that barely any significant attention is devoted to the subject in the undergraduate teaching curricula. The principle whereby national legal systems must possess the procedures and remedies to enforce citizens’ EU rights is also encapsulated in Article 47 of the Charter of Fundamental Rights of the European Union. This provision is entitled ‘Right to an effective remedy and to a fair trial’ states that:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary.\(^{179}\)

Article 47 of the Charter has been cited infrequently in the higher courts in England and Wales. When it is referred to, it has been discussed alongside Article 6(1) ECHR.\(^{180}\) Two recent Court of Appeal rulings make clear the virtually coterminous effect of these separate provisions. In passing however, it may be noted that Article 6(1) ECHR has a broader reach since it refers more broadly to all rights in civil law as compared to Article 47’s more focused concern on questions of EU law and the rights of persons derived under EU treaties, directives and regulations. This may explain why Article 6(1) has been invoked more frequently than Article 47 of the Charter. A recent Court of Appeal (discussed below) suggesting that Article 47 has horizontal effect may in the future lead to more frequent claims under Article 47. This development may in part reflect the UK Courts’ adherence to the line of reasoning of the Luxembourg Court in cases such as Unibet that the principle of effective judicial protection for EU rights may exceptionally demand creative activity on the part of domestic courts to find new remedies at the national level.\(^{181}\)

As the Court of Appeal noted in R (on the application of Gudanaviciene and others) v Director of Legal Aid Casework and another (British Red Cross Society intervening)\(^{182}\) Article 47 of the Charter imposes a requirement on EU member states that mirrors that laid down on Council of Europe signatory states by virtue of Article 6(1) of the European Convention on Human Rights. In Gudanaviciene the court was asked to rule on guidance issued by the Lord Chancellor on

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\(^{179}\) Chapter VI Justice (2000/C 364/01).

\(^{180}\) Article 6(1) of the Convention states that ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

\(^{181}\) C-432/05 [2007] ECR I-2271. See A Arnulf, ‘The Principle of Effective Judicial Protection in EU law: An Unruly Horse?’ (2011) Eur L Rev 51 who notes the clear tension between the ECJ’s more recent and interventionist laying down of a rule requiring the creation of new national remedies on the one hand and on the other hand the idea of national procedural autonomy developed early on in cases such as Rewe Zentralfinanz [1976] ECR 1989.

\(^{182}\) [2014] EWCA Civ 1622.
exceptional funding which stated that civil legal aid was to be used for ‘rare cases … where the risk of a breach of an individual’s Charter/Convention rights would be substantial’. This informed the Director of Legal Aid Casework’s decision to refuse legal aid in a number of cases now before the court.\textsuperscript{183} In finding that the Guidance was not compatible with Article 47 of the Charter and Article 6(1) of the European Convention, the Court of Appeal stressed that the threshold of ‘rare and extreme cases’ meant that in all immigration cases the United Kingdom would be in breach of its duty to award legal aid. The complexity of immigration rules (which was not necessarily replicated in other civil law contexts) and the importance of what was at stake in these cases meant that an unrepresented litigant was unlikely to be able to cope with the demands and complexity of self-representation. The Guidance was accordingly in this respect unlawful.

In \textit{Benkharbouche and another v Embassy of the Republic of Sudan} the Court of Appeal was called upon to assess the legality of provisions of the State Immunity Act 1978.\textsuperscript{184} The Act confers immunity on foreign diplomatic missions with the consequence that individual employees who alleged that they had been dismissed unfairly, paid below the minimum wage and required to work in excess of the Working Time Regulations were denied effective protection of their EU law rights as well as their Article 6(1) Convention rights. Declaring Article 47 of the Charter to be a fundamental right as a general principle of EU law, the Court found that no national legislation was needed to bring it into effect against non-UK state parties and that consequently Article 47 was capable of being invoked horizontally against the government of Sudan. Having already found that certain provisions of the SI Act violated the right to an effective remedy under Article 6(1) of the European Convention on Human Rights, the Court of Appeal stated

\begin{quote}
\textit{It is common ground that, in so far as relevant to the present case, the content of Article 47 is identical to that of Article 6 ECHR. It follows from our conclusions on Article 6 ECHR that the appellants have accordingly succeeded in showing that Article 47 is violated.}
\end{quote}

The Court of Appeal then invoked s.2(1) of the European Communities Act 1972 and disapplied those provisions of the State Immunity Act 1978 in so far as the latter infringed the right to an effective remedy for breach of EU law.

\section*{IV.2. The right to an effective remedy under Article 13 ECHR}

There is a close conceptual link between the notion of access to the courts in Article 6(1) of the Convention (and brought into domestic law under the Human Rights Act 1998) and the right to an effective remedy set out in Article 13 of the Convention. The latter goes further than merely guaranteeing that a person can access the courts to have their civil law rights determined, obliging signatory states to ensure that Convention rights are given effect by national authorities. Article 13 has not however been incorporated into domestic law.

Article 13 ECHR states that

\begin{quote}
\textit{Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.}
\end{quote}

\textsuperscript{183} The primary legislation from which the Director’s discretion is derived is the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

\textsuperscript{184} [2015] EWCA Civ 33.
Alongside Article 35 of the Convention that requires inter alia the exhaustion of domestic remedies before an application to the Strasbourg Court is deemed admissible and Article 1 of the Convention that places the primary obligation to secure Convention rights firmly on the signatory states, Article 13 stresses the role of national authorities (including the courts) in safeguarding the Convention rights of persons within the jurisdiction. More recently, the Brighton Declaration has sought to remind member states of the key role played by the national enforcement of Convention remedies.\(^{185}\) Where the national system of remedies is working effectively, it should be expected that relatively few applications of merit would reach Strasbourg.\(^ {186}\)

When the United Kingdom Parliament brought the Convention into domestic law via the Human Rights Act 1998, the list of Convention rights accorded domestic status did not include Article 13. Nonetheless, in Brown v Stott one of earliest Convention cases to come before the courts after the passing of the 1998 Act, Lord Hope of Craighead observed that Article 13 ‘has not been overlooked.’\(^ {187}\) Parliament, he stated, intended to create ‘an appropriate remedial structure for giving effect to Convention rights’ in cases involving public authorities in sections 7 - 9 of the Human Rights Act.\(^ {188}\) Section 7(1) provides that

> A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may bring proceedings against the authority under this Act in the appropriate court or tribunal, or rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

Under section 8 of the 1998 Act, in cases where a court concludes that the act/proposed act of a public authority (including the courts themselves) is/would be unlawful, ‘it may grant such relief or remedy, or ...order, within its powers as it considers just and appropriate.’

Against this background, an analysis of the case law of the highest UK jurisdictions on the right to effective legal protection under Article 13 ECHR is now offered. In this section of materials I will focus on rulings of the House of Lords and its successor the UK Supreme Court. In another early ruling R v Lambert the House of Lords gave a broad and retrospective effect to the 1998 Act’s obligations as regards the conduct of prosecuting authorities that had occurred before the Act came into force.\(^ {189}\) The conduct was raised by a convicted defendant in an appeal against his conviction that was heard after the Act had come into force. The House of Lords held that the defendant could rely retrospectively on his Convention rights to challenge his original conviction. This much was clear from s.7(6) which defines legal proceedings as those brought by or at the instigation of a public authority and which, by the reference in s.22(4) of the 1998 Act to ‘whenever the act in question took place’, extended the Convention rights in proceedings brought by state prosecutors backwards in time to before the Act’s commencement. The obligation on public authorities in sections 7 & 22 did not apply however to the original trial judge in his summing up since he could not be regarded as a public authority who had ‘instigated’ legal proceedings.

\(^{185}\) \(\text{http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf}\)


\(^{187}\) [2001] 1 WLR 817, 847.

\(^{188}\) Ibid; noting en passant that an equivalent remedial structure was in place in respect of the acts of devolved systems of government in Scotland, Wales and Northern Ireland (that is Parliament, Assemblies and Executives) as far as they impacted on Convention and EU law rights of individuals. See further on this point, J Wadham et al Blackstone’s Guide to The Human Rights Act 1998 (7th edn.) (2015 OUP) at p.310.

\(^{189}\) [2001] UKHL 37.
The Strasbourg Court’s Article 13 jurisprudence has been cited by the House of Lords/Supreme Court in a limited number of decisions as part of the domestic courts’ obligation to ‘take account of’ European Court of Human Rights’ rulings.

In *R (on the application of Al-Skeini and others) v Secretary of State of Defence* the question of an effective domestic remedy in respect of acts committed outside the UK arose from the UK’s involvement in the Iraq war in 2003-4. The Defence Secretary had refused to hold a public inquiry into the deaths in Iraq of six Iraqi civilians alleged to have been killed by the British military. Relatives of the deceased argued that the refusal to hold a public inquiry was unlawful since it violated the victims’ Convention rights to life under Article 2 where a death had been caused by agents of the state. The House of Lords had to determine by reference to Convention jurisprudence the exceptional, extra-territorial application of the 1998 Act to foreign lands. Convention jurisprudence in the case of *Bankovic v Belgium* extended the territorial reach of Convention rights to foreign lands where the Council of Europe state had effective control of that territory and exercised powers that would have usually been exercised by the government of that territory. Five of the six deceased had however been killed in locations and circumstances where the UK forces lacked ‘effective control’ on account of ongoing insurgent activities and so following *Bankovic v Belgium* the House of Lords ruled that the UK was not in a position to discharge the Article 2 obligations of a Council of Europe member state. The position was different in relation to the sixth civilian Mr Moussa who was employed in a hotel in Basra when he was seized and taken to a British military detention base. He later died of injuries sustained at the hands of British troops whilst under interrogation. Lord Brown noted that Article 13 required as a matter of international law an effective remedy in national legal systems for violations of Convention rights. Mr Moussa was in an area where the British military had effective control under the rule from and as such the Human Rights Act did apply. Article 13 would therefore be found to have been violated if the court was to rule that his Article 2 complaint could not be heard on its merits.

In 2014, the UK Supreme Court considered whether reporting restrictions imposed on media organisations in deportation proceedings against a foreign national who had been convicted of sexual abuse of a minor respected the Article 10 Convention rights of broadcasters to freedom of expression. The BBC argued that, as the original reporting restriction had been made under s. 11 of the Contempt of Court Act 1981 on an ex parte basis, its Convention rights to freedom of expression had been interfered with by the court without an effective opportunity to challenge that interference in contravention of Article 13. The Supreme Court agreed with the Court of Session below that the procedures for imposing reporting restrictions must as a matter of fairness allow media organisations an opportunity to make representations about the need for and extent of any order. The Article 13 obligation to ensure the effective protection of Article 10 interests could be met where any ex parte reporting restriction could be promptly challenged at an inter partes hearing. This was indeed the case in relation to s.11 Contempt of Court Act reporting restrictions on the facts in the present case since the BBC was...
allowed to argue for the recall of the original restriction before the Court of Session within two
days of the ex parte hearing.195

Where judicial or tribunal proceedings are concerned, it is clear that such hearings engage the
citizen’s right to fair trial in accordance with Article 6 of the Convention. In the specific context
of cases involving sensitive national security information however, the state will not want to
disclose material that potentially prejudices national security interests. Accordingly, modified
procedures have been devised to safeguard the interests of the state whilst at the same time
purporting to uphold the Article 6 rights of tribunal applicants. In Home Office v Tariq a Home
Office Immigration Officer had his security clearance withdrawn and sought to challenge the
basis of the withdrawal, alleging that it was motivated on grounds of racial and/or religious
discrimination.196 At the Employment Tribunal, Tariq and his representatives were excluded
from certain parts of the proceedings (closed material procedure) where the tribunal judged
that the exclusion was justified on grounds of national security. Tariq argued that, although
he and his lawyers knew of the general basis of the Home Office’s case against him, the
exclusion violated his Article 6 right to a fair trial since he and his lawyers were unable to test
certain specific materials relied upon by the tribunal to reach its conclusion and that the failure
of domestic law to remedy this violation meant that he had been denied an effective remedy
as required by Article 13. In the UK Supreme Court, their Lordships noted the settled
application of Strasbourg jurisprudence on Article 13 in the context of national security
considerations. Three cases Leander v Sweden197, Esbester v UK198 and Kennedy v UK199 established
that national security considerations may necessitate procedures such as the one employed
in Mr Tariq’s case by which the applicant is unable to know aspects of the case against him.
The critical question was whether adequate safeguards attached to the procedures. In Mr
Tariq’s case, a Special Advocate had been appointed from a panel of security cleared,
independent advocates who, whilst not engaged to act by the applicant, was required to
represent his best interests during the closed material procedure. The special advocate was
able to call witnesses if he/she considered this necessary to represent the applicant’s best
interests. Moreover, with the permission of the court/tribunal and without disclosing the
contents of any closed materials, the special advocate could even communicate with the
applicant so as to inform the special advocate about issues that could form the basis of an
appeal.200 The resort here to a closed material procedure was therefore attended by sufficient
safeguards and therefore lawful. No violation of Article 6 had occurred and accordingly no
question of the failure to provide an effective remedy arose.

The question of what constituted an effective remedy for a failure by the state to act
compatibly with Article 6(1) was at issue in AG’s Reference (No. 2 of 2001).201 Seven prisoners
had been charged with violent disorder following an outbreak of violence. They came to trial
over two and half years later whereupon their lawyers argued that there had been a failure to
commence the criminal trial within a reasonable time as required by Article 6(1). The trial judge
agreed and ruled that the trial should be halted.202 The Attorney General sought clarification

195 The UK Supreme Court nonetheless suggested that, as a matter of practice, improved procedures to notify
adversely affected parties in advance of any s.11 order ought to be considered by administrators.
198 (1994) 18 EHRR CD 72.
200 Lord Mance at paras.58-9.
201 [2003] UKHL 68.
202 When the men were retried, the prosecution offered no evidence and a formal verdict of acquittal was recorded.
as a matter of law as to whether a violation of Article 6(1)'s requirement to commence a trial within a reasonable time did justify the halting of proceedings when the defendants had not established that they had suffered any detriment or prejudice as a result of the delay. A majority of the House of Lords concluded that the need under Article 13 to provide an effective remedy to defendants who had not been brought to trial within a reasonable time did not require a trial judge to order a stay of proceedings unless very exceptionally the delay was of such a magnitude as to make it unfair to the defendant that the proceedings should continue. In the vast majority of cases, the ‘effective remedy’ obligation could be met by action to expedite proceedings.  

203 [2003] UKHL 68 at para.24 (Lord Bingham). A public acknowledgment of the delay might also constitute a ‘just and appropriate remedy’ as required under s.8(1) Human Rights Act 1998.
V. Conclusions

In the absence of a formal, founding constitutional document setting out the powers of the various organs of the state, their inter-relationships and the rights and obligations of the citizens, an enquiry into the position of the citizen vis-à-vis the state must look to a variety of sources of constitutional rules comprising primarily of statutes and judge-developed rules (common law). Alongside the lack of officially-designated laws enjoying ‘constitutional’ status, the United Kingdom differs to other liberal democracies in lacking specialised courts with exclusive jurisdiction to hear public law claims. The highest court in the UK is the UK Supreme Court which acts as a final appellate court for disputes of both a public and private law nature that have started in the lower courts. Below the UK Supreme Court, both the Court of Appeal (Criminal and Civil Divisions) and the High Court (Queen’s Bench, Administrative, Family and Chancery Divisions) also hear both public and private law disputes. Two brief qualifications should be made in regard to the claim of non-specialised jurisdiction however. First, the UK Supreme Court does act as a quasi constitutional court in relation to disputes regarding the competences of the devolved administrations in Scotland, Wales and Northern Ireland. In this context, the Supreme Court is called upon from time to time to rule upon the rights of citizens. Secondly, in the context of constitutional litigation from UK overseas territories and Crown dependencies, the Judicial Committee of the Privy Council is asked to rule upon the constitutional settlements of those territories and dependencies and, in so doing, hands down a determinative reading of the constitutional rights of affected citizens.

Statutory tribunals do afford the citizen an avenue of appeals against executive decision-making to a specialised adjudicator in a range of situations where certain rights and freedoms of the individual are adversely affected by the state. These include the rights to liberty, privacy, freedom of association, residence and free movement, access to official information and income support. From a litigant’s perspective, an appeal to a specialised tribunal is a preferable means of challenging the exercise of public power when set alongside an action for judicial review on account of the fact that, as an appellate body, the tribunal can reverse the impugned decision and substitute its own decision, thereby granting a successful appellant the right/freedom initially denied by the state. The fact that the grounds upon which such a reversal takes place often mirrors the grounds of challenge in judicial review proceedings should not obscure this major advantage in remedial terms.

In the absence of a statutory appeal mechanism, judicial review offers a generalised form of judicial oversight. It is rooted in the common law and constitutes the principal means of testing the legality of acts and decisions of public bodies and others with public functions. Premised upon the idea of confining public bodies within the scope of the authority conferred upon them by Parliament, judicial review serves to enforce the rule of law. It does this in the main by striking down as unlawful acts and decisions of public bodies and requiring the decision-maker to re-take the original decision. The various grounds of challenge that exist in judicial review are entirely judge-developed. In recent times, these grounds are commonly justified in terms of promoting good administration and/or protecting the human rights of affected parties (including claims to equal, non-discriminatory treatment at the hands of the state).

Critics however claim that the apparently neutral criteria used to define the grounds of challenge mask the questionable imposition of value judgments by the unelected courts. Where the judges strike down decisions of elected authorities on matters where the latter have been explicitly authorised by a majority of citizens, the claim of illegitimate interference requires particularly close examination. The issue of the amenability of bodies to control via an action for judicial review has assumed arguably even greater importance in late 20th and
early 21st century advanced capitalist economies. The traditional functions of the state have been rolled back and tasks including the provision of social care to the elderly and vulnerable handed over to for-profit private companies. In what circumstances, if any, ought citizens with a grievance about their treatment in privately-run institutions be able to seek judicial review of such non-state actors’ conduct?

Exceptionally, an award of monetary damages may be made by a court in a judicial review hearing. An example occurs where under s. 8(3) of the Human Rights Act 1998 the Court finds a violation of a Convention right and is satisfied that the award ‘is necessary to afford just satisfaction.’

Where unlawful conduct on the part of a public body or one of its agents (e.g. a police officer) interferes with a citizen’s rights to liberty, physical and/or data privacy, an action in tort may lie against the public body to recover compensatory damages. The underlying purpose of such an action will be award a monetary sum to the citizen to restore him/her to the position enjoyed immediately prior to the rights violation. Actions in tort against public bodies proceed in the same way and through the same courts as their equivalents against private persons/bodies.

In respect of the requirements under TEU Art 19(1) and Article 47 of the EU Charter on Fundamental Rights for effective judicial remedies at the national level, there have been few occasions when these provisions have been cited before the highest national courts. Indeed, domestic judicial treatment has tended to subsume discussion of effective judicial protection of EU rights under Article 6(1) of the Convention on Human Rights. There is a close conceptual link between the notion of access to the courts in Article 6(1) of the Convention (and brought into domestic law under the Human Rights Act 1998) and the right to an effective remedy set out in Article 13 of the Convention although Article 13, unlike Article 6, has not been incorporated into domestic law. This omission has been explained by domestic courts in terms of the provisions of ss.7-9 of the Human Rights Act 1998 which empowers courts to issue such remedies as they consider just and appropriate in all the circumstances of the case. It is fair to say that the UK Supreme Court and the House of Lords before have sought in good faith to implement Strasbourg jurisprudence on Article 13, paying particular attention to the importance of ensuring that individuals have access to domestic courts.
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This study forms part of a larger project whose aim is to provide a comparative analysis of the rights of individuals in law proceedings before the highest courts of different States and before certain international courts. The objective is to describe the various remedies developed under domestic law that are available through the UK courts including the Supreme Court which, though not a constitutional court in the classic Kelsenian model, does sit at the apex of the appellate court structure in the UK.

The study commences with an historical introduction which stresses the absence in domestic law of a clearly delineated sense of what counts as ‘constitutional’. In traditional accounts of the UK Constitution there is no hierarchy of higher order ‘constitutional’ and ‘ordinary’ Acts of Parliament. Neither has a separate court structure developed to handle exclusively constitutional claims, although specialised ad hoc tribunals do exist in public law contexts. The underpinning principles remain (i) the doctrine of parliamentary sovereignty and (ii) the rule of law.

After this introduction, a review is provided of the main remedies and procedures used for the redress of grievances against public bodies. In a subsequent section of materials, a table of the main sources of individual rights against the state is provided. The domestic status of constitutional conventions and international law are dealt with in this part. Then, an account of the substantive norms informing the standards of effective protection for the individual is given, including some critical commentary on the operation of key provisions.

The concluding section compares the benefits and drawbacks of specialised tribunal adjudication, the ‘politicised’ nature of certain judicial review proceedings against a background of increasing privately-owned provision of services to the public and the continuing relevance of private law tort claims where compensation for mistreatment at the hands of the state is sought.