

# **ADMINISTRATIVE LAW SUMMARY**



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## THE SCOPE OF ADMINISTRATIVE LAW<sup>1</sup>

Administrative law regulates the relationships between the branches of government. It provides a set of rules to ensure that the executive branch of government is accountable for its actions to Parliament.

This is important because a significant amount of decision-making power is delegated to the executive by Parliament.

Doctrines such as Parliamentary sovereignty, ministerial responsibility, separation of powers and the rule of law are fundamental in deciding the extent and nature of the relationships between the branches of government.

### Supremacy of parliament

This is the idea that Parliament as the legislature, is supreme to all the other governmental institutions of the state (i.e. the courts, the executive) and is competent to make, repeal and change any legislative acts.

The enforcement and control of statutory duties may be justified by reference to this notion of supremacy.

Even though Parliament did not expressly authorise the courts to supervise and regulate the use of discretionary power by the executive, they cannot have intended that such power should be used unchecked and without some form of regulation.

However, this theory of the basis of judicial review has some faults.

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<sup>1</sup> Peter Cane, *Administrative Law* (Oxford, 4<sup>th</sup> Edition, 2004)

- 1) There are some situations where the courts cannot be said to be giving effect to the will of Parliament, as there are many gaps in the reasoning of the legislature where they have not considered an issue. In such a situation, it seems false to say that the will of Parliament is being given effect to. Here, the courts have to adopt a creative approach to the problem and adopt a 'purposive interpretation' of the legislation before them.

In *Pepper v Hart [1993] AC 593*, the House of Lords held that a court may refer to policy documents and speeches made by a Minister in introducing a piece of legislation to Parliament, in deciding what the purpose of legislation was. This implies that it is the will of the government rather than the will of Parliament that is important.

*Wilson v Secretary of State for Trade and Industry [2003] 3 WLR 568* has lessened the damage to an extent that *Pepper v Hart* caused to the principle of supremacy. It reiterated that the courts must consider what the statutory words meant rather than what the courts think they mean.

- 2) In certain situations, the courts seem to have ignored the express intentions of Parliament, evidenced in legislation. In order to ensure that their jurisdiction is preserved, the courts have on occasion, been prepared to read words into apparently unfettered discretion.

The cases relating to the attempts to exclude judicial review provide some particularly good examples of the courts acting in this way.

Whilst Parliament has sought to use a number of different clauses in legislation in an attempt to exclude the possibility of judicial review, many in the clearest of terms, the courts have found ways of preventing the clauses from having the effect desired by Parliament, to preserve their jurisdiction.

- 3) Another problem with the use of Parliamentary supremacy as the basis for judicial review is that it does not easily deal with situations where the courts have reviewed decisions of bodies who have not been exercising power founded in statute or where the bodies themselves do not have a statutory basis. For example, in the *GCHQ* case, the House of Lords rejected the notion that the prerogative powers are not subject to the judicial review process.

Similarly, in the *Datafin* case, the courts undertook review of the actions of a body that exercised de facto power rather than having statutory authority for acting in the way that it did.

The legislature and the courts now seem to be engaged in a joint enterprise of controlling the exercise of the public powers bestowed upon the government. There has been a gradual shift away from a constitution founded in notions of political power towards a constitution of legal/judicial power.

### **Ministerial responsibility**

This is one of the constitutional foundations of central government to Parliament. It is the idea that the individual cabinet minister is responsible for the actions of their department.

Should a member of their department act in an improper manner, the minister would be required to resign, as he is responsible for the actions of all those under him.

However, as a general accountability measure, it is limited in its effectiveness as much decision-making falls outside of its scope.

In addition, a government with a sufficiently large majority is capable of resisting the calls for the resignation of a member.

Factors such as the *Human Rights Act 1998* for example, have caused a shift away from political accountability, of which ministerial responsibility is an element, towards a system that favours legal accountability.

### **Separation of powers**

This is the idea that excessive concentration of public power in any one body is undesirable as it may lead to use of the power for improper purposes and general abuse of the power.

In its purest form, it dictates that no body should exercise more than one function of judicial, legislative and executive.

However, no governmental system conforms entirely to this principle,

In the UK, there are a number of situations where there is an overlap of the different functions discussed above.

To counter this, a system of 'checks and balances' is used to guard against abuse of public power.

This system involves giving power to another body, belonging to another governmental branch, to enable them to scrutinise the actions of the agency, to hold them to account and to ensure that they do not abuse the power that they have been given.



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