Principles of Public Law

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INTRODUCTION TO DISPUTE RESOLUTION

9.1 Why dispute resolution is important

Government based on principles of liberal democracy endeavours to ensure that the people who govern us do so with our consent (see above, 1.1.2). This implies several things: that the constitutional system permits people to choose their rulers in fair and regular elections; that between elections, rulers and officials working for them allow people to participate in collective decision making; and that laws and executive actions are open to challenge once they have been made. It is with the last of these things that we are now concerned.

Chapters 9–18 examine some of the ways in which disputes between people and government, and between different governmental institutions, are resolved. The election of office holders does not give them or their employees *carte blanche*. One of the responsibilities of government is, therefore, to provide adequate opportunities for citizens to challenge the good sense and lawfulness of its decisions, and seek reparation for harms wrongfully inflicted on them; only if these exist will government be 'limited'.

The existence of institutions and procedures for redressing grievances is also important for government itself. The fact that an apparently independent third party (a judge, tribunal, ombudsman) can be called upon to correct mistakes and remedy abuses of power helps to *legitimate* government action by reassuring citizens. Some commentators identify a ploy here: by providing 'a symbolic appearance of legality', dispute resolution procedures can deflect attention from the harsh or unfair substance of government policy on, say, immigration control or entitlement to welfare benefits (see Prosser, T, 'Poverty, ideology and legality: supplementary benefit appeal tribunals and their predecessors' (1977) 4 BJLS 39). Dispute resolution procedures may also assist government by providing information about what is, and is not, acceptable conduct. For instance, the grounds of judicial review (see below, 11.2) provide not only a basis for challenging public authorities in the High Court, but also principled guidance on how power ought to be exercised in a democracy. There is some evidence to suggest that UK government departments attempt to learn lessons from judgments for their future work and, to this extent, the case law improves the quality of public administration (see Richardson, G and Sunkin, M, 'Judicial review: questions of impact' [1996] PL 79). The various ombudsmen also publish reports of their investigations into cases of alleged maladministration and may make recommendations for improving decision making within public authorities (see below, Chapter 10). Finally, government bodies themselves may need to use dispute resolution mechanisms. In the

modern constitution, litigation has become an important way for determining conflicts about the allocation of governmental power between different institutions. During the 1980s, for instance, local authorities used numerous judicial review challenges to question new limits placed on their powers to tax and spend imposed by central government. Litigation is also useful for central government: on several occasions, the UK has brought actions in the European Court of Justice to challenge the legality of Community legislation (see below, 18.3.1).

For people and for public authorities, the provision of appropriate dispute resolution mechanisms is therefore an important function of the constitution.

9.2 Types of dispute

Public law disputes take many forms, ranging from relatively trivial grievances that civil servants have been rude or incompetent, to conflicts about the existence or application of important constitutional principles and the validity of legislation. To make sense of these disputes, it is helpful to begin by highlighting some of the conceptual distinctions which exist, although, in practice, these differences may be blurred.

9.2.1 Disputes about the existence of legal power

These are complaints that a decision maker lacks legal authority. There is, in other words, a dispute about legal power or duty. The Latin word *vires* is often used (pronounced 'vie-rees', meaning power). Commonly, the public body in question has done something which a citizen claims it had no capacity to do (for example, the Foreign Secretary pays a grant to the government of Malaysia to construct a uneconomic hydro-electric station); or it has failed to do something which the law required it to do (for instance, a local authority declines to pay for a home help for a disabled person). To work out whether or not a legal power or duty exists, the court has to examine all relevant legislation and sometimes (in the case of government ministers) the extent of the prerogative.

Within the UK, government institutions and officials normally stand in a different position to that of ordinary citizens. Whereas we may do anything that is not expressly prohibited by the law, government may do only that which it is authorised to do by law (see above, 1.7.1). Central and local government, and other public bodies must, in other words, be able to point to a positive law before the take coercive action against us. The institutions of the European Community – the Commission, Council, Parliament and the Court of Justice – likewise have only those legal powers which are conferred on them by the EC Treaty and legislation made under the treaty. If they act beyond those powers, they act unlawfully. On several occasions, the UK has gone to the Court of Justice to argue that the Council has acted beyond its

powers (see below, 18.3.1), for instance, by adopting the controversial Working Time Directive in 1996, or that the Commission has overstepped its legal authority (for example, by making an EC Regulation banning the export of beef from Britain in 1996).

The creation of devolved legislative and executive bodies in Scotland, Northern Ireland and Wales has brought with it the inevitability of disputes about their powers. As we have seen, the 1998 Acts provide for 'devolution issues' to be determined by the Judicial Committee of the Privy Council (see above, 2.8.4).

At an abstract level, disputes about the existence and extent of legal power involve 'the rule of law'. We have already examined how AV Dicey and his critics have conceived this principle (see above, 5.3) and, in the chapters which follow, we see how this precept is put into practice.

9.2.2 Disputes about the manner in which decisions are made

Disputes also arise about the *way* in which a public body has set about reaching its determination. There is, in other words, disagreement over the decision making procedures which have been used. The issue here may, for instance, be whether a local authority ought to have heard representations from parents before closing a school, or whether it was unfair for a public authority to revoke a person's licence to carry on a trade without first giving her a chance to answer the allegations made against her. Some such complaints involve an allegation that the public authority has breached the law by not following correct procedures, so making the decision flawed, and may be the subject of an application for judicial review to set it aside (see below, Chapters 13 and 14). Other grievances are merely that a public body was unhelpful or inefficient in making its decisions. These disputes do not necessarily involve an allegation that government officials have breached the law. Officials who are rude, incompetent, or misleading may not have acted unlawfully, even though they cause offence and inconvenience. Such complaints may, however, amount to 'maladministration' and be investigated by an ombudsman (see below, Chapter 10); or be the subject of an internal inquiry (see below, 9.3.1).

9.2.3 Disputes about the motives of public officials

Citizens and business enterprises may sometimes question the motive for a public official's decision. At its most extreme, this involves an allegation of corruption. In many constitutional systems, corruption is endemic and bribes are needed to obtain what is due from public authorities. When the Committee on Standards in Public Life (see above, 1.7 and 6.7), then chaired by Lord Nolan, published its First Report (Cm 2850-I) in May 1995, it concluded that there was no evidence of systematic corruption in British

public life. It does, however, occasionally occur – especially in some local authorities and police forces. The corruption of public office holders is primarily regulated by the criminal law. In March 1998, the Law Commission called for reform of the common law offence of bribery and the Prevention of Corruption Acts of 1889–1916, recommending the ending of the distinction between public and private sector corruption, not least because it is unclear how the present law applies to privatised utilities and the many tasks that are now contracted out by government (*Legislating the Criminal Code: Corruption*, Law Com No 248). As part of the international effort to suppress corruption, in 1998, the UK ratified the international Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and Parliament passed the International Bribery and Corruption Act 1998, making it an offence for people in the UK to bribe officials in other countries to gain contracts.

In England and Wales, the tort of misfeasance in public office makes it possible to sue a public authority or official who causes harm by taking action or omitting to do something which the person knows is unlawful, or where the motivation is malice towards the injured claimant (see *Three Rivers DC v Bank of England (No 2)* (1996)). There have been very few successful claims in this tort, in part, perhaps, because of the difficulties claimants have in obtaining evidence sufficient to satisfy the court that an improper motive was present.

'Bias' – in the sense of a public official having a financial or other personal stake in the decision he makes – is a ground for seeking judicial review (see below, 13.7).

9.2.4 Disputes about wrong conclusions

In many conflicts between citizens and government, it is common ground that the public official had the legal authority to make a determination (see above, 9.1.1) and did so using the correct procedures (see above, 9.1.2). What is at stake is whether the official exercised his or her judgment in the right or wisest way. Sometimes the decision making task for the public authority is to apply set criteria to a person's circumstances, but, even in these circumstances, some public authorities are notoriously incapable of reaching correct conclusions. In 1997, for example, the National Audit Office (see above, 8.4) refused to accept the Child Support Agency's accounts after finding errors in 85% of its determinations; one in six of these errors exceeded £1,000. In other contexts, the decision making task is more subtle and complex; and disputes are, for example, over whether an immigration officer is correct in thinking that a person who claims asylum from persecution is, in fact, merely seeking entry to the UK for economic reasons, or whether a disabled person is sufficiently incapacitated to be entitled to a welfare benefit. Here disputes are about facts, or inferences drawn from facts, and qualitative assessments of people's

conduct, circumstances and motives are required. These cannot be settled just by burrowing away in a law library or testing rival legal submissions.

The courts are very reluctant to interfere with a public authority's conclusion merely on the basis that inappropriate inferences were drawn from facts or that an official weighed up competing factors in a particular way. In judicial review, the High Court will set aside a public body's conclusion only if it is 'so outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it' (Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (1985), discussed below, Chapter 15). The European Court of Human Rights, in deciding whether there has been a violation of the ECHR, is also aware that there may sometimes be a range of permissible conclusions open to a signatory State. They are permitted by the Strasbourg Court to have a 'margin of appreciation' in deciding, for example, whether, in relation to Art 10, a restriction on freedom of expression is 'necessary in a democratic society' (see below, 19.5).

Acts of Parliament have established tribunals to hear appeals from government decisions in areas such as immigration control, welfare benefits and taxation. Typically, the function of tribunals is to look at the original decision and satisfy itself that the official reached the correct conclusions, in effect giving a person a second chance to put his or her case – before, say, being deported or excluded from receiving a social security payment (see below, 9.3.2).

9.3 Types of dispute resolution

Because this is a book written by lawyers for law students, we focus on the role of law, lawyers and litigation in dispute resolution. Over the past few years, something curious has been happening (see below, 9.4). On the one hand, there is a trend towards 'alternative dispute resolution'. This means that, rather than leaving disputes to be resolved by litigation in court, other mechanisms are established. These include the informal settlements of grievances through internal complaints procedures, the use of ombudsmen to investigate complaints of maladministration, and adjudication by tribunals. On the other hand, courts are being called upon to adjudicate on new and important issues; an ever wider range of decisions are becoming 'justiciable' (that is, subject to litigation), including whether Acts of Parliament are consistent with European Community law and the European Convention on Human Rights (see below, 9.4).

9.3.1 Internal complaints procedures

The tendency today is to believe that going to court should be a last resort; litigation is seen as expensive, long winded and, more often than not,

unnecessary. Successive governments have, therefore, encouraged the proliferation of alternative methods of dealing with disputes. Under the Citizen's Charter initiative (see above, 4.3.6 and 4.4.3), public authorities have been exhorted to establish their own internal procedures for dealing with complaints. These range from recording complaints via telephone 'hotlines' to more elaborate reviews by the public body itself of what allegedly went wrong. The shift to informal dispute resolution has, in large part, been motivated by the desire to reduce public spending (tribunal hearings and litigation in court are expensive). However, in so far as the aim of internal complaints procedures is to provide cheap and quick resolution of disputes, they are good things. There is, however, also a darker side. The Council on Tribunals (see below, 9.3.3) several years ago identified 'a trend to compromise and downgrade [external] appeal procedures in a way which may endanger the proper application of the principles of openness, fairness and impartiality which should underpin tribunal systems in general' (*Annual Report 1989–90*, HC 64, p 1). Informal grievance handling takes place behind closed doors; and if public authorities are not called to account in public, the wider public interest that justice is not only done, but seen to be done is compromised (see Mulcahy, L and Allsop, J, 'A Woolf in sheep's clothing? Shifts towards informal resolution of complaints in the NHS', in Leyland, P and Woods, T (eds), *Administrative Law Facing the Future*, 1997, London: Blackstone).

9.3.2 Ombudsmen

One form of alternative dispute resolution which avoids the potential pitfalls of internal systems are the so called ombudsmen. In Chapter 10, we see how the Parliamentary Commissioner of Administration, the Local Commission for Administration and other ombudsmen investigate cases in which complainants allege they have suffered injustice because of the 'maladministration' of a public body.

9.3.3 Tribunals

Under many Acts of Parliament, tribunals have been set up to hear appeals against the determinations of public bodies. Tribunals dwarf the ombudsmen and judicial review in terms of the number of complaints they deal with each year. They operate in different contexts, often resolving disputes of great importance to individuals – such as applications by to remain in the UK by asylum seekers, and the entitlement to welfare benefits of people living on the edge of subsistence.

Typically, tribunals consist of three people, one of whom is legally qualified. The term tribunal may also be used to encompass single adjudicators, such as the Social Security and Child Support Commissioners and the Special Adjudicators in immigration and asylum cases. The grounds

on which a person may appeal to a tribunal are set out in legislation. Generally, the task of a tribunal is to consider whether public officials have understood the law and any relevant administrative guidance, whether their assessment of the facts of a case are correct, and whether they have applied it correctly to the facts of the particular case. Unlike the High Court on an application for judicial review (see below, 9.3.4), the decisions of tribunals do not act as binding precedents in later cases, though the determinations of some tribunals are published in series of reports.

In the 1950s, the government of the day asked a committee chaired by Lord Franks to investigate and make recommendations on the future of tribunal adjudication (*Report of the Committee on Administrative Tribunals and Enquiries*, Cmnd 218, 1957, London: HMSO). It concluded that tribunals were better for resolving some disputes than courts. People with specialist knowledge could be appointed to sit on them; for instance, doctors on tribunals hearing complaints against refusal of welfare benefit for disablement. Tribunal hearings could also be conducted with less formality than litigation in court, and so be speedier and less costly. The Franks Committee was, however, quite clear that tribunals should be viewed as independent adjudicative bodies, not part of the internal complaints mechanisms of government departments and other public bodies. The Franks Committee urged that three principles – 'openness, fairness and impartiality' – should inform the design and practices of appellate tribunals. This meant that, so far as appropriate, tribunals should use procedures similar to those of courts: the chair of a tribunal should be a barrister or solicitor; hearings should be in public; appellants should have the right to be legally represented; tribunals should give formal reasons for their adjudications; and there should be an appeal from the findings of tribunals to the High Court.

The many tribunals which exist today are regulated by the Tribunals and Inquiries Act 1992 (formerly the 1952 and 1971 Acts), which imposes on them a legal duty to give reasons (s 10) and allows appeals on points of law to the High Court or Court of Appeal from their decisions (s 11). It may also be possible to seek judicial review of a tribunal decision. The Tribunals and Inquiries Act also creates the Council on Tribunals, an advisory body which carries out research and gives guidance on good practice both to government and tribunals (see Bradley, AW, 'The Council on Tribunals: time for a broader role?' [1990] PL 6).

Major concerns with the current operation of the tribunal system persist. Legal aid is not available to pay for legal representation, and so almost all complainants have to act as their own advocates. It is also often difficult for people to obtain affordable and competent legal advice about their rights before going to a tribunal; highly complex legislation governs decision making in fields such as welfare benefits and immigration control. Tribunal hearings can, therefore, be very uneven contests. Anxieties have also arisen

about the impartiality of tribunals (see Council on Tribunals, *Tribunals: their Organisation and Independence*, Cm 3744, 1997, London: HMSO).

9.3.4 Courts

Although ombudsmen and tribunals deal with far more grievances against public authorities than do the courts, what happens in the courtroom is of great constitutional importance. Court proceedings against governmental bodies and office holders take many forms: tort actions; applications for judicial review on the grounds of illegality, procedural impropriety and irrationality; claims in European Community law; and petitions to the European Court of Human Rights in Strasbourg. Litigation procedures, remedies and legal arguments differ somewhat in the three legal systems of the UK (see above, 2.10); our focus will be on those of England and Wales, rather than Scotland and Northern Ireland.

In tort actions, citizens and businesses may sue government institutions, their employees, police officers and even ministers for negligence, trespass, assault, false imprisonment and other tortious wrongs committed in the course of official work. The primary role of tort law is to provide compensation. Public authorities and office holders are generally liable in tort on the same basis as businesses and individual citizens, but the courts have made many adaptations to how normal principles apply in this context. A public authority will not, for instance, owe a duty of care in negligence for 'policy' decisions which cause harm unless that policy decision is so unreasonable that no reasonable authority could have made it (see *X (Minors) v Bedfordshire CC* (1995) and Cane, P, 'Suing public authorities in tort' (1996) 113 LQR 13). On the grounds of public policy, the courts have also created immunity from tort actions for police investigations (*Hill v Chief Constable of West Yorkshire* (1989)) – though the European Court of Human Rights has recently held that such an immunity breaches Art 6 of the ECHR (see below, 20.3).

The common law does, however, recognise that the special powers of public authorities may justify the imposition of liability where none would normally attach to private bodies. Thus, the torts of misfeasance in public office (see above, 9.2.3) and malicious prosecution only lie against public authorities. Exemplary damages (over and above that which is needed to compensate a claimant) are also more readily available against public authorities for the 'oppressive, arbitrary or unconstitutional action by the servants of the government' (*Rookes v Barnard* (1964)), though the Court of Appeal has recently laid down the guideline that the maximum penalty for bad conduct by police officers of superintendent rank and above should be £50,000 (*Thompson v Commissioner of Police for the Metropolis* (1997)) and the Law Commission has recommended reforms (*Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247)).

Judicial review is another type of proceeding in which public authorities are challenged (see below, Chapter 11). The purpose here is not to obtain compensation, but to set aside a legally flawed decision. Until the 1950s, this area of law lacked conceptual coherence and was regarded as a disparate collection of legal rules and archaic procedures. Since then, the courts and academic lawyers have developed a principled approach to the legal control of governmental powers and the court procedures have been modernised. In Chapters 12–15, we examine the main grounds for seeking judicial review, which for convenience are categorised under the headings of illegality, procedural impropriety and irrationality. Chapter 17 considers the procedure for making an application for judicial review in the High Court and the remedies which are available.

Since the accession to the European Community in 1973 (see above, Chapter 7, below, Chapter 18), citizens and businesses have been able bring legal proceedings to enforce Community law rights in the UK. There is no separate court in the UK dealing specially with Community law; on the contrary, every national court and tribunal is obliged to apply relevant Community law and, where there is a conflict with national law, to give priority to Community law (see above, 7.9.1). Sometimes, litigation in the UK is suspended while the court or tribunal seeks guidance from the Court of Justice (see above, 7.5.5) on a question of Community law (see below, 18.2.1). The Luxembourg Court also has jurisdiction to determine legal actions itself, but such direct adjudication is mostly confined to proceedings brought by Member States and other Community institutions; individuals and businesses have relatively little scope for commencing such litigation (see below, 18.3).

Since 1966, citizens in the UK have been able to bring legal proceedings against the UK in the 'other' European court – the European Court of Human Rights based in Strasbourg in eastern France (see below, 19.7). The rulings of this international tribunal on violations of the European Convention on Human Rights are not binding in the national legal systems of the UK, though the government usually complies with its findings. The Human Rights Act 1998 brings about significant changes to the status of the Convention in British law. From now on, all British courts and tribunals are required to interpret Acts of Parliament and statutory instruments 'in a way which is compatible with Convention rights' (see below, 19.10) and violation of the Convention has become a new ground for seeking judicial review of public authorities. In Chapters 19–27, we look at the rights protected by the Convention in more detail.

9.4 Conclusions

Like much else in the British constitutional system at the moment, ideas and practices about redressing grievances against public authorities are in a state of flux.

Although litigation in courts is regarded as slow and expensive, and ill suited to resolving many of the day to day disputes between citizens and public authorities, more people than ever before are using legal proceedings. The annual number of applications for judicial review has risen from 544 in 1981 to over 4,000 in 1998; there are also record numbers of tort actions against public bodies, especially local authorities and the police. Courts and tribunals in the UK, the European Court of Justice and the European Court of Human Rights have all faced persistent backlogs in the case loads, and procedural reforms have had to be introduced to help cope with the demand. Why has there been such an increase in litigation against public authorities? One possible explanation is that, even though legal advice is expensive and fewer people than ever qualify for legal aid, citizens now have a growing knowledge of their legal rights and are more likely to be aware of their capacity to challenge government action. On this view, the rise in litigation is no bad thing: it demonstrates a robust citizenry willing and able to stand up for its rights. A different interpretation is that public authorities are more often making unlawful decisions. Another possible analysis is that the growth in litigation has occurred because there are simply more opportunities for it. Since the early 1980s, the courts have developed new grounds on which judicial review may be sought; these include more rigorous requirements of procedural fairness in administrative decision making (see below, Chapter 13) and the principle of legitimate expectations (see below, Chapter 14). European Community law and the ECHR have both also provided new bases for challenges.

A second feature of recent developments in the UK is the belief that 'alternative dispute resolution' is preferable to courtroom litigation (see above, 9.3.1). In part, this development has occurred as a way of helping courts cope with increasing case loads. As we have already noted, while alternatives to courts may be speedier and less costly, these mechanisms for redressing grievances have disadvantages. What is sometimes now lost sight of is the great equalising virtue of courts, backed by the provision of legal aid: both the aggrieved citizen and the powerful public authority are represented by counsel; both have to make out their case according to settled criteria, and the trial takes place in public.

A third area of rapid innovation in the UK is in the reach of the courts' jurisdictions. New issues are becoming 'justiciable', meaning that they are amenable to adjudication. Since 1985, the ways in which ministers exercise prerogative powers are, in principle, subject to judicial review and are no longer a matter solely for Parliament to oversee (*Council of Civil Service Unions v Minister for the Civil Service* (1985), discussed below, Chapter 15). Most significantly, there have been important changes in functions of the courts in relation to legislation passed by Parliament: courts may now 'disapply' statutes inconsistent with Community law (see above, 7.8.1) and may, under the Human Rights Act 1998, make a 'declaration of incompatibility' in relation

to any statutory provision which violates the European Convention on Human Rights. As we shall see in the ensuing chapters, while some commentators welcome these as progressive developments in the protection of citizens from abuse of power by government, others worry that litigation is beginning to replace debate among elected representatives as the method by which we make the important decisions about how society is organised.

INTRODUCTION TO DISPUTE RESOLUTION

Why dispute resolution is important

In a liberal democracy, it is important that legislation and executive action are open to challenge. The election of office holders does not give them, or their employees, carte blanche. One of the responsibilities of government is therefore to provide people with adequate opportunities to question the good sense and lawfulness of public decisions.

Types of dispute

- Disputes about the existence of legal power – people may argue on an application for judicial review that a public authority lacks '*vires*' (power) to take action. The UK government has, from time to time, challenged measures adopted by the European Community on the ground that they are unlawful.
- Disputes about the manner in which public bodies reach decisions. Allegations of procedural impropriety may be a ground for judicial review and complaints to ombudsmen.
- Disputes about the motives of public officials. Corruption in public authorities is not rife in the UK, but it does occur and may be the subject of criminal prosecutions. Allegations of malice may also be the basis for an action in the tort of misfeasance of public office.
- Disputes about wrong conclusions. Even if a public authority does have legal power and makes a decision free from procedural irregularity and improper motives, there may still be dissatisfaction with it.

Types of dispute resolution

- Internal complaints procedures, encouraged by the Citizen's Charter programme.
- Ombudsmen investigate cases of injustice resulting from 'maladministration'.
- Tribunals have been established by many Acts of Parliament.

- Courts: legal proceedings against public authorities take many forms, including tort actions and applications for judicial review. In some circumstances, people may be able to begin proceedings in the European Court of Justice or the European Court of Human Rights.