

The Executive and The Courts

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1. The relationship between the executive and the courts in English law is not regulated by any formal constitutional framework, but has evolved as a result of history and convention. The enactment of the Human Rights Act in 1998 therefore resulted in a significant constitutional shift- by enacting the European Convention of Human Rights into English law, the courts have acquired a wider supervisory jurisdiction over executive decision making which it is vital to consider.
2. In this paper I propose to focus on two principal issues:
 - the extent to which executive decisions is regulated by law; and
 - the degree to which the Court scrutinises executive decision making when reviewing the merits of particular decisions.

The regulation of executive decision making

3. It is important when considering the extent to which executive decisions are subject to the Courts to differentiate the source of power a public body is potentially exercising.
4. The paradigm case of public law decision making in England is that created by statute. Obviously, both central and local government decision makers have statutory powers and duties and these decisions will invariably be subject to review. In particular, local authorities are statutory bodies and therefore cannot make any decisions which are outside the scope of those statutory powers. I shall briefly look at the *ultra vires* principle and at some important cases where the Court has held that the local authority had no power to act.
5. Central government exercises statutory powers, powers which derive from the Crown's prerogative and other common law powers. The need for central government to exercise non statutory powers means that there are some areas of decision making that are not subject to any form of legal control. The extent to which the Courts can review the prerogative has been a controversial topic and I shall examine the difficulties which have arisen in this area including, for example, the problems which arise to foreign policy and defence such as the challenge to the legality of the Iraq war. It also appears that the Crown has certain additional common law powers; and recent cases indicate some uncertainty about whether these powers are open to challenge on general public law grounds.
6. Furthermore, the Human Rights Act has resulted in a sea change; and requires that public bodies justify interferences with certain human rights on the ground that they are in accordance with law. I shall examine the implications of these principles by looking at recent cases on telephone tapping, stop and search powers under terrorist powers and the House of Lords case decided on

30 July 2009 on the liability of a husband to be prosecuted for assisting suicides of his wife who is an MS sufferer.

Challenging the merits of executive decisions on judicial review grounds

7. In order to work out the proper approach to a merits challenge in an administrative law case, it is necessary to identify a governing principle; and in England we take the view that the principle of separation of powers justifies the courts taking a stand off approach to executive decision making.
8. However, I shall argue that the principle of separation of powers is not well developed in English law; and that, in any event, it has little application to executive decision making as opposed to legislative policy choices.
9. The fundamental administrative law principle in English law is to ask the very high threshold question of the executive has lost leave of his or her senses. The analysis has become more sophisticated in recent years by developing a context based sliding scale which I will also examine.
10. Nevertheless, there are obvious and real problems about applying such a strict rationality principle and I shall trace the criticisms of it and the failure to date to replace the principle in general administrative law with a more structured and sophisticated proportionality test.
11. The Human Rights Act has again had implications for the merits review of executive decision making as well- because it mandates a more intrusive hard look at executive decisions. I shall examine the ways the courts have developed a doctrine of judicial deference under the Human Rights Act when applying the Act; and the value of differentiating in this context between the institutional competence of the court to decide certain issues and its constitutional competence to do so.