

THE UNIVERSITY OF HULL

*Towards similar standards of judicial protection against administrative
action in England and Germany?*

*A Comparison of Judicial Review of administrative action and the liability
of public authorities under the influence of European Laws*

being a Thesis submitted for the Degree of Doctor of Philosophy (PhD) in the
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by

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To my parents, Ingeborg and Manfred Künnecke

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CHAPTER ONE

A. Introduction

In recent decades, the role of judicial review of administrative action has developed continually. The rise of the administrative state has led to the courts in many jurisdictions “becoming themselves the “third giant” to control the mastodon legislator and the leviathan administrator.”¹ However, the approaches taken by the common law system and the continental law systems vary greatly. Therefore the comparison of the English and German judicial review system (and the availability of liability in negligence) is a fruitful undertaking. Both, the English and German legal systems recognise that the powers given to decision-makers may lead to decisions which interfere with the lives of individual citizens in a way which may be unlawful. Both legal systems have therefore developed mechanisms of judicial control over the actions of public bodies. The courts provide remedies against such actions and they may hold public bodies liable in damages. However, the tools employed by the judges in reviewing administrative decisions are different. Comparing the different approaches taken by these two great legal systems is an interesting undertaking which has become particularly important in the European context.

In its wider sense this thesis is concerned with the question whether a common law for Europe in the field of judicial review of administrative action and tortious liability of public bodies is emerging. A common law for Europe in this area of the law is desirable both in respect of ensuring the uniform application of Community law as well as in respect of the application of purely domestic law: “If a market is to flourish, disputes arising out of business conducted in the market must be resolved consistently with one another, and that requires more than a uniform substantive law. Distortion is bound to occur if the mode of litigation, with all that that implies both by way of procedural techniques and by way of their implications for costs, delays, appeals, enforcement of judgments and so on, varies substantially from one place to another. The idea of a

¹ Cappelletti, M, *The Judicial Process in Comparative Perspective* (Oxford:University Press, 1989) 19

single “internal market” requires for its complete realisation a single system for the judicial resolution of disputes.”²

A common law for Europe in this field is not to be understood as a single body of harmonising legislation as enacted according to the Community legislative process. It is a body of common principles, which is either already present in the existing legal systems and or which is beginning to take shape through the guiding case law of both the European Court of Justice and the European Court of Human Rights and which may lead to a convergence of diverging national positions. It is, however not always clear whether the existence of common principles is due to the influence of European law.

The first step in the identification of the existence of a common law and for its future development is the identification of *common principles* in the domestic legal systems across the member states of the European Union. This automatically involves the identification of the differences between the legal systems, which is equally valuable for the future development of a common law. Even if a particular procedure or principle might have no counterpart in any other legal system it might simply work best and should therefore serve as a model. Alternatively, the differences as identified through the comparative method may lead to compromises found at European level.

The second step is the identification of the changes as brought about by European influences on the national systems. This would entail a large-scale comparative project as has been carried out in the field of Administrative Law by Professor *Jürgen Schwarze*. He has carried out the most significant research projects in this field, which include his book on *European Administrative Law*³, and *Administrative Law under European influences*⁴. This thesis ties on to this groundbreaking work. However, it differs as this thesis is limited to the comparison of two legal systems and the emphasis

² Jolowicz, T., Introduction in Storme M.(ed.), *Approximation of Judiciary Law in the European Union* (The Storme Report) (Dordrecht; London: Kluwer and Martinus Nijhoff, 1994)

De Smith, *Judicial review of administrative action* (London: Sweet & Maxwell, 1995) 897: “If Community law is to be uniformly applied, if undertakings are to benefit from comparable levels of judicial protection in different member States, and if Member States themselves are to be subject to comparable burdens, then there should be a more uniform approach to remedies and procedural rules governing the enforcement of Community rights.”

³ (London: Sweet & Maxwell, 1992)

⁴ (Baden-Baden: Nomos, 1996)

is laid on the judicial review of the exercise of administrative power and the liability of public bodies. The task of comparing the legal systems of all the member states of the European Union was beyond the scope of this thesis. It is only concerned with the comparison of the approaches taken by two member states, England and Germany since they represent two main legal traditions in Europe.

B. The research questions

I. Common principles

This thesis' approach is therefore twofold as it aims to uncover *common general principles*, which already exist in the law of judicial review and liability of public bodies in England and Germany. It is therefore concerned with the approaches taken by the domestic courts in dealing with domestic law. It is also concerned with an understanding of the differences in the approaches taken and the complexity of the historical and constitutional backgrounds in which both systems operate. The further development of a common law for Europe in the field of judicial review of administrative action and governmental liability which is heavily reliant on the European Court of Justice's case law will benefit most if it draws inspiration from the concepts and principles that are *common* to the legal systems of the member states. It has been suggested that if the European Court of Justice wants to continue in its creative function, it must look systematically for common ground in the legal systems of the Member states on which it can build. There is a need to strengthen within each legal system and between the legal systems of the European Union those elements which preserve homogeneity in the face of growing divergence's, resulting partly from the fact that Community legislation regulates only limited areas of national laws and leaves other similar ones untouched. Thirdly, the Community "shall contribute to the flowering of the cultures of the member states, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." (Art 128 EC).⁵ My thesis is concerned with the detection of such common principles. Are there any similarities or *common general principles*, which we need to identify for the articulation of shared values in national legal systems?

⁵ van Gerven, W., "Taking Article 215 EC Treaty Seriously", in *New Directions in European Public Law* (Oxford, Hart Publishing, 1998) at 46-47

Analysing the historical and constitutional framework in which both systems are embedded is essential for the understanding of the judicial review mechanisms and the search for common principles. This question will involve an evaluation of the historical development of both legal systems, the institutional and the constitutional framework within which judicial review operates. The comparison will also cover the judicial style and legal reasoning, and whether a common ground for possible solutions can be discovered. The thesis illustrates that the emergence of a common law for Europe requires the articulation of common values around which common positions by national Administrative Legal Systems are being taken.

A comparison of the two great legal systems is significant because of the contrast in approaches taken. At the beginning of the last century it was remarked that the continental traditions of public law are “so complete an antithesis to the development of the law and constitution of England [that] the true meaning and effect... of the latter are best shown “through this antithesis.”⁶ This thesis will analyse whether this statement is still valid at the beginning of this century.

II. Convergence through European influences

It has been said that the most powerful factors which have “provoked and lead the emergence of a common law for Europe”⁷ are the jurisprudence of the European Court of Justice and the European Court of Human Rights. The thesis will therefore uncover the extent to which European laws have influenced the development of the two systems and to which extent a slow approximation of judicial protection is under way. These findings will be of importance for the articulation of a common body of principles governing the judicial enforcement of Community law in the member states courts. In the absence of harmonising legislation amongst the fifteen member states a considerable level of differences between the approaches taken still exist.⁸ A major driving force

⁶ Redlich J. and Hirst F. W., *Local Government in England* (Macmillan, London, 1903), 376-377 cited in Thomas, Robert, *Legitimate Expectations and Proportionality in Administrative Law*, (Oxford: Hart Publishing 2000) 16

⁷ van Gerven, W, *Ius Commune casebook series, Cases, Materials and text on National, Supranational and International Tort Law* (Oxford: Hart Publishing, 1999)

⁸ The Public Procurement Directives are an exception. They contain provisions on damages, interim measures and appeal, see Directives 89/665 and 92/13 EC.

behind the approximation of national judicial review systems has been the European Court of Justice. Despite its recognition of the procedural autonomy of domestic jurisdictions it has become increasingly active in providing guidelines to national courts in ensuring the effective judicial protection of EU law rights in domestic courts. The European Court of Justice has developed the requirements of equivalence and effectiveness of domestic remedies, which seek to “force national courts to view the national remedies under the prism of Community law.”⁹ The case law of the European Court of Justice has steadily grown and an increasing number of academics have suggested the harmonisation of aspects of judicial review procedures and remedies.¹⁰ Various judgments have already had a major impact on domestic judicial review systems. The ECJ has developed a series of case law in which it formed the principle of effective judicial protection of European Community rights. It held in the earlier cases that it was the responsibility of the member states to apply their own procedural rules for the protection of Community law rights, nevertheless these rules should be no less favourable than those provided for comparable national rights and they had to be effective.¹¹ In following such cases the ECJ held that national judges should not apply those domestic rules, which make the assertion of Community Law rights impossible or extremely difficult.¹²

In England, for example, the "growing extent and impact of principles of law derived from the ECJ "have recently been described as "the biggest influence in the national legal system".¹³ As a consequence of the European Court of Justice's case law it is said that a common law for Europe is developing.¹⁴ The legal systems of the member states

⁹ Tridimas, T. in Kilpatrick, C., Novitz, T., Skidmore, P. (eds.) *The Future of Remedies in Europe*, (Oxford: University Press, 2000) 35 [49];

¹⁰ see for instance van Gerven, W, “Bridging the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies?” (1995) 32 *CMLR* 679; “Taking Art 215 seriously”, in Beatson, J, Tridimas, T, *supra* n. 5; M. Storme, *Approximation of Judiciary Law in the European Union* (Dordrecht, London) 1994, Himsworth, “Things fall apart: the Harmonisation of Community Judicial Procedural Protection Revisited” (1997) 22 *ELRev* 291 at 304

¹¹ *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1997; *Comet BV v. Produktschap voor Siergewassen* [1976], ECR 2053

¹² Caranta R. “Judicial Protection against member states: A new *Jus Commune* takes shape”, (1995) *C.M.L.R.*, 703 [706]; *Simmenthal v. Commission* [1978] ECR 629

¹³ Birkinshaw, P., “European Integration and United Kingdom Constitutional Law”(1997) *European Public Law* 57 [88]

¹⁴ van Gerven W., “Bridging the gap between community and national law: towards a principle of homogeneity in the field of legal remedies” 32 *C.M.L.R.* 679 [697]

are said to have become more "permeable"¹⁵ with the result of a slowly emerging convergence and the development of a common administrative law. However, it has recently been questioned whether the jurisdiction of the European Court of Justice, which is naturally mainly concerned with the adjudication of single cases rather than the establishment of general rules will be able to guarantee and ensure the uniform application of Community law in the long term.¹⁶

On the other hand Community law has been described as a "medium and a catalyst which is starting to contribute to a convergence and approximation of Administrative Law in Europe and not only in a Community Law context."¹⁷ However, the "convergence thesis" is not undisputed. It is argued that the legal cultures of English Common Law systems remain as distinct as they ever were, and that comparison of legal rules does not take the underlying legal cultures into account.¹⁸ However, a recent survey on national administrative legal systems has shown an increasing effect of European influences.¹⁹ This thesis aims to identify European influences on the standards of review applied in the context of the review of discretionary powers, the review of administrative procedures and the tortious liability of public bodies. The liability of public bodies will be limited to a comparison of tortious liability. Other areas of liability such as compensation paid after expropriation or compensation for special sacrifice (*Sonderopfer, enteignungsgleicher Eingriff*) or compensation schemes will be excluded from this thesis due to the complexity and depth of this area. It will assess to which extent a convergence between the two systems is taking place.

¹⁵ Schwarze, J., "Konvergenz im Verwaltungsrecht der EU-Mitgliedstaaten" (1996) *DVBl* 881 [882]

¹⁶ Schwarze, J., Report on Germany, *Das Verwaltungsrecht unter europäischem Einfluß* 1996, p.208

¹⁷ Schwarze, J., *European Administrative Law*, 1992, 1456, 1436; see also van Gerven, W., "Bridging the gap between Community and National Law: towards a principle of homogeneity in the field of legal remedies", 32 *C.M.L.R.*, 679

¹⁸ *The Convergence Debate*, Editorial, (1996) *Maastricht Journal of European and Comparative Law*, 105 [106]; Legrand P, "European Legal systems are not converging", (1996) *International and Comparative Law Quarterly*, 52, [76]; Ward, I, "The Limits of Comparativism: Lessons from UK-EC Integration", (1995) *Maastricht Journal of European and Comparative Law* 23 [25]

¹⁹ Schwarze, J, *Das Verwaltungsrecht unter europäischem Einfluß*, 1996

III. Limitations to convergence

Finally, the thesis is concerned with the identification of the limitations to a convergence of national judicial review systems and the liability of public authorities in England and Germany respectively. These limitations derive from both the role of the courts in each legal system as well the role of the law in administrative decision-making. This question raises wider issues such as the constitutional background in which both systems operate as well as the historical development of the courts in applying procedures and principles to control administrative action.

C. The comparative method in the field of public law

The comparability of administrative law has been questioned because of its extremely national character. Nevertheless first roots of Comparative Administrative law can be found at the end of the last century including the work of Albert V. Dicey and his basic introduction to English constitutional law, Otto Mayer with his development of German Administrative law and Edouard Lafférière, one of the founders of French Administrative law. However, Comparative Administrative law then was mainly used to develop one's own doctrine of administrative law by investigating into more developed administrative law systems.²⁰

The method of comparative law has been used by legislators for their own law making, by [...] and for the international unification of law.²¹ Legislative Comparative Law was successfully used in drafting the German Civil Code, which unified the private law of Germany as from 1 January 1900. The preparation of the Code involved the careful consideration of the solutions accepted in all the systems then in force in the various parts of Germany. These included the *Gemeines Recht*, the Prussian law and the French Civil Code, which was in force in the Rhineland.²² The need for national unification of the law inspired a medieval French jurist, Coquille (1523-1603) to write a commentary on the French Customary law, the *Coutumes* of the County of Nevers, and an *Institution*

²⁰Schwarze, J, *European Administrative Law*, 1992, p.82

²¹van Gerven, W., *Bridging the unbridgeable: Community and National Tort Laws after Francovich and Brasserie*, (1996) 45 *International and Comparative Law Quarterly* 507

au droit français, by using the comparative method in order to harmonise the various customs of medieval French law - "the very task which comparative law still has to perform today, with the difference that it is no longer the customs of localities but the legal systems of nations which have to be assimilated and harmonised."²³

Comparative law has developed from a purely academic discipline to a practical tool in the further development of a common law for Europe. As a result of the goals set in the Treaty establishing the European Community the Comparative law research method has gained momentum. As Legrand puts it, "there is now (...) a prominent role for the comparatist to play - a role which is actually so meaningful that her work can help determine whether or not there will, one day, arise a common law of Europe with the obvious implications that can be imagined for every European citizen".²⁴ There is more awareness that comparative methods may lead the lawyer somewhere, and that comparative materials may be a source of inspiration for legal decisions - whether by legislative bodies or by the courts."²⁵

Two recent English decisions illustrate the use of comparative legal material for the development of principles of judicial review inspired by European laws. In *R (Pro Life Alliance) v BBC*²⁶ Simon Brown LJ cited the case of *Kommunistische Partei Deutschland/Marxisten*²⁷ which was decided by the German Federal Constitutional Court in 1978 to illustrate the highly sensitive consequences of banning a Party Election Broadcast. Further, in *R v Ministry for Agriculture, Fisheries and Food ex parte Hamble*²⁸ Sedley J. recognised the existence of substantive legitimate expectation and referred to case law of the European Court of Justice and Jürgen Schwarze's research on European Administrative law.²⁹

²²Zweigert, K., Kötz, H., *An Introduction to Comparative Law* (Oxford: Clarendon Press 1987, 51)

²³*ibid* p. 80

²⁴ Legrand, P, "How to compare", (1996) *Legal Studies*, 232 [233]

²⁵ Koopman, T "Comparative Law and the Courts", (1996) 45 *International and Comparative Law Quarterly* 545

²⁶ [2002] 2 All ER 756 at 777; for a further discussion of the case see Chapter Three, on England and the Development of the principle of proportionality under European influence

²⁷ (1978) 2 BvR 5223/75

²⁸ [1995] 2 All ER 714

²⁹ [1995] 2 All ER 714, at 729; for a further discussion of this case see Chapter Three, England, The development of the principle of substantive legitimate expectation under European influence

In the field of administrative law the European Treaties do not provide for legislative competences for harmonisation. The role of comparative law research in the field of administrative law is therefore less obvious than in the case of harmonisation of private law. Traditionally, Comparative Law is concerned with the comparison of private law.³⁰ The necessity of comparing national private law systems stems from the need to harmonise existing systems in order to facilitate the legal implications of the exchange of goods and services in the common market. The majority of recent articles on comparative legal issues are therefore concerned with the harmonisation of European Private law.³¹

Today the role, which Comparative law in the field of remedies against public bodies plays in the European Community, finds a clear expression in the often-quoted Article 288, paragraph 2 of the EEC Treaty:

In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member State, make good any damage caused by its institutions or by its servants in the performance of their duties.

This provision not only recognises that there *are* general principles common to the laws of the member States but also that these principles are a source of Community law. The well known principles of proportionality, equal protection, legal certainty, protection of

³⁰ Zweigert, K/Kötz, H *An Introduction to Comparative Law*, 1987; Markesinis, B., *The German law of tort*; de Cruz, P *Comparative Law in a Changing World*, (London: Cavendish Publishers, 1995)

³¹ Armbrüster, C "Braucht Europa ein umfassende Privatrechtskifikation? Vortragsbericht Juristische Gesellschaft zu Berlin", (1998) *JR* 98; Basedow, J "Un droit commun des contrats pour le Marché commun" (1998) *RIDC* ,7; Coester-Waltjen, D, ZR: "Europäisierung des Privatrechts" (1998) *Jura* 320; Jayne, E "Entwurf eines EU-Übereinkommens über das auf außervertragliche Schuldverhältnisse anzuwendende Recht - Tagung der Europäischen Gruppe für Internationales privatrecht in Den Haag (998) *IPRax* 140; "Angleichung der Rechtsvorschriften der Mitgliedstaaten über die Kraftfahrzeughaftpflichtversicherung" 13.10.1997, EWS 1998, 19; Editorial Comment, "On the way to a European consumer sales law?", (1997) 334 *CMLR* 207; Editorial, "European private Law between utopia and Early Reality" (1997) *MJ*, 1; Lando, O, "European contract law after the year 2000" (1998) *CMLR*, 821; Gamerith, H, "Das nationale Privatrecht in der Europäischen Union - Harmonisierung durch Schaffung von Gemeinschaftsprivatrecht" (1997) *ÖJZ* 165; Legrand, P, "Against a European Civil Code" (1997) *MLR* 44; Micklitz, H. W., "Ein einheitliches Kaufrecht für die Verbraucher in der EG?" *EuZW* 1997, 229; Van den Bergh, R. Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law, (1998) *MJ*, 129

legitimate expectation etc. have been the product of the European Court of Justice's active role in further developing these two considerations in other branches of law. Here the European Court of Justice relied on Article 220 (ex Article 164) that it shall ensure that in the interpretation and application of the Treaty "the law is observed". In *Van Gend en Loos* the Court has held that Article 220 (ex Article 164) must mean that Community rules, and the decisions, directives and regulations of Community Institutions must respect general principles of law, such as are common to the legal traditions of the member States.³²

Further, the jurisdiction of the European Court of Justice illustrates the importance of the comparison of Administrative legal systems. Comparative Administrative law has been described as having a great influence on the ECJ's solution finding process.³³ As a result of this Comparative Administrative law influences the decisions of national courts as well. Comparative Law has therefore gained importance in the field of judicial law making and the Interpretation of Statutes. Today indirect harmonisation of Administrative legal systems through decisions of the European Court of Justice is taking place. This development started with the establishment of the principle of effective judicial protection of European Community rights in the courts of the member states by the European Court of Justice.³⁴ Disputes between individuals and national authorities raising issues of Community law fall within the jurisdiction of the member states and therefore national procedural rules apply.³⁵ However, more and more references of cases concerning national procedural rules under Article 234 to the ECJ have been made from national courts because national law hindered the effective enforcement of Community rights.³⁶

Apart from disagreement amongst writers using the same language about the existence and the extent of a convergence of the administrative legal systems in Europe, there

³² *Van Gend en Loos*, C-26/62 [1963] E.C.R. 12

³³ Koopman, T., "Comparative Law and the Courts" (1996) 45 *International and Comparative Law* 545-548; Schwarze, J., *European Administrative Law*, 1992, 92; van Gerven, W. "Bridging the Unbridgeable: Community and National Tort Laws after Francovich and Brasserie" (1996) 45 *International and Comparative Law Quarterly* 507 [541]

³⁴ R. Caranta, R., "Judicial Protection against member states: A new *Jus Commune* takes shape" (1995) *C.M.L.R.* 703 [706]

³⁵ DeSmith, *Judicial Review of Administrative Action*, 1995, 865

remains a lack of "communication" between those writing in different languages. For example, "the continental writers find themselves ignored by those writing in the imperial language."³⁷ With regard to the *Francovich* decision³⁸, it has been said that "each national group of scholars has examined the implications of the judgment for their own national legal order while ignoring its reception elsewhere."³⁹ In order to ensure an effective implementation of the Community concept it is necessary to investigate into the other Member States' legal systems.

The significance of a comparison of the administrative legal systems of England and Germany is based on the need for reconciling the "common law" with the "civil law". This "gulf" between Common Law and Civil Law as described by Cappelletti has occupied many comparative lawyers.⁴⁰ The convergence of the Civil Law and Common has been a long-term topic of discussion among comparative lawyers and has created its own "miniature Babel of terminology". Terms such as unification, harmonisation [...], *Angleichung* and approximation can be found in the increasing number of publications in this field.⁴¹

One difficulty of comparative legal analysis is that of legal concepts and their translation. The danger of translating concepts lies in the fact that the culture of the chosen language associates other or no underlying meanings to a word. Pierre Legrand in his article "The Impossibility of "Legal Transplants" describes it like this: "[...] as the words cross boundaries there intervenes a different rationality and morality to underwrite and effectuate the borrowed words: the host culture continues to articulate its moral inquiry according to traditional standards of justification. Thus, the imported form of words is inevitably ascribed a different, local meaning which makes it ipso facto a different rule. As Benjamin wrote, "the word *Brot* means something different to a

³⁶ *ibid* at 867

³⁷ "The Convergence Debate", Editorial, (1996) 3 *Maastricht Journal of European and Comparative Law* 105 [106]

³⁸ *Francovich and Bonifaci v. Italy* [1991] C-6 9/90 ECR I-5357

³⁹ "The Convergence Debate", *supra* note 37 at 106

⁴⁰ Cappelletti, M., *New Perspectives for a common law of Europe*, 1978

⁴¹ Merryman, J.H., *Convergence of Civil Law and Common Law* in Cappelletti, M., *New Perspectives for a common law of Europe*, 1978, p. 195 [196-197]; Storme, M., *Approximation of Judiciary Law in the European Union*, 1994

German than the word *pain* to a Frenchman⁴² or *bread* to an Englishman. Another example to illustrate the dangers of translating concepts can be found in the recent judgement of the European Court of Justice on the recovery of state aid, *Land Rheinland/Pfalz and Alcan Deutschland GmbH*⁴³ where the Court refers to Art 48 of the Law on Administrative Procedure in one of the German Länder. The German *Verwaltungsakt* was translated as an *administrative measure*. Does this translation take the conceptual background of the *Verwaltungsakt* into account? To underline the distinction between the *Realakt*, which covers most activities of the authorities, which do not fall into the category *Verwaltungsakt*, a more precise translation like Administrative Act as opposed to Administrative measure or even an explanatory footnote should have been chosen. The aforementioned linguistic features illustrate the necessity to apply the principle of functionality as the basic methodological principle of any work on legal comparison." In this type of approach, care must be taken to ensure that the substantive problem is formulated in terms which are wherever possible free from the specific doctrinal conceptions of the legal order in which it occurs. Only thus is it possible to recognise a rule to be found in a foreign legal order, which as a matter of doctrine may be differently formulated or situated, as a functionally equal solution."⁴⁴

It has been argued, "Judicial review procedures are perhaps the most nationally idiosyncratic aspects of administrative law. The explanations for the structure of any one country owe as much to history and chance as they do to any deep-seated rationale."⁴⁵ In agreement with that, it is crucial that in the field of Administrative law the comparison is not restricted to rules and principles but that both the historical perspective and the constitutional context in which a legal systems operates is embraced in that comparison. The origins of the Administrative law traditions in both jurisdictions and the role of the courts are crucial in understanding its place in modern society. Allison has illustrated the importance of such a historical perspective even though his conclusions appear to deny the potential for change in modern English

⁴²Legrand, P., "The Impossibility of "Legal Transplants", (1997) 4 *Maastricht Journal of European and Comparative Law* 111 [117]

⁴³ C-24/95 [1997]

⁴⁴Schwarze, J, *European Administrative Law*, 1992, 212

⁴⁵ Bell J, in Beatson J, Tridimas T, *New Directions in European Public Law* 1998, 166

society.⁴⁶ Administrative law has been referred to as constitutional law in action⁴⁷ or as concretised Constitutional Law.⁴⁸ Therefore the constitutional basis for judicial review and the main constitutional concepts are essential components of a comparative study in the field of judicial review.

This thesis's justification is the need to arrive at an understanding and to free the systems from "national provincialism" which could hinder the equal protection of Community law rights within the member states. However, national law continues to exist alongside Community legislation. For once "the diversity of the legal systems of Europe may be a valuable source of inspiration for the creation of European law in the years to come"⁴⁹ and because the development of a harmonised European Administrative law has to be a dynamic process in order to best respect national peculiarities in the legal cultures of the Member States. The clear articulation of further common values around which common positions by national Administrative laws are being taken is essential.

D. Methodology

It has been noted that Administrative law traditions are more "nationally specific" than private law traditions.⁵⁰ The validity of this statement can be illustrated by explaining some of the difficulties encountered during the development of the methodology used in this thesis. The German law of Judicial Review and the tortious liability of public bodies are codified in the Administrative Court Procedure Act 1960 and the Civil Code and in a Constitutional provision respectively. Even though many of the codified principles are directly based on previous case law by the Administrative courts, for example the principle of substantive legitimate expectation or the most recent changes concerning the permission of in-trial curing of procedural defects (Article 114 sentence 2 Law on

⁴⁶ Allison, J.W.F., *A continental distinction in the common law, A historical and comparative perspective in the English Public Law*, 2000, Oxford: University Press

⁴⁷ mentioned by Birkinshaw P., "European Integration and United Kingdom Constitutional Law", in Andenaes, M., *English Public Law and the Common Law of Europe* (London: Key Haven Publications Ltd 1998)

⁴⁸ Schwarze, J., *European Administrative Law*, 1992

⁴⁹ Latrup-Pedersen, T., (1995) *International Journal of the Legal Profession* 93 on the Leaflet of ELPIS = European Legal Practice Integrated Studies

Administrative Court Procedure 1960) case law does not play quite the same role as it does in the English Administrative law tradition. Due to an increased activity of the legislature to regulate judicial review it has become a highly systematised subject. Further, it is a subject concerned with complex theoretical concepts such as the unique distinction between discretionary concepts and undefined legal concepts which will be explained in detail in chapter three. As we will see the expansion of judicial review of administrative actions in England has been due to the active role taken on by the courts in increasingly developing the available grounds of review. However, this development has not resulted in the desire to codify and systematise the principles. Neither has the incremental development of judicial supervision been accompanied by a highly theoretical approach. The reasons for this are deeply rooted in the different legal traditions and their legal reasoning.

Therefore this thesis has aimed to reach a compromise between the different approaches. Each chapter will commence with a *National Report* on the subject matter, which sets out the development and basic principles of the area of law. These National Reports will be followed by an evaluation and a set of *Comparative Cases*, which aim to reflect the reasoning of the courts in the most important areas. This facilitated the comparison, avoided distortions that might occur by simply compressing a legal system in statutes. I have tried so far as possible to find parallels in the factual situations in decisions by the Highest courts in both jurisdictions. However, this was not always possible. It was important to preserve the authenticity of the national legal systems to present cases which most clearly illustrate how a particular principle is applied. (see for instance the decision by the German Federal Constitutional Court on the review of the margin of appreciation of the examiners in the German Law State exam case where no English counterpart could be found⁵¹). The research into suitable German case material was more difficult. German textbooks, monographs or articles only refer to case material very briefly. Facts do not play the same role as in English cases. Maurer, in particular and the casebook by Schuppert were of great assistance. The decisions by the Federal Administrative Court (*Bundesverwaltungsgerichtsentscheidungen*) were not available

⁵⁰ Bell, J., in Beatson, J., Tridimas, T., *New Directions in European Public Law* 1998, 167

⁵¹ Chapter Three; Law exams in England are not administered by the Ministry of Justice

over the Internet, therefore research was carried out in Germany, at the University of Göttingen.

The section of comparative cases is followed by an analysis of *European influences* in the particular area of law. These influences are limited to the jurisprudence of the European Court of Justice and the European Court on Human Rights as the two main sources of guidance for the national courts, which may lead to a convergence of the two legal systems. Nevertheless, difficulties occurred in clearly separating the previous section of comparative cases from the section on European influences. The comparison of principles which in Germany have been long established, i.e. the principle of substantive legitimate expectation and the principle of proportionality, with their comparably novel application in English law resulted in difficulties as no clear distinction between this section and the previous section could be made. Consequently the comparison of the application of these principles entailed overlaps between the previous category and this category. However, this reflects the current state of English and German Administrative law – it can no longer be seen in isolation from European influences.

Finally, potential *Limitations to a convergence* are set out in each chapter. This part leans on to chapter two in which the historical and constitutional perspective of each jurisdiction is compared. This reminds us that its national legal character which is shaped inter alia by its constitutional framework and its historical legacy sets the limitations to an approximation of national Administrative law systems.

E. Brief summary of the contents

Chapter Two is concerned with an introduction into the main features of Judicial Review of administrative action in both member states. This overview shall serve as a basis and reference for the remaining chapters. It assesses the development of the administrative legal systems in England and Germany. It explains the reasons for the different positions of both countries in the nineteenth century, which was marked by an increase in administrative activity in both countries. It analyses the development of the institutional structure of judicial review as well as the substantive distinction of public

and over the constitutional background of both systems, the remedies available to applicants, private law matters. It provides an overview the grounds of review and the procedures applied by the courts.

Chapter Three will deal with the Review of discretionary powers of the Administration. This is “one of the most important areas of European Administrative law in the future”⁵² In this area of judicial review the constitutional role of the courts is most clearly expressed.

Chapter Four will be concerned with procedural errors and their consequences in judicial review proceedings.

Chapter Five will cover the area of state liability, an area of law, which in Germany traditionally falls within the jurisdiction of the ordinary courts. However, the liability of public authorities concerns public law scholars in both countries, particularly in the light of recent case law of the European Court of Justice and the European Court of Human Rights. In both systems this area of law is difficult and will require adaptation to European standards and systematisation.

Chapter Six contains the overall summary and conclusion.

⁵² Schwarze, J., *Administrative Law under European Influence*, 1996, 197 and Redeker/von Oertzen, *Verwaltungsgerichtsordnung* (Stuttgart, Berlin, Köln: Kohlhammer, 1997) *Vorwort*, p. V

CHAPTER TWO

THE DEVELOPMENT OF JUDICIAL REVIEW

A. Introduction

The role which the courts play in relation to the administration and the individual is crucial to the understanding of the principles and remedies provided in judicial review proceedings. This chapter is therefore concerned with the position of the courts in this complex constellation. It is crucial to explore the origins of Judicial review of administrative action for the understanding of how the English and German systems have evolved until today. This chapter is concerned with the historical development of judicial review in both jurisdictions and with the parameters as set by the national constitutions.

B. National reports

I. England

1. The reasons for the lack of a separate system of Administrative courts

The most striking difference between the common law and civil law system on the continent is the absence within the common law system of any separate administrative courts as they developed in Germany in the nineteenth century.¹ This institutional difference is closely linked to the lack of a clear substantive distinction between matters regarded as public law and those regarded as private law. On the contrary, the English approach to a systematisation of judicial review was based on a remedial approach, as applied to the prerogative writs. Since the thirteenth century the common law and the courts had achieved a central legal system for England. The judges either sat in London or travelled to the localities away from the centre.² The writ-system was a procedure of channelling individual complaints into a pre-existing system of orders from the king

¹ De Smith, S.A., *Judicial review of administrative action*, 1995, 156

directed to the person who had injured the individual.³ The writ originated in a personal request by an individual to the king to remedy a wrong suffered by another individual. They were sealed governmental documents by which the King conveyed notifications or orders.⁴ These forms of personal requests developed into a set of standardised writs. Aggrieved subjects had to try and fit their complaints into one of the existing writs and submit them through the chancellor to the king. Some remains of this remedial system have survived many centuries until today. As we shall see in chapter four until today claimants have to fit their claims into existing heads of tort in order to obtain compensation, for instance for unlawful administrative action.⁵ The old Public law remedies of *certiorari*, *mandamus*, *prohibition* and *habeas corpus* were also called the "prerogative writs". This term stems from 17th century Royalist judges who encouraged the association of the remedy of *habeas corpus* with the King's beneficence.⁶ *Certiorari* instructs the person or body whose decision is challenged to deliver the record of the decision to the Office of the Queen's Bench Division to be quashed. *Mandamus*, which dates back to the 16th century, is designed to enforce the performance by governmental bodies of their duties owed to the public.⁷ *Prohibition* orders a body to refrain from illegal action. The writs of *habeas corpus* were designed to order the appearance of a person before one of the King's courts to attend judicial proceedings.⁸ The writ of *certiorari* was important in controlling the decisions of inferior tribunals. The origins of the writ of *certiorari* which has been developed over centuries and which is now known under the name quashing order dates back to the thirteenth and fourteenth century.⁹ These ancestors of the writ of *certiorari* were called writs of error used to correct errors in the lower courts. An example of such an early writ of error dated Easter 1294 illustrates the nature of these writs:

² Van Caenegem, R.C., *The Birth of the English Legal System* (Cambridge: University Press, 1973) 29

³ Shapiro, M., *Courts, A comparative and political analysis*, Chicago, London: University of Chicago Press, 1981) 80

⁴ De Smith, S.A., *Judicial Review of Administrative Action*, 1995, 617

⁵ This remedial conception has caused confusion in the context of Human Rights violations under Article 6(1) in the case of *Osman v UK* (see chapter four on governmental liability)

⁶ De Smith, *supra* n. 4, 618

⁷ Cane, P., *An Introduction to Administrative Law*, 1996, 62

⁸ De Smith, *supra* n. 4, 618

⁹ Henderson, E., *Foundations of English Administrative Law* (Cambridge, Massachusetts, 1963) 83

The lord king sent his writ to his beloved and faithful John of Mettingham in these words; Edward by the grace of God king of England etc. to his beloved and faithful John of Mettingham, greeting. Because we wish for some definite reasons to be certified – *quibusdam certis de causis volumus cerciorari*¹⁰-about the record and process of the suit which was by our writ before you and your fellows, our justices of the bench between Thomas son of Edmund Pecche, demandant, and Robert the clerk and Johanna his wife, tenants, with respect to one message, a hundred acres of land, four acres of meadow and the three shillings' worth of rent with appurtenances in Little Blakenham, we command you that, if judgement has been given thereon, then you are to send us under your seal that record and process with everything concerning them and this writ.¹¹

In the seventeenth century the writ of *certiorari* developed into an order to quash administrative orders in the King's Bench beginning with the formulation: "Wishing for certain reasons to be informed about a certain order, *Volentes certis causis quendam ordinem de ... certiorari*."¹² *Certiorari* was therefore a writ whereby the King asked to be informed of a matter. If he did not agree with the matter at stake he would quash it. Until today the cases are reported as *R v X ex parte Y* – the King or Queen against X on the application of Y. This development was "inherently complex". De Smith summarises the main purposes served by *certiorari* between the fourteenth and middle of the seventeenth century as *inter alia*

"To supervise the proceedings of inferior courts, for example the Commissioners of Sewers,

To obtain information for administrative purposes, to bring into the Chancery or before the common law courts judicial records and other formal documents for a wide diversity of purposes."¹³

The first case in which it was certain that the writ of *certiorari* was applied is the case of *Rex v Commissioners of Sewers of Yorkshire* dating back to 1641. Accordingly "all the

¹⁰ as contained in the latin original version in Seldon Society, *Select cases in the court of King's Bench under Edward I*, (London: Bernard Quaritch, 1939) Volume 58, page 19, Coram Rege Roll, no 140

¹¹ *ibid*

¹² Henderson, *supra* n. 9, 95

¹³ De Smith, *Judicial Review of Administrative Action*, 1995, 622

indictments...along with all the orders, fines and amercements presented against Thomas Stephenson before you, “ “ to be determined before us and not elsewhere.”¹⁴

These writs were collected in the Register of Writs. There were only a limited number of writs available, but the chancellor could increase the number.¹⁵ Interesting to note is that “the development of the writ system [...] has about it a hint of paradox for modern Administrative law: what began as executive commands aimed at avoiding judicial proceedings became in turn the central mechanism for the judicial control of executive action.”¹⁶ The writs became a requirement to gain access to the jurisdiction of the common law courts.

The three first common law courts were the Court of Exchequer, the Court of Common Pleas and the Court of King’s Bench.¹⁷ The Court of Exchequer dealt with matters affecting the King’s revenue. One of the stipulations in the Magna Charta in 1215 was the establishment of a permanent court seated in Westminster. The Court of Common Pleas fulfilled this function and it dealt with disputes over land, debts, detinue and covenant and trespass. The Court of King’s Bench was closely connected to the king and its prime jurisdiction was in matters directly affecting the king. It could issue the prerogative writs of mandamus, prohibition and habeas corpus. Later the High Court of Admiralty and the Court of Exchequer Chamber were created.¹⁸

The law of equity attempted to fill the gaps left by the common law writ system. “If no common law writ appeared to meet the need of a prospective litigant, he might go instead to equity, which supplemented or complemented common law in a number of ways.”¹⁹ Equity developed into the provider of substantive justice in those cases, which fell outside the scope of the writ system. Equity developed its own body of remedies. The Court of Chancery and the court of Requests were equitable courts.²⁰

¹⁴ Controlment Roll no. 289, m.151 as seen in Henderson, *supra* n.9, 101

¹⁵ Van Caenegem, *The Birth of the English Legal System*, 1973, 29

¹⁶ De Smith, *Judicial Review of Administrative Action*, 1995, 618

¹⁷ Rudd, G.R., *The English Legal System*, 1962, 13

¹⁸ *ibid*

¹⁹ Shapiro, M., *Courts, A comparative and political analysis*, 1981, 85

The Tudor kings had managed to withdraw matters of State from the courts of common law and had enforced their will primarily through their own prerogative courts in which substantive and procedural rules unknown to the common law were applied. As early as Edward I the King's council exercised judicial functions. During the fourteenth century conflict broke out between the council and parliament regarding the judicial functions of the council. Parliament tried to end the judicial function by enacting legislation. However, these statutes, which were to limit the judicial function of the council and to enforce the common law procedures as the only legal procedure, had little effect.²¹ The statutes were not repealed during the Tudor reign. They were disregarded and parliament ascribed the council some jurisdictional powers.

For the development of English administrative law the so-called bills, which were to be dealt with by the infamous Star Chamber are of particular importance. These bills were requests from people to the king, and his council, the chancellor and to Parliament by subjects who needed some form of advice or help. Many of those bills were converted into writs or legislation or direct intervention by the king. The so-called conciliar courts, which unlike the common law courts did not use writs, began to accept those bills and to issue orders. A new institution, the Star Chamber, gradually filled the gap left by the common law courts and the equity courts. The Star Chamber was from then on particularly concerned with cases concerning the state but also had jurisdiction in private law disputes and cases of religious deviation. The name Star Chamber appears to relate to the room used in the old Palace of Westminster for the meetings of the King's council. The Star Chamber court was given additional powers in the Star Chamber Statute in 1487 but had existed even before then.²² It applied procedures unknown to the common law or equity courts including the use of torture.²³ It imposed a strict control over the organs of local government, the exercise of judicial and administrative functions.²⁴ It was concerned with complaints against officials or central and local government and against the justices of the peace who enjoyed wide powers in the

²⁰ *ibid* 89

²¹ Maitland, F.W., *The Constitutional History of England: A Course of Lectures* (Cambridge: University Press 1926) 217

²² Walker, P.N., *The Courts of Law* (Newton Abbot: David and Charles 1970) 181

²³ Shapiro, M., *Courts, A comparative and political analysis*, 1981, 87

²⁴ De Smith, *Judicial review of administrative action*, 1995, 226

countryside.²⁵ The Star Chamber therefore acted partly as an early form of Administrative court. It applied the common law but followed different procedures. It exercised an inquisitorial procedure using the rack and other forms of obtaining confessions.²⁶ As a consequence of major criticism of the procedures and involvement in ecclesiastical decisions, The Star Chamber was eventually abolished during the seventeenth century struggles. The common lawyers joined in alliance with the parliamentarians to bring about the downfall of the Court of Star Chamber and other prerogative courts in 1641. Most of the cases dealt with under it were then dealt with by the King's Bench. The traditions handed down from the constitutional struggles of the seventeenth century created a prejudice against encroachments in the field of common law. Therefore until today the executive still enjoys a considerable degree of autonomy and immunity from judicial control.²⁷ After its abolition these traumatising experiences remained in the perception of public law as an area of law, which in future had to be inseparable from private law. Judicial independence in the English tradition has therefore developed in a rather different form. In the early seventeenth century some courts functioned at least partly as administrative courts. These developments three hundred years ago still seem to influence the attitude of modern judicial institutions. Judicial independence was forthwith associated with the so-called "doctrine of limited judicial review".

The most distinctive characteristic of the English Administrative legal system and its sources is the absence of a written constitution and the absence of a catalogue of Human Rights guaranteeing effective judicial protection in the courts. There is also no written record of the constitutional principles of administrative law. Further, there are no separate Administrative Courts. Judicial review of administrative action is, in principle, exercised not by a special administrative judiciary, but by the ordinary courts. In the absence in the past of a statutory basis for the power of the courts²⁸, their power to review administrative action is inherent and discretionary. The courts have developed a number of devices designed to keep them out of highly controversial areas. In particular, the general principle on which the exercise of discretionary powers is

²⁵ Allison, J.W.F. *A continental distinction in the common law*, 1999, 153

²⁶ Pollard D., Parpworth N., Hughes, D., *Constitutional and Administrative Law* (London, 2001) 514

²⁷ Cane, P., *An Introduction to Administrative Law* (Oxford: University Press, 1996) 13

reviewed is that of "unreasonableness" understood in a rather strict sense, which allows judicial intervention only when an administrative authority has acted so unreasonably that no reasonable authority could so act.²⁹ The courts are inferior to Parliament, and the common law inferior as a form of law to parliamentary legislation. English constitutional history has witnessed a rigid division between law and politics. There are realms within which judges may not operate. Lawyers cannot apply the ideals of legality and constitutionality to politics and administration, certainly not in a way, which is familiar to a German lawyer.³⁰ This judicial restraint is partly a function of the doctrine of separation of powers, which will be discussed in more detail below.

The subject of judicial review of administrative action poses the question of the role, which the courts fulfil, in both jurisdictions of England and Germany. An area, which will be dealt with in more detail in the second chapter, is the review of discretionary powers. Here, in particular, the question arises which institutions have the responsibility to devise and apply constraints to the exercise of discretion.³¹ When defining the role of the judiciary the central issue is to investigate which forms the application of the doctrine of the separation of powers takes. The idea of a division of government powers is a common feature of western constitutional history. The doctrine of the separation of powers dates back to the seventeenth century when John Locke wrote: "It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage."³² Montesquieu developed the doctrine further and based it on the model of the British constitution. In chapter six of his famous *De l'Esprit de Lois*, Book XI, he emphasised that within a system of government based upon law, the judicial function should be separate from the legislature and the executive.³³ Montesquieu further saw the importance of each institution in carrying out checks and balances. However,

²⁸ now Supreme Court Act 1981

²⁹ Cane, P., *An Introduction to Administrative Law*, 356

³⁰ Birkinshaw, P., *Grievances, Remedies and the State* (London: Sweet & Maxwell, 1994) 3

³¹ Galligan, D.J., *Discretionary Powers* (Oxford: Clarendon Press, 1986) 219

³² Second Treatise of Civil Government, Ch XII, para 143, quoted in Vile, M.J.C. *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967)

Montesquieu saw the role of the judiciary in simply applying the law. The development of judicial review of the other branches is based on developments in American constitutional history.³⁴ It is important to point out that there is no one single version of the doctrine of the separation of powers. The separation of powers has been described as a fundamental principle upon which all the Western democracies rest but in none of them is it interpreted or lived in the same way. The common underlying ratio is that “power must be checked by power”.³⁵ Therefore two positions can be identified. Firstly, the separation of powers and secondly the checks and balances of each power. This, however still does not provide guidance for judicial review of administrative action. Galligan sees the problem in the application of clearly adjudicative functions to the judiciary. This would restrict the court’s role to reviewing solely “matters of a preliminary or threshold kind” and exclude the courts from reviewing matters of substance of the decision. However, this has been the position of the courts particularly in the first part of this century. Galligan offers some guidance for judicial review by concluding that “judicial review is most justifiable not when it is directed at substantive policy choices that occur in exercising discretion, but rather when it draws on values which form part of the constitutional framework within which discretion occurs. The justification for review lies in the assertion of certain values as sufficiently important to be constraints on the exercise of discretion.”³⁶ In the absence of a written constitution such an interpretation relies on the weight given to traditional constitutional principles such as the rule of law. However, as will be shown in later chapters, the introduction of the Human Rights Act 1998 is an expression of a constitutional change as it will give the courts in England new powers.

The development of English administrative law is closely linked to the conceptions of the constitutional lawyer, A.V. Dicey whose publication *The law of the Constitution*³⁷ on the meaning of the rule of law have influenced generations of lawyers. In 1938 Frankfurter wrote:

³³ Bradley, A.W., Ewing, K.D., *Constitutional and Administrative law* (London: Longman, 1997) 90

³⁴ Galligan, D.J., *Discretionary Powers* (Oxford: Clarendon Press, 1986) 229

³⁵ Mény, Y., *Government and Politics in Western Europe* (Oxford University Press, 1993) 5, 6

³⁶ Galligan, *supra* n. 34, 233

³⁷ Dicey, A.V., *The law of the constitution* 10th ed. (London: Macmillan 1959)

“Few law books in modern times have had an influence comparable to that produced by the brilliant obfuscation of Dicey’s *The Law of the Constitution*... Generations of judges and lawyers were brought up in the mental climate of Dicey. Judgments, speeches in the House of Commons, letters to *The Times*, reflected and perpetuated Dicey’s misconceptions and myopia. The persistence of the misdirection that Dicey had given to the development of administrative law strikingly proves the Elder Huxley’s observation that many a theory survives long after its brains are knocked out.”³⁸

Dicey’s conception of the rule of law embraces at least three main statements. Firstly, he stressed the importance of the legitimacy of law in contrast to the exercise of wide discretionary powers. Secondly, every man should be subjected to the ordinary courts and therefore public officials should not enjoy any other status: “Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.” Lastly, private rights do not stem from any source of higher-ranking law but are the result of judicial decisions made by ordinary courts applying the ordinary laws.³⁹

In particular Dicey’s second conception of the rule of law (“Every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.”⁴⁰) has been central in the discussion concerning the establishment of a separate system of public law courts. *Droit administratif* as being “official” law enforceable in special courts and therefore being incompatible with the rule of law reaffirmed these reservations against a separate system of public law courts.⁴¹ Dicey’s view has been heavily criticised for misinterpreting *Droit administratif* and for ignoring the developments in English law at the time when he was writing his thesis.

³⁸ Foreword to Discussion of Current Developments in Administrative Law (1938) 47 *Yale L.J.* 519 as quoted in Arthurs, H. W., “Rethinking Administrative Law: A Slightly Dicey Business”, (1979) *Osgoode Hall Law Journal*, 1 at 4

³⁹ Dicey, *supra* n. 37, 188-203

⁴⁰ *ibid* 188

⁴¹ De Smith, *Judicial review of administrative action*, 1995, 157

Firstly, the end of the nineteenth century was marked by an increase in the activities of tribunals who existed alongside the ordinary Courts. Secondly, Dicey ignored the extensive immunities public officials enjoyed from ordinary law.⁴² For example, only since 1947 after the enactment of the Crown Immunities Act, public officials can be held liable in tort for negligent exercise of public powers in their official capacity. Before then they were immune from suit. However, they have always been subject to personal liability.

Dicey misinterpreted the fact that the governments or an agency is often acting for the citizens at large and that therefore the application of the same legal principles and procedures as for a private person might not be adequate. Further, he did not realise that public law and public law remedies can be seen as a defence of the citizen against a powerful state.⁴³ The latter view becomes more transparent in a system with a strong tradition of constitutionally guaranteed Human Rights provisions like in Germany or the United States where British cases are read by the judges “with a mind dominated by the spirit of the American Constitution - stripping away the limited frame of reference of judicial review in Britain.”⁴⁴ Dicey supported the idea of parliamentary control of the administration and judicial control through the ordinary courts. Dicey’s understanding of judicial independence went along with the neglect of expertise in administrative matters. Arthurs discussed Dicey’s belief that the ordinary courts are supreme and that ordinary law is all pervasive in detail. He questioned both whether ordinary laws are the opposite of administrative norms and whether they must be regarded as superior. Firstly, Arthur questioned the meaning of ordinary laws. According to Dicey’s definition rules that are not enforceable by the courts cannot be considered as ordinary laws. In Dicey’s view ordinary law included the common law, judge made law, and some statutes but certainly not all statute law.⁴⁵ Arthur raises doubts as to whether in Dicey’s view administrative statutes would have fulfilled the requirements of the rule of law: “It is fair to speculate that administrative statutes would not be regarded as ordinary law by Dicey. [...] A theory that stigmatises twenty, fifty, a hundred years of

⁴² Arthurs, H.W., “Rethinking Administrative Law: A Slightly Dicey Business”, *Osgoode Hall Law Journal*, 1979, 1 at 6

⁴³ Cane, *An Introduction to Administrative law*, 1996

⁴⁴ Birkinshaw, *Public law in the U.S.A.*, A brief outline, quoting Schwartz & Wade

⁴⁵ Arthurs, *supra* n. 38 at 9

legislation on the grounds of departure from the ordinary law and the ordinary courts is ... open to criticism.”⁴⁶ H.W. Arthur’s criticism of Dicey’s views was concerned with the fact that “Dicey overestimated the extent of adjudication through judges.”⁴⁷ At the time when Dicey was writing many important issues were dealt with by tribunals. Dicey’s conception that the adjudication by ordinary courts applying the ordinary law was a pillar on which the English constitution rested was incorrect. The definition of ordinary law has to include many sources including judge made law form judges who do not sit in the superior courts.

However, despite the extensive criticism of Dicey’s view “to this very day, prominent jurists explicitly or by inference echo Dicey’s views, legislators rely upon them as a blueprint for the design of administrative regimes, professional audiences can safely be expected to applaud them, and legal scholars to derive inspiration from them. Dicey and his rule of law have acquired, within and beyond legal circles, a transcendent, a symbolic significance.”⁴⁸

2. The development of an Administrative law system

The absence of specific administrative courts is a fact closely linked to the question whether Britain possesses a distinct system of substantive administrative law. This was answered in the positive in the famous quote by Lord Denning who held that “It may truly now be said that we have a developed system of administrative law.”⁴⁹ In 1981 Lord Diplock held in *R v. Inland Revenue Commissioners, ex p. National Federation of the Self-Employed and Small Businesses Ltd* “that progress towards a comprehensive system of administrative law...I regard as having been the greatest achievement of the English courts in my judicial lifetime.”⁵⁰ Since the end of the 1960s the courts have been actively shaping England’s Administrative law system. Specialised courts such as

⁴⁶ *ibid* 11

⁴⁷ Arthur, H.W., “Without the Law”, *Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto and Buffalo, University of Toronto Press, 1985) 140

⁴⁸ *ibid*, 5

⁴⁹ *Breen v. Amalgamated Engineering* [1971] 2 Q.B. 175 at 189 as quoted in De Smith, *Judicial review of administrative action*, 1999, 57

the Employment Appeal Tribunals have been established and there are more than 2000 administrative tribunals in operation.⁵¹ However, it has been argued that the “English distinction between public and private law procedures is proving unsatisfactory and is becoming less significant.”⁵² The distinction between public and private law is closely linked to the system provided by the prerogative orders, which over the centuries have been reformed in order to fulfil the purposes of judicial review.

The groundbreaking case for the distinction between private and public law remedies is *O’Reilly v. Mackman* (1982). In this case a prisoner challenged the decision of a disciplinary board claiming it had been taken in breach of natural justice. He brought his claim by writ as in civil cases and did not apply for judicial review under Order 53 Rules of the Supreme Court (now Part 54 of the 1998 Rules), enacted in the Supreme Court Act 1981. The House of Lord held that if a decision of a public body violated rights, which are protected by public law, the procedure under Order 53 had to be followed. Until then it was assumed generally that the litigant had a choice between an action of summons for an injunction, a declaration or even damages or he or she could apply for judicial review.⁵³

However, one of the greatest achievement’s of Tony Blair’s Labour government has been the introduction of the Human Rights Act 1998 which incorporates the European Convention on Human Rights into the law of the United Kingdom. Even though no provision is made for the establishment of a Constitutional Court in order to strike down legislation, which does not comply with the Convention, section 3 provides that primary and subordinate legislation must be interpreted in a way, which is compatible with the Convention. If this fails there is the possibility of a declaration of incompatibility, which provides for a ministerial remedial order to remove the incompatibility by amending the legislation⁵⁴.

⁵⁰ *R v. Inland Revenue Commissioners, ex p. National Federation of the Self-Employed and Small Businesses Ltd* [1982] A.C. 617, 641 as quoted in De Smith, *Judicial review of administrative action*, 1999, 57

⁵¹ De Smith, *Judicial review of administrative action*, 1995, 5

⁵² Allison, *A Continental Distinction in the Common Law*, 2000, 135

⁵³ De Smith, *Judicial review of administrative action*, 1995, 160

⁵⁴ Section 4:

Three main areas of judicial review can be identified which are the grounds on which judicial review may be granted, the procedures whereby judicial review may be applied for and the requirements which the law makes of the person seeking judicial review and lastly judicial remedies and their effects.⁵⁵ However, more recent developments indicate a change of approach. An important step in the direction of judicial expertise in administrative law matters was made when the Crown Office List of the Queen's Bench Division of the High Court was created in 1977. The need for a specialist court in administrative law matters was felt in order to protect individual liberties better. All existing procedures of judicial review of administrative action were combined under a single heading called an application for judicial review. In 1981 Order 53 of the Rules of the Supreme Court was amended so that a single judge of the Queen's Bench Division could hear judicial review cases.⁵⁶ This administrative list can be compared to the Commercial List. A number of Queen's Bench judges with a reputation of expertise in the field of administrative law were nominated by the Lord Chief Justice to operate the new Order 53 (now Part 54 of the Civil Procedure Rules 1998). Interesting to note is that the creation of this administrative court is not based on legislation but on "administrative stealth".⁵⁷ The Bowman report in 2000 led to further reform of the application for Judicial Review. The Report recommended that: "There is a continuing need for a specialist court as part of the High Court to deal with public and administrative law cases. To emphasise that this is the principal work of the Crown Office List, it should be renamed "The Administrative Court". The Lord Chancellor accepted this proposal and as of 2 October 2000 the Crown Office List in the Queen's Bench Division of the High Court is known as the Administrative Court.⁵⁸ The judges hearing applications for Judicial Review in the Administrative Court are recruited from the Bar. They receive no special training in public administration.⁵⁹

⁵⁵ Stevens, I, *Constitutional and Administrative law* (London: 1996, 221

⁵⁶ Supreme Court Act 1981, s. 6 (1) (b)

⁵⁷ Bloom-Cooper, L., "The new Face of Judicial Review: Administrative Changes in Order 53", *Public Law* 1982, 250 [259, 260]

⁵⁸ Practice Direction (Administrative Establishment) Queen's Bench Division (2000) 1 WLR 165

⁵⁹ Bloom-Cooper, L., "Lawyers and Public Administrators: Separate and Unequal" (1984) *Public Law*, 215

3. The constitutional basis for judicial review

The constitutional basis for the jurisdiction of the courts in their supervisory function has recently been debated vigorously.⁶⁰ This search for a new constitutional foundation for the supervisory function of the courts might be due the “increasing prominence of judicial review.”⁶¹ The main principle which provided the legal basis for the court’s jurisdiction has been the *ultra vires* rule. This notion of *ultra vires*, however as the basis for judicial review has become under increasing criticism. The *ultra vires* theory contains the idea that “judicial review was legitimated on the ground that the courts were applying the intent of the legislature. The Court’s function was to police the boundaries stipulated by Parliament.”⁶² This meant that the justification for the development of the grounds of review had to derive from the notion that it was Parliament’s intent that they would apply in a particular statutory context.⁶³ The competing model is the so-called common law model of illegality. The supporters of this theory argue that the development of the grounds of review has been due to the courts. The principles of judicial review are based on the common law.⁶⁴ The main criticism centred on the question how the *ultra vires* theory would be able to explain the role of the courts in reviewing non-statutory powers. Further, the *ultra vires* theory was unable to provide an explanation for the development and expansion of the grounds of review: “The constraints which exist on the exercise of discretionary power are not static. Existing constraints evolve and new types of control are added to the judicial armoury. Changes in judicial attitudes towards fundamental rights, the acceptance of legitimate expectations, and the possible inclusion of proportionality as a head of review in its own right are but three examples of this process. These developments cannot plausibly be explained by reference to legislative intent.”⁶⁵ The modified *ultra vires* theory therefore acknowledges now that the courts may impose the judicial review

⁶⁰ for a collection of articles on this subject see Forsyth, C, *Judicial Review and the Constitution* (Oxford: University Press, 2000)

⁶¹ Elliott, M., “The Ultra Vires Doctrine in a Constitutional Setting”, in Forsyth, *Judicial Review and the Constitution*, 85

⁶² Craig, P., “Competing Models of Judicial Review”, in Forsyth, *Judicial Review and the Constitution*, 2000, 373

⁶³ *ibid*, 374

⁶⁴ see De Smith, *Judicial Review of Administrative Action*, 1995, Craig, P, “Ultra Vires and the Foundations of Judicial Review” (1998) *CLJ* 63; Jowell, J. “Of Vires and Vacuums: The Constitutional Context of Judicial Review” (1999) *PL* 448

mechanism on non-statutory bodies.⁶⁶ Secondly, the modified *ultra vires* theory does not try to establish a direct link between the formulation of the grounds of review and the legislative intention. It takes a modified view in that “it is possible to understand the development of administrative law within an analytical model which ascribes a relevance to legislative intention, but without resorting to the strained proposition that changes in judicial control correspond directly to the will of Parliament.”⁶⁷ In this comparative thesis the debate is of interest with respect to the way in which either version of the theories might influence the jurisprudence of British courts in Human Rights issues under the Human Right Act 1998. The Act appears in itself a compromise between competing models of democracy, i.e. systems which either operate on the basis that the will of the majority is paramount or on the basis that the values of the community, i.e. higher ranking principles and rights are of supreme meaning. The difference between these conceptions has been described by Allan as an “inescapable tension”⁶⁸ However, the question remains to which extent the Human Rights Act 1998 has solved this tension. According to Article 6(1) of the Act it is unlawful for a public authority to act in a way which is incompatible with a Convention right. The *ultra vires* theory appears sufficient to guide the courts in the application of more substantive review under the Human Rights Act which “either expressly or impliedly” authorised by Parliament.⁶⁹ Elliott argues further, that the existence of the Human Rights Act 1998 proves that the common law theory or the “rule based approach” as he calls it is insufficient, as it is inconsistent with the Act. In his view the rule based approach would lead to an entrenchment of the Act, whereas the *ultra vires* theory would be consistent with the Act and the constitutional order.⁷⁰

⁶⁵ Craig, P., *supra* n. 54, 63

⁶⁶ Forsyth, C., “Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review” [1996] *CLJ* 122; Elliott, M “The Demise of Parliamentary Sovereignty? The Implications for Justifying Judicial Review” (1999) *LQR* 115, 119

⁶⁷ Elliott, M., “The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law”, in Forsyth, C *Judicial Review and the Constitution, Oxford, 2000*

⁶⁸ Allan, T.R.S. “Fairness, Equality, Rationality” in Forsyth, C and Hare, I *The Golden Metwand and the Crooked Cord* (Oxford: University Press, 1998

⁶⁹ *ibid*, 15

⁷⁰ Feldman, D., “Convention Rights and Substantive *Ultra Vires*”, in Forsyth, *Judicial Review and the Constitution, Oxford, 2000*, 266 ;

⁷¹ Craig, P., Review Article, “Constitutional Analysis, Constitutional Principle and Judicial Review”, (2001) *Public Law*, 763 [766]

Whichever view one may take, the debate indicates a change in the climate. There appears to be an increasing desire to lay the foundations for judicial review in a theoretical, highly scholarly manner. The development of judicial review in England in the courts, on the other hand displays an extremely pragmatic approach. Harden and Lewis observe that “despite the theoretical basis of *ultra vires* in statutory interpretation, the courts have in fact developed a number of principles for the control of discretion, for limiting the sphere of public autonomy created by statute. [...] for the most part they are judge-made law.”⁷¹ Therefore without explicitly identifying their role the courts have expanded judicial review beyond the traditional *ultra vires* model. However, the “lack of a clear understanding of the nature and purpose of judicial review, the courts have vacillated between a helpless quietism and an active interventionism which has too often appeared to depend on the judge’s views of the merits of particular policies rather than upon a view of their role in the constitutional order of things.”⁷²

In the absence of a written constitution, however, which sets out the overall value order in terms of a clear entrenchment of Human Rights and a constitutional mandate to protect those values imposed on all three powers, it appears difficult to reach consensus on a single theoretical foundation. It has been suggested that consensus is not even necessary as different justification for different principles as applied by the courts may be employed.⁷³ This appears to have happened in practice anyway as witnessed by for instance the revival of the common law rules of natural justice. Finally, Sir John Laws view of the constitutional position of the courts is even more pragmatic:

“For every body other than the courts, legal power depends upon an imprimatur from an external source; but this is not true of the High Court and its appellate hierarchy. In point of theory, there exists no higher order of law for them. It follows that any analysis of their jurisdiction, if it is not to be confined to the simplest statement that the court reviews what it chooses to review, must consist in a description of the nature and extent of judicial review in practice... The ultimate freedom of movement which on my own analysis the judges enjoy need to be understood in order to appreciate that the court, if it

⁷¹ Harden, I., Lewis, N., *The Noble Lie*, London, 1988, 202

⁷² *ibid.*, 203

decides in effect to push out the boundaries of judicial review in the particular case, is not guilty of any constitutional solecism." ⁷⁴

However, a recent decision concerned with the protection of the right to free speech under the Human Rights Act 1998 illustrates that the judges are expressing their constitutional role directly as in *R (ProLife Alliance) v BBC* citing extensive case law. Laws LJ held that: "as a matter of domestic law the courts owe a special responsibility to the public as the constitutional guardian of the freedom of political debate. The responsibility is most acute at the time and in the context of a public election. It has its origin in a deeper truth, which is that the courts are ultimately the trustees of our democracy's framework." ⁷⁵

In conclusion, the debate concerning the constitutional foundation of the supervisory role of the courts in judicial review proceedings cannot be fully analysed in the context of this thesis. However, it can at least be regarded as an indicator that there is a strong trend towards the more explicit articulation of constitutional foundations both in court decisions and at an academic level, based on a broader understanding of the rule of law and the increasing Human Rights culture in this country.

4. The grounds of review

In England judicial review of administrative action has become an important protection of the individual.⁷⁶ This has not always been so. The role of the courts in relation to the administration of government has undergone major changes within the last 30 years.⁷⁷ To fully appreciate the development in judicial review proceedings, I shall first define judicial review by contrasting it with appellate proceedings and secondly briefly

⁷³ Sir Robert Carnwath, No Need for a Single Foundation, in Forsyth, *Judicial Review and the Constitution*, Oxford, 2000

⁷⁴ "Illegality: The Problem of Jurisdiction" in Supperstone, M. and Goudie, J., *Judicial Review*, London, 1991, 69

⁷⁵ [2002] 2 All ER 756 at 773

⁷⁶ Kingsland, C., Shadow Lord Chancellor, *Analysis*, Radio 4, 6.11.1997

⁷⁷ Jowell, J., Birkinshaw, P., *Tendencies towards European Standards in National Administrative Law: England, Wales and Northern Ireland* in Schwarze, *Das Verwaltungsrecht unter euroäaischem Einfluß: zur Konvergenz der mitgliedstaatlichen Verwaltungsrechtsordnungen in der Europäischen Union*, (Baden-Baden: Nomos, 1996)

describe the constitutional framework in which light judicial review in England has to be seen. Secondly I will introduce the main features of judicial review, which will be examined in the comparative context in the following chapters.

Judicial review has to be distinguished from appellate powers, which are provided by Parliament against an administrative decision. Judicial review can be described as an exercise of a residual supervisory jurisdiction by the superior courts.⁷⁸ There are two differences between judicial review procedures and appellate powers. Firstly, an appeal court can adjust the decision of an administrative body, whereas in judicial review proceedings it can only refer the matter back to the original body. Secondly, judicial review proceedings differ from appellate powers with regard to the court's jurisdiction. The appellate court has the power to review the merits of the decision contested whereas in judicial review proceeding the scope of review is limited to the legality of the decision.⁷⁹ The difficulties arising out of this not always clear distinction will be discussed shortly. Secondly it is important to discuss the relationship between the courts of law and administrative action.

The modern form of Judicial review is a result of a gradual development. Judicial review now is the procedure by which the Administrative Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies. It is governed by the Supreme Court Act 1981, Section 31 and the Civil proceedings Rules, Part 54. It can be described as a public law remedy.⁸⁰

Lord Diplock identified three grounds of judicial review in *Council of Civil Service Unions v. Minister for the Civil Service* (1984)⁸¹: illegality, irrationality and procedural impropriety. In this case staff employed at the Government Communications Headquarters ("GCHQ") were no longer permitted to be members of national trade unions even though since 1947 they had been permitted to. Before the instruction of the Minister for the Civil Service was issued there had been no consultation of the Trade Unions or the employees. The House of Lords held that the government's action was

⁷⁸ Wade, E.C.S., and Bradley, A., *Constitutional and Administrative law*, 1994

⁷⁹ Cane, *An Introduction to Administrative law*, 1996, 35

⁸⁰ Gordon, R., *Judicial Review and the Crown Office Practice*, (London: Sweet & Maxwell 1996), 3

reviewable, that the applicants would have had a legitimate expectation to be consulted before the instruction but that national security issues outweighed the legitimate expectation of the applicants.

Lord Diplock's trilogy draws important distinctions between the various more traditional grounds of review.⁸² A far less traditional ground of review is the principle of proportionality, which was suggested by Lord Diplock in this decision, could become the fourth established ground of review. Even if the Court in *ex parte Brind*⁸³ stated that proportionality, as a general rule could not be inserted into the substantive law of judicial review there appears to be a chance for the principle to be applied on a case-by-case basis.⁸⁴ Proportionality will be discussed in some detail in the second chapter.

The first ground for judicial review is illegality. Here, the courts are concerned with the review for error of law. This area of judicial review has been notoriously difficult centred upon the accommodation of jurisdiction within the *ultra vires* principle and the exclusion of judicial review in ouster clauses.⁸⁵ The most famous case to illustrate the complexity of English administrative law is probably *Anisminic Ltd v. Foreign Compensation Commission*.⁸⁶ Here a tribunal denied the applicant compensation for the nationalisation of its property by the Egyptian government because the applicant's successor in title was not a British national. The error consisted in the fact that the right to compensation did in law not depend on the nationality of the successor in title. The legal issues involved are complex and a few points require an introductory explanation. The doctrine of *ultra vires* permits the courts to quash decisions made by administrative bodies, which they have no power to make. Traditionally, before the decision in *Anisminic*, an administrative tribunal or an administrative body could make a wrong decision as long as it acted within jurisdiction, which was not reviewable by way of

⁸¹ [1984] 3 All E.R. 935 (House of Lords)

⁸² See Bailey, S.H., Jones, B.L., & Mowbray, A.R., *Cases and materials on Administrative law* (London: Sweet & Maxwell, 1992) 193 et seq, where a distinction is being made between simple *ultra vires*, failure to retain discretion as to exercise of power, abuse of discretion, procedural irregularity and error of law on the face of the record.

⁸³ *R. v. Secretary of State for the Home Department, ex p. Bugdaycay* [1987] A.C. 514

⁸⁴ Jowell and Birkinshaw, *supra* n. 77; 12; Gordon, *Judicial Review*, 1996, 193

⁸⁵ see Hare, I., Separation of Powers and Error of Law in Forsyth and Hare, *The Golden Metwand and the Crooked Cord*, 1998, 113

⁸⁶ [1969] 2 AC 147

judicial review, but it was not permitted to exceed its statutory vires, i.e. act *ultra vires*.⁸⁷ Traditionally, the term “vires” is used in the context of administrative decisions, “jurisdiction” in the context of judicial decisions.⁸⁸ Before 1969 the division between reviewable decisions of the administration, i.e. those that were clearly *ultra vires* and those, which were not reviewable, i.e., which contained an error within jurisdiction was clear. The only exception to that clear rule was that those errors, which were patent “on the face of the record”, even though within jurisdiction, were reviewable as well.⁸⁹ The reason for this distinction is deeply rooted in constitutional law. For once it is the rule of law, which imposes restrictions on administrative bodies to determine their own powers, and therefore opens for the court to review such decisions, which are taken *ultra vires*. On the other hand it is the principle of sovereignty of Parliament, which restricts courts to review the legality of actions of the executive in particular in case of ouster clauses, i.e. parliamentary legislation to restrict the courts jurisdiction.⁹⁰ However, the distinction between these two errors is rather difficult to achieve. Just as difficult can be the distinction between law and fact. Generally speaking only legal errors can be reviewed. The administrative body is entitled to decide over facts and no judicial review takes place into the merits of a case. The distinction between law, fact and policy can cause particular difficulties. In a case about two decisions by immigration authorities it was held that the question whether immigrants should be granted asylum in the UK because they were political refugees constituted a so called question on a “legislative fact”, dealing with policy issues and therefore was not reviewable. The second question was whether an immigrant would be in danger of persecution in his country of origin. This was held to be a question of “jurisdictional fact” and therefore reviewable.

After the decision in *Anisminic* in 1969 the distinction between errors within or without jurisdiction became rather blurred.⁹¹ However *Anisminic* did not fully answer all the questions. For instance it remained unclear whether all errors in law resulted in illegality, whether within or without jurisdiction. In the following years some judges

⁸⁷ De Smith, *Judicial Review of administrative action*, 1995, 223

⁸⁸ *ibid* 229

⁸⁹ *ibid* 223

⁹⁰ *ibid* 223, 224

⁹¹ Cane, P., *An introduction to Administrative law*, 1996, 122

took the view that all errors of law should go to jurisdiction and that there remained nothing of the traditional distinction as held before *Anisminic*.

In *Pearlman v Keepers and Governors of Harrow School*⁹² a county court judge had to determine whether the installation of central heating in a dwelling house amounted to structural alteration, extension or addition. Without proffering a definition of the statutory words, the judge held that the work under consideration did not fall within them. The appellant sought an order of certiorari to quash the judge's decision on the ground that it depended on an error of law and accordingly was beyond jurisdiction. It was held by majority that the judge's decision on the issue was such that he must have made an error of law in the interpretation of the statutory words. Lord Denning held that the distinction between an error which entails absence of jurisdiction – is fine. So fine indeed that it is rapidly being eroded... I would suggest that this distinction should now be discarded... The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.

However, the doctrine of error of law remains complex and has been described as “hopelessly confused.”⁹³ In *R v Hull University Visitor, ex parte Page*⁹⁴ it was held that the distinction between jurisdictional and nonjurisdictional errors of law should still be relevant. However, this related to decisions of university visitors only, because there the distinction between domestic laws of the university as distinct from the general law of the land was drawn.⁹⁵ It appears that after the decision in *Anisminic* every error of law is a jurisdictional error, which is reviewable by the courts as it amounts to an *ultra vires* action which cannot be protected by an ouster clause. There is very little room for non-jurisdictional errors, which might be protected by an ouster clause. In *Racal Communications* Lord Diplock suggested that a tribunal could make an error when the matter involves as many inter-related questions of law, fact and degree.⁹⁶ However,

⁹² [1979] QB 56

⁹³ Hare, I., *supra* n. 85 at 120

⁹⁴ [1993] AC 682

⁹⁵ Cane, *An introduction to Administrative law*, 1996, 124

⁹⁶ *Re Racal Communications* [1981] A.C. 374, 390-391

“the distinction between jurisdictional and non-jurisdictional error is ultimately based upon foundations of sand.”⁹⁷ It is interesting to note that the development of the grounds of review is closely connected to the availability of remedies in the courts. Early cases dating back to the seventeenth and early eighteenth century show that the prerogative writ of *certiorari*, now the quashing order was originally aimed at errors within jurisdiction.

The three remaining grounds of review will be discussed in some detail in the following chapter. They are irrationality, procedural impropriety and possibly proportionality.

5. Remedies

Until today English Administrative Law is organised around remedies and causes of action. Administrative Law distinguishes two categories of remedies, which are Private law remedies, and Public law remedies. The former includes damages, the remedy of injunction and declaration. The old order of *mandamus* is now called mandatory order, and order of *prohibition* is now referred to as a prohibiting order, and the order of *certiorari* is now called a quashing order. These changes in the language are interesting but merely cosmetic⁹⁸ The application procedure of Judicial Review is now contained in the Civil procedure Rules part 8, as modified by a part 54. This is the result of the *Bowman* report on proceedings in the Crown Office published in March 2000. These new rules govern all application filed on or after October 2, 2000. Part 54 displays similar features to the previous Order 53 of the Rules of the Supreme Court. Changes have been made to the requirement of standing, discovery and cross-examination⁹⁹.

As we shall see in later chapters, overlaps between private and public law occur in other jurisdictions as well, for example in the field of state liability in German Administrative Law, which is dealt with by the ordinary, i.e., civil courts.¹⁰⁰ The reason why state

⁹⁷ De Smith, *Principles of Judicial Review* (London: Sweet & Maxwell 1999) 120

⁹⁸ Civil Proceedings Rules (section 31(1); rule 54.1(2), 54.2); Cornford, T., “The new rules of procedure for Judicial Review” (2000) 5 *Web JCLI*; Fordham, M., “Judicial review: the new rules” (2001) *Public Law* 4

⁹⁹ With regard to the right to cross-examine see below under “The adversarial procedure”

¹⁰⁰ See Art 34 (2) Basic Law

liability in Germany is dealt with by the civil courts lies in the fact that the claim against a civil servant was originally a civil law matter until the introduction of vicarious liability of the state for its servants. This is an example in German law where a public law right is dealt with by civil courts which are separate from the administrative courts, i.e. the procedural side is a purely private law matter. Private law remedies in English law were originally used only in private law matters but were later transposed into Public law remedies.¹⁰¹ German Administrative law on the other hand is centred on rights (*Rechtsansprüche*) and causes of action. However, by comparing the two systems it is important to understand that the English legal system has never provided a clear distinction between substantive and procedural administrative law.¹⁰² English law is concerned with remedies rather than rights: “*Ubi remedium, ibi ius*”. In Germany on the contrary the individual right against a public authority to an act or omission of that authority is always accompanied by a procedural means to effectuate this act or omission directly: “*Ubi ius ibi remedium*”. Further, in German Law some topics dealt with by the English Courts under the heading of “remedies” would not be considered as procedural topics. In German Law damages are dealt with in “substantive” rather than “procedural” provisions.¹⁰³ The term rights is used in English law, however it is said “that it does not reveal any rational adherence to a legal philosophy that would locate in the legal subject a legally authoritative form of sovereignty so that he would be invested with the power to frame a legal claim in the language of “individual prerogatives”.¹⁰⁴ In Germany the focus on rights rather than remedies dates back to the 19th century. German criticism of the European Court of Justice’s jurisprudence on direct effect is based on these conceptual difficulties between rights and remedies because the ECJ seems to follow the Common law model.¹⁰⁵

Since the Administration of Justice (Miscellaneous Provisions) Act 1938 *Certiorari*, *Mandamus* and *Prohibition* are also referred to as the prerogative orders. The writ of *Habeas corpus* remained unchanged until the Administration of Justice Act 1960 which

¹⁰¹ Cane, *An Introduction to Administrative Law*, 1996,66

¹⁰² Schwarze, *European Administrative Law*, 1992, 148

¹⁰³ see Art 34 Basic Law in connection with Art 839 Civil Code

¹⁰⁴ Legrand, “European Legal Systems are not converging”, (1996) *ICLQ* 52 [70] and further references

¹⁰⁵ Ruffert, M., “Rights and Remedies in European Community Law: A comparative View” (1997) *CMLR* 309 [333]

provided a new procedure. It is now mainly used in connection with immigration and deportation cases.¹⁰⁶ The private law remedies are injunctions, declaration and damages. An injunction can be granted either to forbid a person a certain action or to require him to do something. Interim relief also falls under the heading injunction. The main function of interim relief is to prevent a challenged governmental decision to be enforced, i.e. to achieve a "stay of proceedings".¹⁰⁷ The traditional position that injunctions could not be awarded against the Crown has been reversed in the aftermath of the famous *Factortame* litigation.¹⁰⁸ The new rule 54.10 states that "where leave to apply for judicial review is granted, then if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of proceedings to which the application relates until the determination of the application or until the Court otherwise orders."

The declaration is a non-coercive remedy and failure to comply with it does not amount to contempt of court. The declaration merely states the legal position of the parties but does not change their legal position or rights.¹⁰⁹ Damages are a purely private law remedy. They cannot be awarded in order to compensate an authority's illegal activity unless a private law cause of action can be shown, for example damages for breach of contract or tort.

The availability of these remedies, which are appropriate to judicial review, underlay certain restrictions. These are: the court's discretion, *locus standi* provisions, exclusions of remedies, time limits and the exhaustion of remedies. Under the application for judicial review, the English High Court enjoys a considerable amount of flexibility because of the discretion it is granted in exercising its powers. The Court has discretion on deciding whether to grant leave to apply for judicial review, when deciding about the nature of the preparation and the procedure for the hearing and when deciding whether the application succeeds on the merits when deciding what relief.¹¹⁰ However, it is important to distinguish between different remedies. The remedy of damages, for

¹⁰⁶ Stevens, I., *Constitutional and Administrative Law*, (London: Pitman, 1996), 259

¹⁰⁷ Cane, *An Introduction to Administrative Law*, 1996, 66

¹⁰⁸ *M v Home Office* [1994] 1 AC 377

¹⁰⁹ *supra* n. 107, 69

¹¹⁰ De Smith, *Judicial Review of Administrative Action*, 1995, 805

instance, is not discretionary and will only be awarded if this would have been the case in a private law action. Further, the remedy of declaration is a non-coercive remedy, which means the legal position of the applicant does not change with the granting of a declaration. They are granted when no other order succeeds. When exercising its discretion the Court has taken the "Prima facie approach", which consists of the rule that where an applicant can successfully show that the administrative action is unlawful he is entitled to a remedy. However, in exceptional cases the Court can have "reasons to depart from it" if the non-granting of a remedy is in the public interest.¹¹¹

The drafting of the new Rules in part 54 has raised hopes that the rules regarding the release of evidence and disclosure of documents would be changed in favour of the defendants. "Hitherto, perhaps the single greatest source of inequality between claimant and defendant in judicial review has been their differing positions with respect to information."¹¹² As we shall see in chapter three English law does not recognise a general duty to give reasons. Therefore as opposed to the claimant traditionally the defendant authority has always been in the advantage of having access to the information on which a decision was based. Even though discovery was introduced in 1977 into the Rules of the Supreme Court, discovery was rarely ordered. Orders of discovery required that the court had to be of the opinion that discovery would enable the court to dispose of the case fairly or for the purpose of saving costs.¹¹³ The so-called Protocols Practice Direction has created some hope, which is clearly supportive of the idea that parties should exchange information before initiating proceedings:

"In cases not covered by any approved protocol, the court will expect the parties, in accordance with the overriding objective and the matters referred to in C.P. R. 1.1(2) (a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings".¹¹⁴ However, it is unlikely that this will increase the numbers of orders made for discovery as the intention of the new Civil Procedure Rules are to save time and speed up

¹¹¹ *ibid.*, 808

¹¹² Cornford, "The New Rules of Procedure for Judicial Review" (2000) 5 *Web JCLI*, 7

¹¹³ Order 24 rr 8 and 13(1) of the rules of the Supreme Court

¹¹⁴ as cited in Cornford, *supra* n. 112, 8

litigation. Further, judicial review is supposed to remain a “special jurisdiction” “unlikely to involve a substantial dispute of fact”.¹¹⁵

6. The adversarial procedure

In England the adversarial procedure applies to judicial review cases as well as to private law disputes. More specifically, when deciding on questions of fact or public policy in the course of an application for judicial review the underlying facts on which an application is based are set out by the applicant and then are agreed by the parties.¹¹⁶ Generally speaking the available forms of evidence are affidavit, cross-examination and interrogatories and discovery. Affidavits are sworn written statements and they usually form the sole form of evidence for decisions in public law procedures. In order to speed up the proceedings under the Civil Procedure Rules, part 54 are no pleadings allowed for the purpose of clarifying disputes relating to questions of fact. Further, cross-examination of the party, which produced an affidavit does no longer appear to be contained in Part 54 (which has superseded the former Order 53 of the Rules of the Supreme Court). However, a recent decision by the Administrative Court¹¹⁷ seems to suggest that the court could still receive oral evidence and order the cross-examination of witnesses in judicial review proceedings. Another decision emphasises that “in some judicial review cases cross-examination is regarded not only as appropriate but also essential.”¹¹⁸

Discovery of documents is a procedure to ensure that documents in the possession or custody of a party are disclosed. In actions begun by writ, discovery is automatic and mutual and all parties must make discovery without having been ordered to do so by the court. Discovery consists in serving a list of documents on the other party. However, in applications for judicial review under Part 54 these so called interlocutory procedures are only available following a court order. In practice the courts have only

¹¹⁵ *ibid*, 9

¹¹⁶ De Smith, *Judicial review of administrative action*, 1995, 15 - 085

¹¹⁷ *Regina (G) v Ealing London Borough Council and Others*, March 18, 2002, Times Law Reports

¹¹⁸ *R (Wilkinson) v Broadmoor Special Hospital Authority* (The Times November 2, 2001; (2002) 1 WLR 419

rarely used this procedure.¹¹⁹ The reasoning behind this rather restrictive use of fact-finding procedures is to reduce the length of judicial review procedures and also to “minimise the pressure to disclose government documents.”¹²⁰ Further, English law does not contain a general duty to give reasons for administrative decisions. Despite exceptions, i.e. in statutes which contain the duty to give reasons for a decision made (for instance in the Homeless Persons Act s.8 (4) and the Housing Act 1980, s. 5) this constitutes another obstacle to applicants in judicial review applications.

The burden of proof generally lies with the applicant. The maxim *omnia praesumuntur rite esse acta* comprises the presumption that the authority’s action was legal.¹²¹ Therefore it is the applicant’s duty to present such facts, which are able to challenge this presumption. Because of the above-mentioned restrictions of interlocutory procedures “any conflict between an applicant’s and respondent’s evidence normally has to be resolved in the respondent public body’s favour, on the grounds that the applicant has failed to discharge the onus which he is required to satisfy to show that the respondent has acted unlawfully.”¹²²

These shortcomings in the fact-finding procedure at trial stage have been criticized widely. In Griffith’s view the English have “an interventionist judiciary but a judiciary which is limited by procedures and practices designed to exclude certain sources of information and factual investigation without which the policy choices made by the courts—that is, their decisions—are inevitably less good than they could be.”¹²³ In an article concerned with the work by L. L. Fuller on polycentric disputes¹²⁴, Allison argues, “the judge who responds only to the proofs and arguments of the parties cannot ensure that relevant repercussions are considered or that affected parties other than the litigating parties participate in proceedings.”¹²⁵ These criticisms all result in a call for

¹¹⁹ De Smith/supra n. 116, 15 - 086, Cane, supra n. 101, 96; A concise Dictionary of Law, 1990, 131

¹²⁰ Cane, supra n.101, 93

¹²¹ Wade/Forsyth, *Administrative Law*, 1994, 333

¹²² De Smith, supra n. 116, 15 - 086

¹²³ Griffith, J.A.G., “Judicial Decision-Making in Public Law” (1985) *Public Law* 564 [580]

¹²⁴ Fuller, L.L., “Adjudication and the Rule of Law” (1960) 54 *American society for International Law Proceedings* 1; “The Forms and Limits of Adjudication” (1978), 92 *Harvard Law Review* 353; for further references see Allison, J., “The Procedural Reason for Judicial Restraint”, *Public Law* 1994, 452

¹²⁵ Allison, supra n. 124, 467

reform of the adversarial procedure, which would involve a movement, from the adversarial towards the inquisitorial system. The most famous proposal in this context stems from Lord Woolf: "... I have been concerned as to whether our adversarial procedure, which applies to judicial review in the same way as it applies to an ordinary action, sufficiently safeguards the public. It has been suggested again recently that there is a need for a Minister of Justice. If this is too dramatic a constitutional innovation, I would suggest consideration should be given to the introduction into civil procedure of an independent body that can represent the public. For the want of a better title, I should like to see established a Director of Civil Proceedings who at least in administrative law proceedings would have a statutes similar to that of the Director of Public Prosecutions in criminal proceedings."¹²⁶ The Director of Civil Proceedings would be empowered to initiate proceedings in the public interest, be of help to applicants and present evidence of the public interest to the court. However, this proposal has not been put into practice yet and "such a development seems unlikely for the foreseeable future."¹²⁷

II. *Germany*

1. The development of separate administrative courts in the nineteenth century

The administrative courts in its current form are the result of a historical compromise, which had to solve the tensions between two main competing models of administrative justice and the tensions caused by Germany's federal structure. The first forms of administrative courts exercised administrative justice (*Administrativjustiz*). Similar to the Conseil d'Etat they were part of the administration. The administration controlled itself and a variety of civil servants could hold office. To some extent this administrative self-control protected the interests of the citizens in that it ensured the legality of administrative action. However, its function cannot be compared with the legal protection of individual rights as provided in the modern Administrative courts.¹²⁸ The administration was judge in its own cause. This was particularly true in the case of policing, where it was almost impossible for individuals to obtain favourable judgments.

¹²⁶ Woolf, H., "Public Law-Private Law: Why the Divide? A Personal View" (1986) *Public Law*, 220 [235-236]; *Protection of the Public A New Challenge* (London: Stevens & Sons, 1990) 109

¹²⁷ Birkinshaw, P., *Grievances, Remedies and the State*, 1994, 259

In the nineteenth century the political climate changed which led to an increasing awareness for human rights protection and the development of the principle of the *Rechtsstaat*.¹²⁹ In addition, the intensity and quantity of administrative interference with individual rights had increased. Towards the middle of the nineteenth century liberal groups increasingly demanded the effective control of administrative action by independent courts. The Paulskirche constitution contained in its article 182 the quest for judicial control of administrative action in the ordinary courts as opposed to the self-control through the administration (*Administrativjustiz*). Further, courts should no longer carry out administrative functions. However, the revolution failed in 1849 due to the refusal of Friedrich Wilhelm IV and with it the reform developments came to a halt for almost two decades.

However, the quest for reform of the administrative justice in the form of independent judicial control returned and most famously found its expression in the controversial opinions of Otto Bähr (1817-1895) and Rudolf von Gneist (1816-1895). Otto Bähr supported the view that the state was part of society and should therefore be judged in the same courts as individuals. Similarly other famous liberal legal scholars such as Feuerbach, Brinkmann, Siebenpfeiffer and others supported the idea of an independent control of the administration through the ordinary courts.¹³⁰ The ordinary courts were dominated by judges stemming from the burgeois part of society whereas the civil service still remained in aristocratic hands. Another group, partly liberals partly conservatives favoured the French model of the *Conseil d'Etat* and hoped to influence the procedures and the choice of judges from the perspective of the administration.

Rudolf von Gneist, on the contrary stood for a separation of ordinary and public law courts because in his view state and society were different entities. Von Gneist was not so much concerned with the protection of individual rights but with the objective control of public authorities according to public law. Von Gneist had carried out research into the English and French legal systems, which he published in his book "Der Rechtsstaat". Accordingly, he considered the judicial control of administrative action as practised in

¹²⁸ Hufen, F., *Verwaltungsprozessrecht* 3rd edition (München: C.H. Beck Verlag, 1998) 27 pp.

¹²⁹ Stolleis, M., *Geschichte des öffentlichen Rechts, Zweiter Band, Staatsrechtslehre und Verwaltungswissenschaft 1800-1914*, (München: C.H. Beck Verlag, 1992) 241

England as an essential element of the *Rechtsstaat*.¹³¹ He succeeds with his reform proposals at the 12th German lawyers convention (12. *Deutscher Juristentag*, 1875). The German model of administrative courts was therefore a compromise between the control by ordinary courts as in England and the administrative justice as carried out by the French model. The creation of Administrative courts can be closely connected to the failure of the 1848/49 revolution. This victory of the liberals in establishing independent courts can be interpreted as a compensation for a failed revolution. It marks the beginning of a trend in Germany towards the juridification of society (with exceptions during the Nazi regime), which has steadily developed into the 20th century.

2. The development of a system of substantive Administrative Law

The nineteenth century in Germany was not only marked by the constitutional movement but also by the establishment of the substantive Administrative law (*Verwaltungsrecht*). The administrative tradition in Germany was stronger than the political confidence of society. Accordingly, German public lawyers of international reputation were mainly to be found in the field of Administrative law such as Robert von Mohl, Lorenz von Stein, Rudolf von Gneist and Otto Mayer.¹³² After the failed revolution the political energies of the liberal forces in society began to concentrate on the establishment of the *Rechtsstaat*. The idea of the German *Rechtsstaat* is often mistranslated as the rule of law, but it contains more than its English counterpart. The meaning of *Rechtsstaat* was synonymous with a system of Administrative law, which was shaped by academic experts. The relevance of the principle of the *Rechtsstaat* was seen in the fact that it eliminated the exercise of arbitrary power. In the years after the revolution the development of a substantive administrative law as a separate discipline, taught at Universities and independent from constitutional law became the central work of major scientific lawyers. Due to the failure of the constitutional reforms Administrative law developed independently from constitutional law. The development of the strong Administrative law tradition can therefore be seen as a compensation for the political

¹³⁰ *ibid*

¹³¹ Gerstner, S., *Die Drittschutzdogmatik im Spiegel des französischen und britischen Verwaltungsverfahrens* (Berlin: Duncker & Humboldt, 1995) 130

and constitutional shortcomings after the revolution. The monarchy, the aristocracy, the army and the churches represented the state. On the other side was the bourgeoisie who wanted to ensure that the state fulfilled its functions and at the same time kept within the legal boundaries. The development of a system, a theory of substantive Administrative law became the passion of famous lawyers. Administrative law was separated from the difficult question of Constitutional law, it developed after 1850 into its own science. There was opposition from Robert von Mohl and Lorenz von Stein, for instance who argued Administrative law could not be seen in isolation from Constitutional law. However, the independent development of an Administrative law system could not be prevented¹³³ and it seemed to be the best compromise in securing the *Rechtsstat* at the time. In 1865 Carl Friedrich von Gerber argued that the discipline of public law would suffer as a scientific subject if there was no separate category for the rights of the *Landstände* (body of representatives of various classes) and the provisions against the foot and mouth disease.¹³⁴ As a result the Administrative law of the nineteenth century developed into an academic playing field, which was somewhat distant from the field of constitutional law. What remained was an area lacking practical and political associations and the task to categorise it in abstract and dogmatic terms.¹³⁵ Due to this lack of political or substantive content the concept of the *Rechtsstaat* was merely of a formal nature. Otto Mayer defined the *Rechtsstaat* in 1895 as follows:

“The word [*Rechtsstaat*] appeared after the thing was already under way. It seeks to describe something that does not yet exist, at least not in a finished state, but has yet to come about. That is why the concept varies so greatly, because everyone is inclined to invest it with his own juridical ideals.”¹³⁶ Mayer’s idea of the *Rechtsstaat* entailed the progressive legislative shaping of the material and organisational administrative law for

¹³² Stolleis, supra n. 129, 229

¹³³ *ibid*, 383

¹³⁴ Gerber, C.F., *Grundzüge eines Systems des deutschen Staatsrechts*, (Leipzig: 1865), 233 “die Reinheit und Selbständigkeit des Staatsrechts würde leiden, wenn man dasselbe wissenschaftliche system für den Platz der Darstellung der Rechte der Landstände und der Bestimmungen über Vorkehrungen gegen die Rinderpest ansehen wollte... So würden wir es gewiss in diesem Sinne als einen Fortschritt begrüßen, wenn endlich auch das Verwaltungsrecht in seiner Selbständigkeit erkannt und von der Verbindung mit dem Staatsrecht gelöst wird.”

¹³⁵ Stolleis, supra n. 129, 383

¹³⁶ cited in Böckenförde, E.W., *State, Society and Liberty* (New York, Oxford: University Press, 1992)

the protection of civil liberties and development of a system of effective, judicial legal protection against administrative authorities.¹³⁷

Forerunners of this realisation of the idea of the *Rechtsstaat* were a variety of early developments on state level of which the introduction of the first Administrative Court (*Verwaltungsgerichtshof*) in Baden in 1863 and Preussen (*Oberverwaltungsgericht*) in 1875 were the beginning of independent specialised courts dealing with administrative matters.¹³⁸ Baden had started reorganising its administration earlier than other states and reacted to the industrialisation and increase in the population as well as to the liberal quest for an independent judiciary in administrative matters.¹³⁹ A recent study has described the administrative courts as a late child of the (failed) revolution in 1848/49.¹⁴⁰ Sydow's article identifies the direct origin of the administrative courts in the discussions on the *Paulskirche* constitution. In particular in Baden first legislative drafts dated back to 1848, which contained the establishment of first instance Administrative courts and a higher Administrative, courts (*Verwaltungsgerichtshof*). These proposals were based on a compromise drafted in 1835 by Ludwig von Minnigerode, the president of the Highest court in *Hessen*.¹⁴¹ In order to find a compromise between the position of the government which was opposed to the introduction of judicial review in the ordinary courts and those who favoured the idea of independent judicial control he suggested the introduction of an independent institution which would not act as an ordinary courts but which would at the same time would not be staffed with civil servants but with lawyers. This reform proposal formed the basis for those first attempts in Baden to establish an independent Administrative court as early as 1848. However, the constitution of 1848 did not opt for an independent

¹³⁷ Mayer, O., *Deutsches Verwaltungsrecht*, (München und Leipzig: 1895) 61-65

¹³⁸ Hufen, F., *Verwaltungsprozessrecht*, 1998, 27 pp.

¹³⁹ Stolleis, supra n. 129, 293

¹⁴⁰ Sydow, G., "Die Revolution von 1848/49: Ursprung der modernen Verwaltungsgerichtsbarkeit" (2001) *Verwaltungs Archiv* 2001, 389

¹⁴¹ von Minnigerode, L., *Beitrag zur Beantwortung der Frage: Was ist Justiz- und was ist Administrativezache?* (Darmstadt 1835), 74 in Sydow, supra n. 140 at 934: "Wenn aber der Staatsregierung so viel daran gelegen ware, das die sogenannten Administrativ-Justiz-Sachen von einer besonderen Behörde [statt von den ordentlichen Gerichten] entschieden wurden, so müsste dieselbe doch als wahrhaftige Justiz-Behörde constituirt, also von der Administration ganz getrennt, ganz unabhängig und nur mit Rechtsgelehrten – keineswegs aber mit Individuen besetzt seyn, welche zugleich in der Administration zu functionieren hatten."

Administrative Judicial review system but opted for the control through the ordinary courts.

The separation of the three powers became a dominant feature of government. Similar to the French system of Administrative Courts with the *Conseil d'État* at the top of the hierarchy the first lower Prussian Administrative Courts that were established between 1872 and 1875 maintained links with the administration. This was a system of Administrative Courts with county committees (*Kreisausschüsse*) at the lowest level, regional committees (*Bezirksausschüsse*) in the middle and the Prussian Supreme Administrative Court (*Preußisches Obervwaltungsgericht*) at the top. Only the Supreme Administrative Court was totally separated from the administrative authorities. As a consequence the scope of review in the lower Administrative Courts included the power to review the expediency or policy (*Zweckmäßigkeit*) of administrative decisions. The model of the separation of powers was therefore not strictly applied. Other states except for *Württemberg* copied the Prussian model. The lower administrative courts were abolished during the reign of the National Socialist Government.¹⁴²

Compared to the application of the doctrine of the separation of powers in England or France one particular feature of the German Empire had to be taken into account and soon replaced the classic distinction of the separation of powers. This was the division of functions on a federal level. The functions of the organs did not comply with any ideal model. It was described as a mixed system. This mix of functions ascribed to different organs could still be seen during the Weimar Constitution which was described by French critics as “lourd et embarrassé.”¹⁴³ The Weimar Constitution provided for a popular referendum (Art 73), and ascribed immense powers to the *Reich* president. Article 48 was the most controversial provision in the constitution. It stated that “in the event that the public order and security are seriously disturbed or endangered, the *Reich* president may take measures necessary for their restoration, intervening, if necessary,

¹⁴² Singh, M.P., *German Administrative Law* (Berlin, Heidelberg: Springer Verlag, 1985) 10-11

¹⁴³ Stern, K., *Staatsrecht II*, Band II, (München: C.H.Beck Verlag, 1980), ch 36 I, 6 with further references

with the aid of the armed forces.” This article later contributed to the “legal” entry to the dictatorship of Adolf Hitler and is therefore called the ”suicide clause”.¹⁴⁴

3. The constitutional basis for judicial review

The crowning principle of German constitutionalism after 1949 became the principle of the substantive *Rechtsstaat*. Article 20 III Basic Law expresses clearly that law and justice bind all three powers. This constitutional order is based on values and all acts of the legislature, the executive and the judiciary must be carried out in the light of these values. *Böckenförde* defines this substantive content of the *Rechtsstaat* as follows:

“The logic of thinking about values and justice demands that the constitution conceived along the lines of the material *Rechtsstaat* should lay claim to an absolute validity extending to all spheres of social life. It thus sanctions certain basic politico-ethnic convictions, giving them general legal validity, and discriminates against others that run counter to them. It no longer guarantees liberty unconditionally by way of formal legal demarcation; it does so only within the fundamental system of values embodied in the constitution.”¹⁴⁵ This change from a formal to a substantive concept of the *Rechtsstaat* has its roots in the abandonment of juridical positivism as a response to the abuse of law during Germany’s years of Nazi dictatorship. As a result the substantive *Rechtsstaat* protects the Basic rights as “overriding principles of justice which claim “validity for all spheres of law”.¹⁴⁶

The principle of the *Rechtsstaat*¹⁴⁷ as applied today contains the guarantee to effective judicial protection (Article 19 IV Basic Law), the independence of the judiciary (Article

¹⁴⁴ Snyder, L.L., *The Weimar Republic* (Princeton, New York: Van Nostrand: 1966) 42/43

¹⁴⁵ Böckenförde, *State, Society and Liberty*, 1992, 67

¹⁴⁶ *ibid.*, 66-67

¹⁴⁷ as contained in Articles 20 and 28 of the Basic Law

Article 20

(1) The Federal Republic of Germany shall be a democratic and social federal state.

(2) All public authority emanates from the people. It shall be exercised by the people through elections and referenda and by specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

Article 28

92, Article 97 Basic Law), the guarantee of the jurisdiction by a lawful judge (Article 101 basic Law), the right to a court hearing (Article 103 Basic Law), the principle of equality (Article 3 Basic Law), and the principle of proportionality and legitimate expectation (see Articles 48, 49 Law on Administrative Procedure).¹⁴⁸

In 1960 the Federal Law on Administrative Courts established a uniform system of Administrative Courts in Germany. The modern form of Administrative Courts maintains no more links with the administration and as a reaction to historical developments now embodies the stricter form of the doctrine of the separation of powers. Like English Courts, German Administrative Courts do not review questions of policy (*Zweckmäßigkeit*). This would be regarded a violation of the principle of the separation of powers. The Law on Administrative Courts provides for this stricter application of the doctrine by providing for a separate review procedure within the administration (*Widerspruchsverfahren*), which is mandatory for the suits for invalidity of an administrative act (*Anfechtungsklage*) or the mandatory suit (*Verpflichtungsklage*). Within this procedure questions of policy can be reviewed by the administration.

Art 19 IV of the Basic Law is of particular importance as it is the cornerstone of the *Rechtsstaat*. It guarantees judicial protection against infringements committed by the public authorities. Under the general clause of Section 40 of the Statute relating to Administrative Courts (*Verwaltungsgerichtsordnung - VwGO*) all public law disputes which are not constitutional in nature fall within the jurisdiction of the administrative courts. The power of the courts is therefore not discretionary but clearly laid down in statute law. The inherent power of the English judiciary to adjudicate is strictly rejected by civil law systems. So at this early stage of evaluation one can observe fundamental differences between the Common law system and the Continental legal system, which have been described as “irreducible”.¹⁴⁹ The modern basis for judicial review of administrative action is the statute on Administrative Courts 1960 which itself is based on the relatively modern constitution of 1949. Therefore legislation supported by the

(1) The constitutional order in the Länder shall conform to the principles of the republican, democratic and social state governed by the rule of law within the meaning of the Basic Law.

¹⁴⁸ Hufen, F., *Verwaltungsprozeßrecht*, 1998, 4; see Chapter 3 below for a more detailed discussion of these principles

¹⁴⁹ Legrand, P., *European Legal Systems are not converging*, (1996) *ICLQ* 52 [74]

constitution is the immediate basis of judicial review of administrative powers in Germany. The central norm is Art 19 IV of the Basic Law, which guarantees judicial protection to the individual. Further it has been expressed in the Basic Law itself that the basic rights bind the executive in the same measure as the legislative and the judiciary and are directly enforceable law. Besides, the Basic Law expressly subordinates the executive to legislation by a clear provision that law and justice shall bind the executive. (Art 1(3) and 20). It also treats this provision as a basic principle, which cannot be changed even by an amendment of the Basic Law. It falls under the so-called "eternity" clause in Art 79(3), which makes it impossible to alter Art 1(3) and Art 20 Basic Law. Certainly the comparatively weak position of the executive and the strong protection of the individual in Germany are a direct consequence out of the experiences during the Nazi-Regime. Even though the modern German constitution had famous predecessors which influenced its drafting, the current model has proven to be the most successful with a population who has great faith in the rights guaranteed in it through judicial protection.

Judges are recruited from amongst all applicants who have passed their second state exam and therefore are automatically eligible for any position in the judiciary. No special expertise in Administrative Law is required. However, before taking the second state exam, German lawyers train within the civil service and some general training (up to six months) within the administration is provided. This is, however not very much so that most Administrative Court Judges have little experience within the administration. It can be argued that they are highly qualified but maybe sometimes too theoretical and dogmatic in their approaches.

However, by comparison with English Courts, the scope of review of the German Administrative Courts is wider. Indicators of this wider review is the fact that German Administrative Courts apply the inquisitorial principle which enables the Court to collect and demand evidence as it wishes. It prepares its own records and takes a very active role in the proceedings. Further, no distinction is drawn between illegality with or without jurisdiction and the courts fully review the fact-finding procedure of the administration. The basis for this approach is laid down in the Constitution itself, which provides in Art 1 III that "the following fundamental rights shall bind the legislature, the

executive and the judiciary as directly enforceable law". This rule imposes the duty on the courts to enforce such rights against the executive and the legislative branch. The German constitution does not embody the principle of Parliamentary sovereignty but provides for constitutional review of all legislation.

However, the intense scrutiny approach of the German Administrative Courts has been the focus of criticism for a long time. The strict control of the administration is a feature of the interpretation of the doctrine of the separation of powers. The idea of checks and balances in its present form is clearly applied in favour of the judiciary. This is particularly true in cases, which involve a strong Basic right element. However, it is generally recognised that the clear separation of powers should not be violated. The Constitutional Court has expressed that no organ of the state is permitted to have superiority over another and no organ can be deprived of its competence necessary to fulfil its constitutional obligations. Any violation of the core sphere of any of the three powers will violate the separation of powers. However, the position of the Constitutional Court in this matter is not very clear. In a recent decision the Court established that the principle of separation of powers does not constitute an obstacle to the power of the legislature to enact planning permission. The grant of planning permission is traditionally within the sphere of the executive. The Court found a loophole in Art 14 III Basic Law, which allows for expropriations to be carried out by way of legislation. The planning permission at stake required an expropriation; therefore a legislative act for the planning permission was justified in the view of the Court.¹⁵⁰

4. The grounds of review

Judicial Review of Administrative Action in Germany falls within the category of *Verwaltungsprozeßrecht* (Administrative Procedural Law) as opposed to the *Allgemeines* and *Besonderes Verwaltungsrecht* (General and Special Administrative Law). The constitutional basis for judicial review of administrative action is Art 19 IV of the Basic Law which is of great importance in Administrative Law reads as follows:

¹⁵⁰ BVerfGE 95, 1:

“Should any person’s right be violated by public authority, recourse to the court shall be open to him [...]”. Art 19 IV not only guarantees access to justice but also the scope of judicial review (*Kontrolldichte*). The scope of judicial review is closely connected with the relationship between the executive, the legislative and the judiciary and constitutes not only an issue of Administrative Law but also a constitutional one.¹⁵¹

One of the major differences between the Common law and Civil law approach is the fact that judicial action under the Civil law must be based on statutory grant of power. Common law courts on the other hand "reason instructively, ascribing much importance to facts and past decisions. In this they differ from the civil law courts which, because their power of adjudication is derivative, must operate within a predetermined, legislated, conceptualised system."¹⁵² In Germany the legal basis is now laid down in the modern Law on Administrative Courts 1960 (*Verwaltungsgerichtsordnung*), which consists of 195 Articles. The Law on Administrative Courts covers both the judicial review of administrative action as well as the non-judicial complaints procedure within the administration, which is a prerequisite for some of the lawsuits discussed below¹⁵³. This is a federal statute which is further supplemented by state legislation on minor issues such as name and seat of Administrative Courts, review of delegated legislation etc. and some regional peculiarities (for instance the non-judicial committee for complaints procedures within the administration - *Widerspruchsausschüsse* - in Hessen) which will be dealt with later on. Art 173 contains a general reference clause to provisions in the Law on Courts (*Gerichtsverfassungsgesetz*) and the Civil Procedure Act (*Zivilprozeßordnung*), which shall apply accordingly in cases of gaps in the Law on Administrative Courts. Since 1990 the Law on Administrative Courts including some extra temporary regulations applies to the five new *Länder* from the former German Democratic Republic as well.¹⁵⁴ A consequence of the statutory basis of the power of the court is that the courts do not exercise any discretion when granting or refusing a remedy. Therefore the courts cannot deny a remedy if all conditions for the grant of a remedy are satisfied. Common law remedies in public law on the contrary are

¹⁵¹Schwarze, *Verwaltungsrecht unter europäischem Einfluß*, 1996, 197

¹⁵² Legrand, *supra* n. 149, 52

¹⁵³see § 68 et seq on the Law on Administrative Courts 1960

¹⁵⁴ Art 8 and 45 of the Treaty of Union and annexe I chapter III, part A III, No.1 lit. t and u, Nr. 6, Part IV No. 2c

discretionary remedies and the public interest as well as the support of a functioning administration plays an important role in the court's exercise of discretion.¹⁵⁵

However, all the grounds of review in German administrative law have also been developed by the courts. Like English Courts in Judicial review proceedings the German courts do not review the merits of a decision. Decisions on the merits of an Administrative Act lie within the jurisdiction of the administration under the complaint procedure.

Under the first heading of formal legality of the administrative action the courts review questions of competence, procedure and form. Competence describes the substantive, functional and territorial jurisdiction of the administrative authority. The substantive competence refers to the choice of the responsible authority, i.e. a federal or state authority or municipal authority or other administrative body. The functional competence refers to the hierarchical structure of the authorities. The local competence regulates the local borders of the authorities. Questions of competence can be very difficult due to a variety of statutes and delegated legislation and the federal structure of the German authorities.¹⁵⁶ One of the most important procedural principles as in English law, under the German Law on Administrative Procedure 1976 is the right to a hearing.¹⁵⁷ Another procedural defect could be the non-compliance with a statute, which requires the participation of another authority.¹⁵⁸ Formal requirements are to be found in provision, which require the administrative decision to be precise, and further administrative acts have to include reasons.¹⁵⁹ However, not all illegal administrative acts are void or voidable. Art 44 of the Administrative Procedure Act now contains a catalogue of those administrative acts, which are to be considered void.¹⁶⁰ This

¹⁵⁵ De Smith, *Judicial review of Administrative action*, 1995

¹⁵⁶ Erichsen H.U., Martens, W., *Allgemeines Verwaltungsrecht*, 8th edition, (Berlin, New York: Walter de Gruyter 1988) 228

¹⁵⁷ see Art 28 et seq Law on Administrative Procedure 1976 and exceptions in section 2 and 3

¹⁵⁸ see Art 36 Law on Planning

¹⁵⁹ see Art 37 and 39 (exceptions in section 2) Administrative Procedure Act 1976

¹⁶⁰ see Art 44 Administrative Procedure Act 1976: An Administrative Act is void: 1. if it is in writing, but the issuing authority can not be identified; 2. if its issue does not comply with the statutory requirement of the form of a certificate; 3. Non-compliance with Art 3 No. 1 (local competence for questions regarding immovable property or legal relationships attached to a place); if for factual reasons no one could exercise it; 5. if it requires the performance of a criminal act 6. if it is against good morals

catalogue contains formal and material defects. Only under these circumstances and Administrative Act is rendered to be void. Otherwise it is possible for the authorities to remedy a defective Administrative Act under Art 45 Law on Administrative Procedure. Nr 3 of that Article deals with the issue of hearing which can be remedied after the decision of the administration by granting a hearing to the applicant. An Administrative Act is only voidable if the illegality has a consequence and the Act cannot be interpreted. Generally speaking, Administrative Acts suffer rather from material than procedural defects which lead to the annulment.¹⁶¹

The area of substantive legality is contained in Art 20 III of the Basic Law. Accordingly, the executive is under a duty to observe the law. This principle is of great importance when reviewing the legality of administrative action. Both, beneficial Administrative Acts and those, which impose a duty on the citizen, may not contradict the law (*Vorrang des Gesetzes*) and those Administrative Acts, which impose a duty on the citizen, require a statute, which empowers the authorities to issue such an act (*Vorbehalt des Gesetzes*). The exemption of beneficiary Administrative Acts from the requirement of a statute has been abandoned by the Constitutional Court, which extended this requirement to all relevant areas.¹⁶² However, most statutes confer discretion on the authorities, which guarantee a certain amount of liberty to the administration. Further Art 1 section 3 Basic Law binds the executive directly to observe the Human Rights provisions in Art 1 to 19. This provision cannot be altered which is laid down in Art 79 III of the Basic Law. Section 79 III is sometimes referred to as the "Eternity Clause", i.e. a clause which guarantees the rights contained in Art 1 and 20 for an unlimited period of time. Art 1 III is a direct consequence of the weaknesses the *Weimar* Constitution suffered from in so far as it binds all three powers in the state to protect the provisions of the Basic Law, particularly the first 20 Human Rights Provisions. Under the *Weimar* Constitution the Human Rights Provisions had a merely declaratory function. The danger that the Administrative authorities violate Human Rights Provisions is larger than within the legislative sphere, because of time pressures in reaching decisions. These Human Rights provisions play an important role in two ways. First of all, when reviewing the administrative acts review if relevant the

¹⁶¹ Erichsen/Martens, *Allgemeines Verwaltungsrecht*, 1988, 238

constitutionality of the enabling acts, i.e. the statute on which the administrative act is based. Here the administration is bound by constitutional principles in a more indirect way.

Secondly, the activity of the authorities in exercising their discretion will be bound directly by constitutional principles. The principle of equality, proportionality and legitimate expectation play a major role in the review of discretionary powers.¹⁶³ According to Article 114 Law on Administrative Courts the courts examine whether the administrative act or its refusal or omission is illegal because the statutory limits of the discretion have been exceeded or because the discretion has not been exercised for the purpose of the authorisation. Art 114 was amended in 1996 and it is now permissible for the authority to complete its discretionary decision during the judicial review proceedings. The question whether the exercise of discretion was carried out in an illegal manner is further defined in statute, this time in the Law on Administrative Procedure 1976 in Art 40 which lays down: If an administrative authority is authorised to act in its discretion, it has to exercise its discretion in consonance with the purpose of the authorisation and the legal limits of the discretion to be observed.

Three forms of illegality can be found in German Administrative Law: Excess of discretion failure to exercise discretion and abuse of discretion. Excess of discretion in German Administrative Law is comparable with the principle of *ultra vires* in English law. However, abuse of discretion is an illegality within the granted powers. Excess of discretion and the failure to exercise discretion where the authority assumed that it was bound to decide in a particular way are treated as similar. More important is the abuse of discretion. The administration is obliged to be guided only by rational considerations. It is not permissible to take personal motives into account and only use such considerations, which are of use to the aim of the statutory grant of discretion.

German Administrative Law has developed a further limitation of the exercise of discretion by recognising the concept of “reduction of discretion to zero”. According to this concept there are cases in which despite the discretion granted to the authorities,

¹⁶² BVerfGE 49, 89, 126

only one course of action will be legal. In these cases the discretionary freedom is seen to develop into a duty to act in a particular way. The groundbreaking decision was delivered by the *Bundesverwaltungsgericht* in 1960¹⁶⁴. Here the builder of a house was misusing the house so that it caused harm to legally protected interests of the neighbours. Even though the intervention by the building inspectors was discretionary the court held that in cases of high intensity of disturbance or danger the only legal measure was the exercise of the authorities power to intervene.

German Administrative Law has recently undergone changes in order to accelerate the court procedures¹⁶⁵ and basic foundations of German Administrative have been questioned.¹⁶⁶ In Environmental law Administrative authorities have gained more discretionary powers.¹⁶⁷ The doctrine of discretion in German Administrative Law contains a peculiarity not known in any other member state or in European Community Law: Undefined legal concepts which are determined within the facts in a decision. Only in clearly defined circumstances has the Federal Administrative Court granted some subjective area of evaluation to the authorities, which are not fully reviewable.¹⁶⁸ However, a decision by the *Bundesverfassungsgericht* in 1990¹⁶⁹ has revived a long-standing debate about these concepts within the elaborate doctrine of discretion and sparked off a discussion about a closer orientation on European models.¹⁷⁰ The decision concerned the publication of a pornographic novel titled “Josefine Mutzenbacher” telling the life story of a prostitute in Vienna around the turn of the century. According to the law on distribution of writings dangerous to the youths the Federal Scrutiny Agency

¹⁶³ for a detailed discussion see Chapter 3 below

¹⁶⁴ BVerwGE 11, 95, 97

¹⁶⁵ see the reform of the Law on Administrative Courts 1960 in the statute of 1.11.1996.

¹⁶⁶ Sendler, H., “Über richterliche Kontrolldichte in Deutschland und anderswo”, (1994) *NJW*, 1511 (1520); H.P. Ipsen, Thomas von Dannwitz, “Verwaltungsrechtliches System und Europäische Integration” (1996) *DVBl* 627

¹⁶⁷ Schwarze, *Das Verwaltungsrecht unter europäischem Einfluß*, 1996, 793

¹⁶⁸ Decisions in examinations, assessment of personnel in Civil Service, decisions of valuation by experts, for instance the Federal Scrutiny agency under the Law about Distribution of Writings Dangerous to the Youth, policy decisions of the administration

¹⁶⁹ BverfGE 83, 130 - *Josefine Mutzenbacher*, The Constitutional Court held that the prohibition of a writing needs to be balanced with the freedom of art and that the administration has no subjective element of evaluation (*Beurteilungsspielraum*) and that therefore the decision is fully reviewable.

¹⁷⁰ Schwarze, *Das Verwaltungsrecht unter europäischem Einfluß*, 1996, 794; Jan R. Sieckmann “Beurteilungsspielräume und richterliche Kontrollkompetenzen” (1997) *DVBl* 1997, 101; Horst Sendler, “Über richterliche Kontrolldichte in Deutschland und anderswo”(1994) *NJW* 1994, 1511 (1520)

included the book into a list, which sets out certain limitations regarding the dissemination of those books, which are considered dangerous to youths. An exception is provided for books considered as art. The applicant considered the book to be a work of art protected under Art 5 of the Basic Law and required the authorities to delete its name from the list. The relevant issue for the area of Administrative Law is the way in which the Constitutional Court dealt with the sensitive area of undefined legal concepts, here the question whether the book falls within the category of “dangerous to youth” and the question connected to that whether the Scrutiny Agency had any subjective area of evaluation. As a result the Court held that there was no area of subjective evaluation and widened the scope of judicial review in this case in order to protect the constitutional right.

5. Remedies

Before describing the standard procedures available to the aggrieved citizen in the German Administrative Courts it is necessary to point out that the division of remedies and procedures cannot simply be applied to the German system. Again, conceptual differences require some explanation. Unlike the English legal system, the German system draws a clear distinction between substantive and procedural Administrative Law. As pointed out before the rules on State liability¹⁷¹ for instance and those concerning the restitution of levies¹⁷² are dealt with in substantive provisions rather than under a procedural heading, therefore belonging to the “rights-side” of the issue.¹⁷³ The other side will be purely procedural. The somehow separate level remedies, also found in Community, law finds no equivalent in German law. Again, this conceptual difference deeply rooted within the concept of a *right* and the constitutional protection of the individual under Art 19 IV Basic Law, which guarantees recourse to the courts. This principle finds its clear expression in Administrative Law and what is known as the doctrine of the *Schutznorm*, which is of great relevance at the standing stage. This subjective Public Law Right enables the citizen to pursue its own interests with the help

¹⁷¹ Art 34 Basic Law in connection with Art 839 Civil Code

¹⁷² Art 48, 49 Law on Administrative Procedure

¹⁷³ Ruffert, “Rights and Remedies in European Community Law: A comparative view”, (1997) *CMLR* 307

of the legal order.¹⁷⁴ At the same time the doctrine of the *Schutznorm* constitutes a hurdle with the result that a norm can only confer rights on the individual under certain circumstances. Its roots go back to the beginning of this century. The concept is applied by administrative Courts and has found wide acceptance amongst academic writers.¹⁷⁵ The concept is concerned with the question whether the legislator has intended to confer individual rights on the citizen. To detect such subjective rights within a legal statute the provision in question has to be interpreted. Three conditions have been developed according to which a statute confers a subjective right on the individual. (1) A public law statute has to contain a particular duty to act on the side of the administration. (2) The statute must have partly been enacted to at least satisfy some individual interest. (3) The applicant must be granted the legal power to exercise such rights. Naturally, the compliance with these conditions has caused the courts some difficulties. Further, with a view to the requirements of Community law and the concept of direct effect clashes have been unavoidable¹⁷⁶ and this position in German law will have to adapt.

Depending on the type of grievance there are six different types of action in German Administrative Law, which are governed by Arts 42 and 43 of the Law on Administrative Courts. The *Anfechtungsklage* is an action to annul an Administrative Act and roughly equivalent to the prerogative order of certiorari, the quashing order. The most important prerequisite for the availability of that action is the existence of an Administrative Act. Art 35 of the Law on Administrative Procedure governs the latter. It is defined as “every order, decision or other sovereign measure taken by an authority for the regulation of a particular case in the sphere of public law and directed at immediate external legal consequence”. The concept of the Administrative Act first appeared in the early 19th Century German Public law literature and was a direct translation of the French term *acte administratif*, which in French Law covered both the activities of the administration whether in the field of private or public law. In Germany, however the term was only used in pure Public Law matters. The concept of the Administrative Act was originally of great importance with regard to the availability of remedies in Administrative Courts. Only if the activity of the administration could be

¹⁷⁴ Erichsen/Martens, *Allgemeines Verwaltungsrecht*, 1988, 155

¹⁷⁵ *ibid.*, p.155 with further references

classified as an Administrative Act, a remedy was available to the applicant. This concept was laid down in the Weimar Constitution as well as in the Regulation on the Administrative Jurisdiction in the British Occupation zone after the Second World War.¹⁷⁷ However, the relevance of the concept was reduced by the introduction of the Law on Administrative Courts 1960 which provides for judicial review proceedings in all non-constitutional public law disputes, regardless whether an Administrative Act is at stake.¹⁷⁸ The Administrative Act still takes a special position within the forms of administrative action. Three of the six causes of action are designed for legal disputes relating to Administrative Acts.

In addition to the Act of annulment (*Anfechtungsklage*) the Law on Administrative Courts provides for an action to compel the authorities to grant an Administrative Act (*Verpflichtungsklage*). This means that the courts may direct the authorities to enact a certain decision. Both actions require the applicant to apply for the non-judicial complaints procedure within the administration (*Widerspruchsverfahren*) and obtain a reply (*Widerspruchsbescheid*)¹⁷⁹ The third type of action provided for the challenge of an Administrative Act is a declaration that the Administrative Act, which does not exist any more, was illegal (*Fortsetzungsfeststellungsklage*)¹⁸⁰.

For other forms of administrative action other than Administrative Acts an action for a declaration (*Feststellungsklage*) is provided for by the Law on Administrative Courts, which is subsidiary to the general action (*Leistungsklage*). The last form of action is the norm control regarding local byelaws as provided in Art 47 of the Law on Administrative Courts. This action is only available in the Higher Administrative Courts (*Oberverwaltungsgericht*).

An important effect of the non-judicial complaint and the action for annulment is their automatic suspensive effect governed by Art 80 of the Law on Administrative Courts.

¹⁷⁶ Case C-431/92, *Commission v. Germany*, [1995] ECR I-2189, para 43 (Environmental Impact Assessment Directive); Case C-433/93, *Commission v. Germany*, [1995], ECR I- 2305, para 18

¹⁷⁷ Art 107 Weimar Constitution,; Art 25 Regulation N0 165 of the British Military Government on the Administrative Jurisdiction in the British zone

¹⁷⁸ Erichsen/Martens, *Allgemeines Verwaltungsrecht*, 171

¹⁷⁹ see Arts 68 et seq of the Law on Administrative Courts

¹⁸⁰ see art 113 section 4 Law on Administrative Courts

As a result of the suspensive effect the Administrative Act cannot be enforced. However, there are exceptions to that general rule and in particular cases there is no automatic suspensive effect. The protection under Art 19 IV Basic Law however had direct influence on the provisions in Art 80 and provides for the restoration of the suspensive effect if the interests of the applicant justify this. This rather intense judicial protection however, collided with the jurisprudence of the European Court of Justice in its interim relief rulings.¹⁸¹

6. The inquisitorial procedure

In judicial review procedures of administrative decisions the inquisitorial procedure applies (*Inquisitionsmaxime*). Article 86 of the Law on Administrative Courts lays down that the court examines the facts of a case suo moto; the participants are called upon to co-operate. It is not bound by the pleadings and evidence of the participants to the dispute. Similar to criminal proceedings or in proceedings in the finance or social courts and others the public interest in a correct decision requires an objectively correct and complete establishment of the facts, which underlie the decision. This stands in contrast to the civil procedure where the parties are required to present their versions of the facts to the court. The main emphasis of the inquisitorial process is completeness, openness and neutrality of the establishment of the facts. However, as mentioned above the participants are called upon to cooperate. The participants have to contribute to the fact-finding process in particular in questions of fact, which they have easy access to because they lie within their sphere. The procedure is flawed if the court does not comply with its duty to investigate the facts properly. The court may not request data or facts, which are not within the sphere of knowledge or access of that particular party. Forms of evidence which can be taken by the court are documents, witnesses, experts and even taken direct evidence at the location (*Augenschein*). The court has to fully use all these methods of taking evidence. However, limits to the use of evidence are set by the principle of proportionality. It is, for instance, not necessary to call an official from abroad as witness in a trial concerning the granting of asylum.¹⁸² According to article

¹⁸¹ *Zuckerfabrik Süderdiethmarschen AG v. Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn* [1991] ECR I-415 C-143 and C-92/89

¹⁸² BVerwG, NJW 1989, 678

99 of the law on Administrative Courts the court may order that the authorities disclose documents, files and information to the court. However, limitations exist for instance if the disclosure of such documents or files would be harmful to the Federation or one of the states.¹⁸³

The investigation into the facts which underlie an administrative decision, in particular the question in which way the authorities have exercised their discretion is facilitated by the provision in article 39 of the Law on Administrative procedure which states: A written administrative act or an act confirmed in writing must carry written reasons. In the reasons important factual and legal grounds, which the authority has taken into consideration in arriving at its decision, have to be communicated. Reasons for discretionary decisions must also state the viewpoints on which the authority has exercised its discretion.

According to the general rule of proof, which applies in civil procedure, the burden of proof rests upon that party for which the proof of a fact is beneficial. However, this principle can only be applied destructively in judicial review procedures. Here, the burden of proof rests upon that party which has more access to the relevant facts and information. This approach is referred to as *Sphärenverantwortung* (responsibility for ones sphere). The aggrieved citizen has to present all facts truthfully and name sources of evidence which are in his sphere and which are accessible to him. The court has to ensure that the authorities disclose all facts and produce evidence within their sphere.

III Legal reasoning in England and Germany

The role played by judges in Administrative law adjudication is not only shaped by the constitutional setting of the courts and their historical development but also marked by a particular way of reasoning. Legrand has described this “cognitive structure that characterises a legal system” as the “legal *mentalité* (the collective mental programme)”¹⁸⁴. He argues that the differences in the *mentalité* between the common law and the civil are too extreme and that therefore “European legal systems are not

¹⁸³ Hufen, *Verwaltungsprozessrecht*, 1998, 594ff

converging.”¹⁸⁵ However, it has been suggested “instead of thinking in terms of the way the cultural context of law shapes the *mentalité* of the legal system, it might be better to try to perceive how the structures of law can help shape the very cultural and ideological context in which the law operates.”¹⁸⁶ This latter suggestion appears more convincing as it allows a more flexible answer to the question whether law is the response to a development in the *mentalité* of a legal culture or whether laws may lead to a change in the legal *mentalité*. The introduction of the Human Rights Act 1998 is an example for a measure which was both a legislative solution in the ongoing process towards a more rights based culture and an educative measure which will lead to a heightened awareness of rights protection in England. In the context of the development of the principle of proportionality under the Human Right Act 1998 David Feldman believes that “the legal culture will affect the way in which proportionality is conceptualised and deployed in municipal law, although it is equally true that the Act is likely to alter the culture itself.”¹⁸⁷

Traditionally, because of their inherent power to adjudicate common law courts are said to “reason inductively and ascribe much importance to facts and past decisions. In this they differ from the civil law courts which, because their power of adjudication is derivative, must operate within a predetermined, legislated, conceptualised system laying much emphasis on rules and rights.”¹⁸⁸ The Germanic legal family has been described as being “marked by a tendency to use abstract legal norms, to have a well-articulated system containing well-defined areas of law, and to think up and to think in juristic constructions.” The main feature of English Common law on the other hand has been described as a “gradual development from decision to decision” in form of case-law rather than enacted law.¹⁸⁹

So traditionally the most striking difference between the German legal family and common law was seen in the fact that the sources of law on the continent were mainly

¹⁸⁴ Legrand, *European Legal Systems are not converging*, (1996) *ICLQ* 1996, 52 [60]

¹⁸⁵ *ibid*

¹⁸⁶ Samuel Geoffrey, *Comparative law and jurisprudence*, (1998) *ICLQ* 1998, 817 [833]

¹⁸⁷ Feldman, D., “Proportionality and the Human Rights Act”, in Ellis, E., *The Principle of Proportionality in the Laws of Europe*, (Oxford: University Press 1999) 118

¹⁸⁸ Legrand *supra* n. 184, 75

found in codes and statutes whilst sources of English law were mainly to be found in the decisions of the Courts.¹⁹⁰ The classic differentiation between the nature of legal reasoning has been described as irreducible in as much as “the common law has not left the inductive stage of methodological development and that it is too descriptive to function as an abstract system of thought divorced from particular sets of facts.”¹⁹¹ New developments in common law are supported by analogies rather than by way of applying a system. Civil law on the other hand is said to be more able to move away from the facts of a case and applying an intellectual scheme to a given case.

The key to understanding these differences is of a historical nature. The reason for the need to codify large parts of the law in Germany was the unsettled state and the excessive fragmentation of the law. The Courts had not developed a general custom, the local customs were numerous. However, Roman law was taught in the Universities whilst the law applied by the Courts was to some extent different from academic law. On the contrary, in England the Royal Courts had developed a common law. The need to codify was not felt as it was on the continent.¹⁹²

However, the danger of exaggerating or oversimplifying this contrast is great. One has to bear in mind that the common law world knows statute law just as much as the civil legal world knows the concept of precedents.¹⁹³ Courts on the continent certainly do not follow a rule of precedent.¹⁹⁴ However, in criminal matters German Higher Courts (*Oberlandesgerichte*) have to consult the Federal Court in criminal matters (*Bundesgerichtshof*) if they intend to deviate from a decision of another Higher Court or the Federal Court itself.¹⁹⁵ Moreover, there are many areas of law where statutes offer either no rules at all or only general clauses or outline provisions and where scope for judicial law-making exists¹⁹⁶ such as the general provision in Police law authorising the Police to interfere in cases of imminent danger. Over the years various court decisions

¹⁸⁹ Zweigert/Kötz, *An Introduction to Comparative Law*, 1987, 70

¹⁹⁰ David, R., *English Law and French Law, A Comparison in substance*, (London: Stevens 1980) 16

¹⁹¹ Legrand, *supra* n. 184, 65

¹⁹² David, *supra* n. 190, 17

¹⁹³ Kahn-Freund, O., *Obstacles to Assimilation*, in Brown, L., Cappelletti, M., *New Perspectives for the common law of Europe*, Leyden: Sijthoff 1978) 137 [152]

¹⁹⁴ Zweigert/Kötz, *An Introduction to Comparative Law*, 1987, 267

¹⁹⁵ see Art 121 section 2, Court Procedure Act (*Gerichtsverfassungsgesetz*)

have defined the scope of the wide provision.¹⁹⁷ In this context it is important to take a look at the historical development of German Administrative Law, which is now mainly codified. When drafting the Law on Administrative Procedure in 1976 the legislator brought the contents of already existing statutes in line with the unwritten general principles of administrative law derived from legal theory and court decision.¹⁹⁸ Most of the general principles of German Administrative Law have the quality of judge-made law. Since 1949 when the Bonn constitution was drafted German Administrative Law has undergone significant changes. Existing general principles of Administrative Law had to be adapted to the constitutional principles of the *Grundgesetz*. These changes were mainly brought about by court decisions. Later then, as mentioned above, these changes were manifested in legislation. There are concepts derived from constitutional principles. A famous example is the concept of legitimate expectation (*Vertrauensschutz*). On the basis of constitutional principles such as the *Rechtsstaat*¹⁹⁹, legal certainty and legitimate expectation the courts developed rules for the withdrawal of illegal beneficial administrative acts. Since 1976 these rules are laid down in Art 48 section 2 to 4 of the Law on Administrative Procedure. This most common though most difficult form of law-making in German Public Law has best been described in the famous quote that “administrative law is constitutional law in concrete form”.²⁰⁰ Judge made law is also still very important in the area of judicial review provisions which since 1960 is laid down in the Law on Administrative Courts. In the case of interim relief provisions Art 80 of the Law on Administrative Courts has undergone considerable changes, which were mainly initiated by judge made law. Moreover both the Constitutional Court (*Bundesverfassungsgericht*) and the Federal Administrative Court (*Bundesverwaltungsgericht*) have developed a large set of cases, which are of essential importance. This will be discussed in more detail in part two of this chapter.

¹⁹⁶ Zweigert, Kötz, *An Introduction to Comparative Law*, 1987, 278

¹⁹⁷ Erichsen, Martens, *Allgemeines Verwaltungsrecht*, 1988, 116

¹⁹⁸ Schwarze, *European Administrative Law*, 1988, 118

¹⁹⁹ The principle of the *Rechtsstaat* has various meanings in German Constitutional law including the following: The separation of powers, The binding force of law, Proper delegation of powers, The independence of the judiciary, Procedural rights such as laid down in Arts 100, 101, 103 and 104 of the Basic Law, General principles such as the principle of proportionality

²⁰⁰ Erichsen, Martens, *Allgemeines Verwaltungsrecht*, 1988, 122; F. Werner, F., “Verwaltungsrecht als konkretisiertes Verfassungsrecht” (1995) *DVBl.* 527

Art 31 of the Law on the Federal Constitutional Court (*Bundesverfassungsgerichtsgesetz*) allows for certain decisions to have binding force.²⁰¹

However, it has to be emphasised that case law does not officially enjoy the same status in German law such as the classic legal sources, i.e. statutes and regulations, do. This is due to the lack of a binding force as there clearly is no rule of precedent. Having said that, the judge cannot ignore previous decisions. The onus lies on the judge to show that the preceding ruling does not apply in the particular case. The relevance of what has preceded therefore contributes to a continuity of the legal order. The same applies to administrative authorities. Even though the administrative authorities are not bound by previous High Court rulings they have to give reasons for deviating from it. This does not usually cause a problem in every day life of the authorities, as they are usually quite pleased if they can find a guiding court ruling. It is interesting that an official will be liable in damages for not complying with the rulings of a Higher Court.²⁰² The Federal Administrative Court itself has treated case law like legislative sources of law. The general principles of Administrative Law (such as the principle of proportionality, legitimate expectation, right to a hearing) which are based on judge-made law have been treated as Federal laws according to Art 137 section 1 No. 1 Law on Administrative Procedure which deals with the appeal procedures.²⁰³ Therefore there is strong support for an increasing recognition of case law as a source of law in German Administrative Law.²⁰⁴

Traditionally the most striking difference between common law and civil law is the emphasis on either case law or statute law respectively. However, it should be noted that in English Administrative Law a wealth of statute law in form of Acts of Parliament and Statutory instruments exists. The case of German Administrative law shows that the modern codes of Administrative Procedure and Administrative Court Procedure

²⁰¹ Federal Constitutional Court decisions are binding on the constitutional organs of the Federal Republic and of the states, all other courts and public authorities. The decisions of this court assume the form of statute.

²⁰² Erichsen, Martens, *Allgemeines Verwaltungsrecht*, 1988, 119

²⁰³ Art 137 section 1 No. 1 Law on Administrative Procedure:

Appeals on a question of law can only be based on the ground that the challenged court decision violates 1. Federal law [...]

²⁰⁴ Erichsen and Martens, *Allgemeines Verwaltungsrecht*, 1988, 119

were based on customary sources and judicial developments. However, judges in Administrative Courts in Germany today are to a large extent occupied with the interpretation of statute law whereas the interpretation of case law is at the centre of English judicial work. Zweigert and Kötz utter a word of warning by stating that “it would certainly be wrong to make out that there was an unbridgeable opposition between the former’s (common law) method of inductive problem-solving and the latter’s method (civil law) of systematic conceptualism. The question therefore is how different are the techniques of interpreting case law and statute law?”

Levi describes the basic pattern of legal reasoning as reasoning by example.²⁰⁵ He points out that reasoning by example reveals important similarities and differences in the interpretation of case law and statutes: “It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and the constitution as well as with case law. Hence reasoning by example operates with all three.”²⁰⁶ As noted earlier Legrand believes that “the common law has not left the inductive state of methodological development [...]”.²⁰⁷ However, Levi explains that even reasoning in case law may involve some deductive reasoning. Generally speaking case law develops concepts out of particular instances. The direction of legal reasoning in case law is from the particular to the general. However, the general concept might then create other categories, which are included under the general concept, and therefore “something like deductive reasoning occurs.”²⁰⁸ Levi agrees that the statement that case-law reasoning is thought of as inductive and the interpretation as deductive has some meaning. The main features of the interpretation of statutes is that the courts determine the course of a statute and that later reasoning in subsequent cases is tied to them.²⁰⁹ A further difference is seen in the fact that during the interpretation of a statute all reference is directed towards the intention of the legislature whereas case law

²⁰⁵ Levi, E.H., *An Introduction to Legal Reasoning*, (Chicago: University of Chicago Press 1968), 1

²⁰⁶ *ibid*, 6

²⁰⁷ Legrand, *European Legal Systems are not converging*, ICLQ 1996, 52 [65]

²⁰⁸ Levi, *supra* n. 205, 27

²⁰⁹ *ibid*, 7

concepts can be re-worked. However, even the intention of the legislature is necessarily ambiguous in order to reach consent of how future cases will be decided.²¹⁰

As a result some overlaps in judicial reasoning in England and Germany can be summarised. Case law in a broader sense is a source of law, which receives growing recognition in German Administrative law. The judicial method of case law in a narrow sense as used in English law cannot be described as purely inductive but also bears some deductive elements in it. It is important to recognise that statutes bear some degree of ambiguity in them and that a form of reasoning by example is also involved in the process of statutory interpretation.

IV. Evaluation

The most striking difference between the English and German Judicial review system is the development of a separate system of Administrative courts in the middle of nineteenth century Germany. The separation of public and private law matters was encouraged by the influence of the French revolution. Particularly the southern German states adopted the French model of a separation of private and public law matters. Unlike his English colleague, the influential A.V. Dicey the leading German administrative lawyer, Otto Mayer, clearly expressed his admiration for the French separation of private and public law. The following two quotes illustrate these different approaches well:

“If there is something that should be recommended, then it is the spirit of it all, the great form of respect paid to the nature of the activity of the state, which is concerned with the development of the [public] law. Here [in Germany] the state has mainly been treated like a private citizen...”²¹¹

²¹⁰ *ibid*, 31

²¹¹ Mayer, O., *Theorie des französischen Verwaltungsrechts*, (Strassburg: K.J. Trübner 1886), page VIII pp., translated by author

“Wenn aber etwas zur Nachahmung empfohlen werden konnte, so ware es viel mehr noch der Geist des Ganzen, jener grossartiger Zug von Achtung vor der hoheitlichen Natur der Thatigkeit des Staates, der in der kräftigen Ausbildung jenes Rechtes sich bezeugt. Bei uns überwiegt von jeher die Neigung, den Staat im Verhältnis zu seinen Bürgern einfach wie ein Rechtssubjekt des Civilrechts zu behandeln.”

“Droit administratif, as it exists in France, is not the sum of the powers possessed or of the functions discharged by the administration; it is rather the sum of the principles which govern the relation between French citizens, as individuals, and the administration as the representatives of the State. Here, we touch upon the fundamental difference between the English and the French ideas. In England the powers of the Crown and its servants may from time to time be increased as they may also be diminished. But these powers, whatever they are, must be exercised in accordance with the ordinary common law principles which govern the relation of one Englishman to another.”²¹²

The systematic development and categorisation of administrative law in Germany raised the issue of which court or body should be responsible for the review of public law matters. In England, on the other hand no such systematisation took place. Therefore there was no need to take cases of a public law nature away from the ordinary courts or to create a separate system of administrative courts. The English remedial approach centred on the question which remedies should be available for disputes of public law nature. However, these prerogative writs as they existed did not require the establishment of a new court. They underwent several reforms.

The historical introduction into the development of the Administrative courts in Germany as the expression of the libertarian developments in after the 1848/49 revolution explain the strong role of the Administrative courts which display both independence and expertise in the area of Administrative law. This process was accelerated after the Second World War when the general mistrust in the executive found expression in the newly drafted Article 19 IV of the Basic Law according to which aggrieved citizens have the guaranteed legal protection against unlawful official action. The *Bundesverfassungsgericht*, established in 1959, complements this system of effective judicial protection of the Basic Rights and enables individuals to complain about the violation of individual rights. The *Bundesverfassungsgericht*'s power to strike down any kind of legislation is also a distinctive feature of Germany's perception of the separation of powers. By contrast no separate system of Administrative courts has been

²¹² Dicey, A.V., *Law of the Constitution*, 1952, p. 387

developed in England. Since the abolition of the prerogative Star Chamber the idea of a separate system of public law courts applying public law as distinct from private law has never found favour.

However, it can now be said that England has a system of Administrative law including both a substantive body of law containing grounds of review. As well as that a large number of Administrative Tribunals deal with statutory appeals from decisions of public bodies. The Queen's Bench of the High Court is now named the Administrative Court and has acquired a high level of expertise in dealing with Administrative cases. English law displays flexibility and the potential for further development. Since the 1960s the courts have begun to shift the balance of power in their favour. By extending the doctrine of ultra vires and establishing the grounds of review and the reviving the rules of natural justice they have begun to shape a system of Administrative law. The following chapters will assess these developments of the grounds of review in more detail.

With regard to the position of citizens in English and German Administrative law disputes it can be observed that the applicant in an English court faces the shortcomings of the adversarial procedure, which makes it much harder to establish the objective facts, which underlay the original decision. This is partly due to a limitation of forms of evidence such as cross-examination and discovery. Further it is due to the onus of proof, which generally rests with the applicant. The court will assume that the authority acted properly unless otherwise proven. In Germany on the contrary the inquisitorial procedure assures that the facts are examined in depth on behalf of the court applying a variety of means of evidence including appearing at site. The onus of proof not necessarily rests upon the applicant as it is acknowledged that certain facts are not within the sphere of knowledge of the citizen. In addition to some of the conceptual differences these procedural differences make it harder for an applicant in an English judicial review procedure to be successful with his claim.

CHAPTER THREE

JUDICIAL REVIEW OF DISCRETIONARY POWERS

A. Introduction

This part will deal with "one of the most important areas of European Administrative Law in the future": The scope of judicial review of administrative discretionary powers.¹ It is an area which most clearly displays the role of the courts in controlling the acts of public authorities. This area of judicial review goes to the heart of both systems approaches to judicial review and the relationship between public authorities and individual citizens. Both, in English and German Administrative Law discretionary powers are an important feature of the administration. In England, review of discretionary powers is traditionally more limited than in Germany. However, the Human Rights Act 1998 poses the question whether the judicial review system is able to protect civil liberties more adequately.² In this context the call for a more substantive probing review of administrative actions and of discretionary powers has once more emerged.³ In Germany where the position of the administration has been weakened by being subject to an over intensive judicial scrutiny basic foundations of the concept of discretion and its review by the Administrative courts have been questioned.⁴

This part will provide a description into how both systems operate the concept of discretion by presenting an overview over the forms of discretion and the main grounds of review. It will be shown that both English and German courts apply similar grounds of review such as for example fettering of discretion and the (even in English law increasingly) the proportionality principle.

¹ Redeker/von Oertzen, *Verwaltungsgerichtsordnung*, 1997, Vorwort, p. V

² Donson, F., "Civil Liberties and Judicial Review: Can the Common Law Really Protect Rights?" in Peter Leyland & Terry Woods, *Administrative Law Facing the Future*, 1997, 347

³ Jowell, J., Lester, A., "Beyond Wednesbury: Substantive principles of Administrative Law" (1987) *Public Law* 368 at 371-2; and more recently Jowell, J., "Beyond the rule of law - Towards Constitutional Judicial Review" (2000) *Public Law* 671

⁴ Sendler, H., "Über richterliche Kontrolldichte in Deutschland und anderswo", (1994) *NJW* 1511 (1520); Ipsen, H.P., von Dannwitz, T., "Verwaltungsrechtliches System und Europäische Integration" (1996) *DVBl* 627

The cases have been carefully selected to illustrate the English and German approach. As far as possible cases with similar factual backgrounds have been chosen to enable the reader to draw direct comparisons. However, this has not always been possible. The cases represent the main areas of review in each jurisdiction respectively. As will be shown the focus of the courts on particular issues may vary.

B. National reports

I. England

The concept of discretion and the constitutional basis for judicial review of discretionary powers

In the administrative decision-making process the concept of discretion is an important tool to reach just decisions. It offers an important degree of flexibility. The concept of discretion in English law does not distinguish between different forms of discretion. However, three different sources, which contain the authorisation of discretionary powers, can be identified. Firstly, express statutory provisions can be found within the areas of education, social welfare, planning and immigration law which confer discretionary powers on the authorities. They are contained in phrases such as “If the minister has reasonable ground to believe that...” or “if there is evidence that...” “if he thinks that...”.⁵ A second form of discretionary power is that of implied discretionary power. Such powers can be found in concepts such as “public interest”. These open concepts require the administration to make choices as to their meaning. There is, however no conceptual difference between express and implied forms of discretionary powers. A third group of discretionary powers is the royal prerogative. When defining the meaning of prerogative powers no express written list of powers can be found within the British Constitution. They are entrenched by practice and example. Prerogative powers are all those powers which were traditionally exercised by the monarch and which have not been regulated by statute. When referring to prerogative powers any

⁵ Craig, P., in Bullinger, M., Starck, C. *Verwaltungsermessen im modernen Staat*, “Discretionary power in modern administration”, Rechtsvergleichender Generalbericht (Baden-Baden: Nomos 1986)

common law power of government is understood as such.⁶ Prerogative powers are no longer free from judicial control. However, some exercises of prerogative power are still exempted from any form of control. Some examples were cited in the *GCHQ* case⁷ Examples for the unreviewable powers under the royal prerogative can be found in connection with foreign relations, the conduct of war and peace, the regulation and disposition of the armed forces, the appointment and dismissal of ministers and the dissolution of Parliament. Another form of discretionary powers is classified as common law discretionary powers. These are neither statutory nor prerogative in nature. The power to contract has been identified as such a type of common law discretionary power. However, the existence of such powers is controversial.⁸ The majority of discretionary powers are based on statutory authorisation, be it express or implied. *K.C. Davis* famously stated that “Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.”⁹ The important question is therefore how discretion can be controlled.

English courts have generally been ill equipped to review the merits of the exercise a discretionary administrative power. “The courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confided [...] However, “the principle that discretion must be exercised “according to law” is, indeed deeply entrenched in the common law.¹⁰ As discussed earlier on in chapter Two this was clearly expressed by A.V. Dicey in his famous *Law of the Constitution*: “It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness of prerogative or even of wide discretionary authority on the part of the government.”¹¹ As discussed in chapter two traditionally, the justification for judicial control of the exercise of administrative powers has been the protection of the intention of Parliament. Traditionally, English courts have not been

⁶ Pollard, P., *Judicial review of prerogative power in the United Kingdom and France*, in Peter Leyland and Terry Woods, *Administrative Law facing the Future*, 1997, p. 300

⁷ *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, (418)

⁸ Craig, *Administrative Law*, 1999, 539

⁹ Davis, K.C., *Discretionary Justice*, (Urbana and Chicago: University of Illinois Press, 1971) 34

¹⁰ De Smith, *Judicial review of administrative action*, 1995, 297

equipped to deal with a comprehensive control of administrative decisions. The most important distinction between the administrative legal system in England and those in France and Germany still is the absence of a separate court system for public law matters.¹² The *Conseil d'Etat* and the *tribunaux administratifs* in France and the *Verwaltungsgerichte* in Germany institutionalise this division. This different position in England has been explained by the constitutional history of the relationship between parliament and the courts and the rule of law. A particularly crucial time was the period of the Tudors and Stuarts in the sixteenth and seventeenth centuries when the conflict between Parliament and the English kings broke out. During this time the Star Chamber was created, a superior court, which dealt with crimes of political significance.¹³ It imposed a strict control over the organs of local government, the exercise of judicial and administrative functions.¹⁴ After its abolition these traumatising experiences remained in the perception of public law as an area of law, which in future had to be inseparable from private law.

A.V. Dicey's interpretation of *Droit administratif* in 1885 as being "official" law enforceable in special courts and therefore being incompatible with the rule of law reaffirmed the reservations against a separate system of public law courts.¹⁵ The rule of law has a number of meanings. According to Dicey, the second meaning is that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".¹⁶ Dicey's view has been heavily criticised for misinterpreting the *Droit administratif*. Two arguments against his theory are that the governments or an agency is often acting for the citizens at large and that therefore the application of the same legal principles and procedures which would apply to a private person might not be adequate. On the other hand public law and public law remedies can be seen as a defence of the citizen against a powerful state.¹⁷ The latter view becomes more transparent in a system with a strong tradition of constitutionally guaranteed Human Rights provisions like in Germany or the United States where British

¹¹ Dicey, *Introduction to the study of the law of the constitution*, 1927, 198

¹² De Smith, *Judicial review of administrative action*, 1995, 156

¹³ Zweigert, Kötz, *An Introduction to Comparative law*, 1992, 202

¹⁴ De Smith, *Judicial review of administrative action*, 1995 226

¹⁵ *ibid.*, at 157

¹⁶ Foulkes, D., *Administrative Law*, 7th edition (London: Butterworths, 1990) 8

cases are read by the judges “with a mind dominated by the spirit of the American Constitution - stripping away the limited frame of reference of judicial review in Britain.”¹⁸

However, the constitutional justification for an expansion of judicial review has been found in a more substantive interpretation of the rule of law and an increase in the protection of personal liberty and dignity.¹⁹ We will see that the methods of control applied by the courts have undergone a gradual development, which has been accelerated by the influence of legal principles employed by the European Court of Human Rights and the European Court of Justice. Principles such as proportionality and the protection of substantive legitimate expectation have found their way into English legal reasoning and have enriched the traditional judicial review mechanisms. The Human Rights Act 1998 will change the legal landscape of judicial review fundamentally. Section 6 of the Human Rights Act 1998 provides that: “It is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights (unless primary legislation leaves the public body with no choice other than to breach the Convention). Under section 7, a victim or potential victim who claims that a public authority has acted (or proposes to act) in a way contrary to Art 6(1) ECHR may bring proceedings against that authority or rely on the Convention rights in any legal proceedings. The Convention rights form thereby a new ground of review. Section 6(1) thereby “creates a new statutory head of illegality for breach of a Convention right. It is a free-standing statutory ground of challenge”²⁰.

The standard of review to be applied by domestic courts will in the near future be one of the most exciting issues. In section 2 the Human Rights Act explicitly empowers the courts to take the European Convention and a judgment of the European Court of Human Rights, an opinion of the European Commission on Human Rights or a decision of the Committee of Ministers into account. With regard to judicial review of administrative action this could mean an increased application of the principle of

¹⁷Cane, *An Introduction to Administrative law*, 1996

¹⁸ Birkinshaw, P., *Public law in the U.S.A.*, A brief outline quoting Bernd Schwartz in Schwartz and H.W.R. Wade, *The Legal Control of Government*, 1972

¹⁹ see chapter Two: National report, England, Nr. 3 with further references

²⁰ Craig, *Administrative Law*, 1999, 556-557

proportionality. “Though the Act itself does not explicitly enjoin the courts to apply a test of proportionality, it is arguable that it implicitly does so, and there are eminent voices, including the Lord Chancellor, who argue for judicial recognition and application of the test of proportionality, at least for cases that fall within the scope of the Act.²¹ By requiring the courts to interpret the Convention they will have to decide whether a restriction of a Convention rights is “necessary in a democratic society”. This will clearly invoke the test of proportionality. Therefore objections of the House of Lords to the introduction of the principle of proportionality as a ground of review in *R v Secretary of State for the Home Department ex parte Brind*²² will not be valid any longer. In the section Comparative cases below most recent case law on the development of the principle of proportionality will be discussed.

II. *Germany*

The concept of discretion and the constitutional basis for judicial review of discretionary powers

In Germany, discretionary powers require an express statutory authorisation by Parliament. Discretion is an area of free exercise of power granted by the legislature. The *Bundesverfassungsgericht* has clearly recognised the granting of discretionary powers as constitutional²³. Accordingly, the exercise of discretionary powers is compatible with the principle of the rule of law if they are granted by the legislature. In 1959 the Constitutional Court held that the granting of discretionary powers does not contravene the principle of the rule of law. The Court arrived at this ruling making three important statements. Firstly the Court emphasised the constitutional limitations to the exercise of discretion, the compliance of which is open to judicial review. Secondly it stated discretionary powers guarantee the protection of personal freedom by enabling the authorities to make just decisions within their discretion. Thirdly, the Court held that the “rule of law requires that the administration can interfere with the rights of an individual only with the authority of law and that the authorisation is clearly limited in

²¹ Wong, G. “Towards the Nutcracker principle, Reconsidering the objections to proportionality”, (2000) *Public Law* 92 [95]

²² [1991] 1 AC 696

²³ BVerfGE 8, 274; BVerfGE 9, 137

its contents, subject-matter, purpose and extent so that the interference is measurable and to a certain extent is foreseeable and calculable by the citizen”.²⁴

However, the Basic Rights can set clear limits to the authorisation of such discretionary powers. The right to artistic freedom guaranteed in Article 5(3)²⁵ of the Basic Law, for instance requires that the composition of the agency for the protection of youths is based on a statute and that it does not exercise any powers, which cannot be reviewed by the courts.²⁶ The authorities have to exercise their discretion within the limits set by the provisions in the Administrative Court procedure Act (section 114 *VwGO*)²⁷ and the Administrative Procedure Act (section 40 *VwVfG*)²⁸. The legal basis for the review of discretionary powers can be found in Art 114 of the Law on Administrative Courts. According to this article the courts examine whether the administrative act or its refusal or omission is illegal because the statutory limits of the discretion have been exceeded or because the discretion has not been exercised for the purpose of the authorisation. Art. 114 was amended in 1996 and it is now permissible for the authority to complete its discretionary decision during the judicial review proceedings. This is the only norm, which contains criteria for the review of discretionary powers.

However, this provision has been described as insufficient and therefore requires to be complemented by general principles of the doctrine of discretion.²⁹ In numerous decisions by the Federal Administrative Court and the Constitutional Courts and in legal writings the attempt has been made to clarify the exact scope of review. However, the controversy has not reached clarification yet. The question whether the exercise of discretion was carried out in an illegal manner is further defined in statute, this time in

²⁴ BVerfGE 80, 274, 326; Translation by Singh, M.P., *German Administrative Law*, 1985, p.84

²⁵ Art and scholarship, research and teaching shall be free.

²⁶ Jarass, H.D., Pieroth B., *Grundgesetz*, (München: C.H. Beck Verlag, 1995) Art 5 Rn 74

²⁷ Article 114 Administrative Court Procedure Act (as amended in 1996)

“If an administrative authority is authorised to act in its discretion, the court has to review whether the administrative act or the refusal or omission to enact an administrative act was illegal on the grounds that the authority acted beyond its authorisation or that the authority has exercised its discretion in a way which was not intended by the authorisation. The administrative authority may complement its reasons for the discretionary administrative act as late as during the Judicial review proceedings”.

²⁸ Section 40 Administrative Procedure Act

“If an administrative authority is authorised to act in its discretion, it has to exercise its discretion in consonance with the purpose of the authorisation and has to observe the legal limits of the discretion.”

²⁹ Redeker/von Oertzen, *Verwaltungsgerichtsordnung*, 1997, Art 114, Rn 1 with further references

the Law on Administrative Procedure 1976 in Art 40 which lays down: If an administrative authority is authorised to act in its discretion, it has to exercise its discretion in consonance with the purpose of the authorisation and the legal limits of the discretion to be observed. The issues involved were mainly dealt with by the administrative courts and legal writing. In recent decisions the Constitutional Court has given some constitutional guidelines with regard to the scope of jurisdiction in the area of review of discretionary decisions of the administration. The Court has derived its guiding principles out of the Basic Rights and Art 19 IV Basic Law. Art 19 IV of the Basic Law, which guarantees full legal protection to everyone, serves as a legal basis for the duty of the courts to fully review the legality and the facts of an administrative decision.³⁰ This constitutional basis has led to a very intensive control of decisions of the administration which has been described as a second "Administrative procedure with better means"³¹ There are, however, restrictions upon the courts when reviewing purely discretionary decisions of an administrative body.

German Administrative law contains a highly abstract theory of the concept of discretion. The concept of discretion is not a uniform concept. Rather it contains three different forms of discretion, which requires some explanation. These forms of discretion can be localised in different parts of authorising statutes. Firstly, there is *einfaches Ermessen* (ordinary discretion). This can be identified in so-called conditional norms, which contain a *Tatbestand* (constituent elements of a provision) and a *Rechtsfolge* (legal effect).

Secondly, elements of discretion can be found in the *Beurteilungsspielraum* (margin of appreciation) granted to authorities in the determination of undefined legal concepts on the *Tatbestand* of a provision (constituent elements of a provision). The concept of undefined legal concepts and margin of appreciation is a peculiarity not known in any other member state or in European Community Law³². The undefined legal concepts are concepts such as "public welfare", "public need", "public safety" etc., which are quite

³⁰ Jarass/Pieroth, *Grundgesetz*, 1995, Art 19 Rn 35; BVerfGE 61, 81 (111)

³¹ Lerche, C., *Die Kontrolldichte hinsichtlich der Tatsachenfeststellung*, 249ff, in Frowein, J.A., *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung*, 1993

commonly used in statutes conferring powers on the administrative authorities. Such legal concepts can only be interpreted in one correct way. As a consequence its application is fully reviewable by the courts. The German concept of discretion has to be seen in the context of the German way of statutory structure. Statutes are seen to consist of two parts. A distinction is drawn between those elements, which constitute the facts (*Tatbestand*) and those parts of it, which deal with the legal consequence. Both parts of a statute under this concept can contain elements of discretion. On the constituent part of the norm undefined legal concepts (*unbestimmte Rechtsbegriffe*) which govern the application of the law can be found such as the public weal, the public interest, the public order, security of the traffic, danger or the reliability or ability of persons. The other part of the norm might include real discretion (*Ermessen*) which is the freedom to decide which of a number of possible legal consequences will be adopted by the decision-maker.³³ Not only the common law lawyer will have difficulties understanding this division. There is no equivalence to undefined legal concepts in common law or European law and amongst German legal scholars and the courts this concept has been the focus of controversies until today. The distinction between the two concepts is based on legal reasoning in German law, which dates back to the post-war period. The ordinary structure of a norm is regarded as conditional. If certain requirements are given, a particular legal consequence follows. If only one particular consequence is laid down in the statute, then the decision-maker has no choice. In case the decision-maker is given a choice between one or more legal consequences he has discretion. However, with regard to the fulfilment of the elements of fact the decision-maker is never given a choice. Under this legal reasoning there is only one right decision possible even when confronted with an undefined legal concept which is not always clear in its meaning. However, this distinction between *Tatbestand* and legal consequence has been relaxed by the granting of a margin of appreciation (*Beurteilungsspielraum*) in deciding on undefined legal concepts.³⁴ Only in clearly defined circumstances has the Federal Administrative Court granted some subjective

³² Strictly speaking undefined legal concepts are not seen to be part of the doctrine of discretion in Germany; however, in this chapter for ease of reference undefined legal concepts are covered under the heading of discretion

³³ Schwarze, *European Administrative Law*, 1992, 271

³⁴ Arai-Takahashi, Y., *Discretion in German Administrative Law: Doctrinal Discourse Revisited*, (2000) *European Public Law* 69 [75]

area of evaluation to the authorities, which are not fully reviewable.³⁵ However, a decision by the *Bundesverfassungsgericht* in 1990³⁶ has revived a long-standing debate about these concepts within the elaborate doctrine of discretion and sparked off a discussion about a closer orientation on European models.³⁷ The decision concerned the publication of a pornographic novel titled *Josefine Mutzenbacher* telling the life story of a prostitute in Vienna around the turn of the century. According to the law on distribution of writings dangerous to Youths, the Federal Scrutiny Agency included the book into a list, which sets out certain limitations regarding the dissemination of those books, which are considered dangerous to youths. An exception is provided for books considered as art. The applicant considered the book to be a piece of art protected under Art 5 of the Basic Law and required the authorities to delete its name from the list. The Constitutional Court's view on the sensitive area of undefined legal concepts, here the question whether the book falls within the category of "dangerous to youths" and the question whether the Scrutiny Agency had any subjective area of evaluation is of great importance for Administrative Law. As a result the Court held that there was no area of subjective evaluation and widened the scope of judicial review in this case in order to protect the constitutional right in Art. 5 of the Basic Law.

Finally, discretionary powers can be found in statutes on planning, so-called *Planungsermessen* (discretion in the planning process). These provisions are described as *Finalnorm*, they do not contain *Tatbestand* und *Rechtsfolge* in the sense described above. Planning decisions are based on provisions containing programmes with predispositioned aims and objectives. They require the balancing of interests rather than the determination of legal concepts.³⁸ Therefore the standards of review applied for ordinary discretionary powers are not equally applied for planning decisions. Planning authorities enjoy comparably greater freedom. The courts, however review in particular

³⁵ Decisions in examinations, assessment of personnel in Civil Service, decisions of valuation by experts, for instance the Federal Scrutiny agency under the Law about Distribution of Writings Dangerous to the Youth, policy decisions of the administration

³⁶ BVerfGE 83, 130 - *Josefine Mutzenbacher*, The Constitutional Court held that the prohibition of a writing needs to be balanced with the freedom of art and that the administration has no subjective element of evaluation (*Beurteilungsspielraum*) and that therefore the decision is fully reviewable.

³⁷ Schwarze, *Das Verwaltungsrecht unter europäischem Einfluß*, 1996, 794; Sieckmann, J.R. "Beurteilungsspielräume und richterliche Kontrollkompetenzen", (1997) DVBl, 101; Sandler, H., "Über richterliche Kontrolldichte in Deutschland und anderswo" (1994) *NJW* 1511 (1520)

³⁸ Maurer, M., *Allgemeines Verwaltungsrecht*, (München: C.H. Beck Verlag, 1999) 149

the balancing process of competing interests. In contrast to the generally high intensity of review of discretionary decisions, the courts have illustrated an increasing willingness to reduce the intensity of control of planning decisions. The reasons for a reduction of the standard of review are due to the nature of planning decisions, which often entail highly technical issues.³⁹ An important decision in this context is the decision of the Federal Administrative Court in *Wyhl*.⁴⁰ The applicants lived in the close neighbourhood (3 and 7 km) from a planned nuclear power station in *Wyhl*. In 1975 the defendants were granted building permission for the power station including ancillary buildings. The applicants challenged the building permission on the grounds that the erection of the power station would put their lives and health at risk and that the power station would harm the growth of tobacco, wine and fruit, which was planted in the region. The lower Administrative court quashed the building permit. However, subsequently the applicants were unsuccessful in the Higher Administrative court and the Federal Administrative court. The Federal Administrative Court held that judicial review has to be restricted to a legality review and that the judges may not substitute the decision of the authority with their own value judgement: It held that it is not the task of the judges to retrospectively substitute the opinion of the executive whose task it is to decide matters of a highly scientific nature. It is for the authorities to decide on the risks of such a project. The court is entitled to quash the decision if it shown clear deficits concerning the gathering of facts or the investigation of the technical issues concerned. According to section 7 para 2 of the *Atomgesetz* the executive is responsible for the investigation of the risks involved and the value decision concerning the running of the power station. Accordingly, the courts have to respect this division of power intended by the legislator. Similarly the courts have applied a reduced intensity of control and accepted a margin of appreciation in decisions concerning the planning of railways⁴¹ and motorways⁴².

A brief look into the historical development of judicial control of discretionary powers reveals that the degree of judicial control of discretionary powers reflects the changes in

³⁹ Schwarze, J., "Europäische Rahmenbedingungen für die Verwaltungsgerichtsbarkeit" (2000) *NVwZ* 241 [249]

⁴⁰ BVerwGE 72, 300, 312

⁴¹ BVerwG *NVwZ* 1998, 513

⁴² BVerwG, *NVwZ* 1997, 914; BVerwG *NVwZ* 1998, 961

Germany's constitutional history. During the second half of the nineteenth century when Administrative courts were established judges and academics respected that the administration had to be permitted an area which is free of judicial control in reaching their decisions. Germany's system of constitutional monarchy allowed for discretionary powers to remain an area of unlimited exercise of sovereign powers of the monarch: "In a constitutional monarchy the *pouvoir administratif* is the area of sovereign power where parliament and the courts have no role to play."⁴³ Intrusions into rights and freedoms of the citizens could only be justified if based on law, but such laws had only to be of very general nature and did not have to contain the right to appeal. Often the courts were expressly barred from judicial control of discretionary powers. In case a law provided a framework laying out the purpose of discretion the courts were merely empowered to review whether discretion was exercised within the boundaries of the set purpose. A limited control of the merits of a discretionary decision only developed slowly. The central issue was the identification of discretionary powers. As opposed to theories developed in Austria in Germany this question was closely linked to the question whether or not the legislator had made the exercise of a statutory discretion subject to appeal⁴⁴. The absence of a statutory right to appeal was interpreted as the intention of parliament to leave areas of discretionary powers free from judicial scrutiny. Accordingly all concepts contained in statutes without provision on appeal such as "public interest" were regarded as concepts of discretion. On the other hand similar concepts such as "public order" were regarded as questions of law if the statute in question provided for judicial review.

A decisive shift in the interpretation of discretion occurred in 1945. This was a direct response to the experiences during the Nazi dictatorship during which government and administration possessed all powers and Administrative Courts were deprived of their functions. Discretionary powers were no longer regarded as an area of free exercise of administrative power but as a tool to grant a limited area of flexibility in the enforcement of the law. This development was the necessary consequence of history and the effect that the establishment of the *Rechtsstaat* had on German Administrative

⁴³ Laband, *Das Staatsrecht des Deutschen Reiches*, Bd. II, 5th edition, (Tübingen, 1911), p. 175 cited in Bullinger, M., *Das Verwaltungsermessen im modernen Staat*, p. 132

law. The *Rechtstaat* principle includes elements such as “a state, which founded on and subject to the rule of law, a state respecting and conforming to the rule of law, a state governed by the rule of law.”⁴⁵ Therefore “judicial review is [...] a key element of the *Rechtsstaat* under the Basic Law.”⁴⁶ In its Article 19 IV the Basic Law⁴⁷ now requires the effective judicial protection against decisions by public authorities. Article 19(4) Basic Law provides the constitutional justification for the strong position of the courts in reviewing the decision-making process of public authorities. This constitutional guarantee of judicial review plays a pivotal role with regard to the standard of review and with regard to any reforms of the concept of discretion. Article 19 IV is part of the principle of the *Rechtsstaat*. It has developed into a constitutional justification for the doctrine that there is only one right answer⁴⁸, an idea that goes back to German idealism.⁴⁹ Accordingly the protection of substantive rights is more important than the protection of procedural safeguards. This approach has most recently found clear legislative expression in the new laws on the Administrative Court Procedure as will be discussed in detail in Chapter Four. As will be shown in case examples below three important constitutional principles, the principle of equality (Article 3 Basic Law), the principle of the protection of substantive legitimate expectation and the principle of proportionality set limits to the exercise of discretionary powers.

German commentators have suggested to give up the dogmatic division within the doctrine of discretion and adapting a uniform concept of discretion, which other member states in the European Union.⁵⁰ The other demand is concerned with a reduction of the intensity of judicial control, which ironically has led to immense delays

⁴⁴ In Germany the difference between appeal and judicial review is not known which means if there were no provisions of appeal, no other form of judicial control was available.

⁴⁵ Foster, N., *German Legal System and Laws*, 1993, 149:

⁴⁶ Kommers, D. P., *The constitutional jurisprudence of the Federal Republic of Germany*, 2nd edition (Durham, N.C.: Duke University Press, 1997)

⁴⁷ Article 19(4) Basic Law

“Where rights are violated by public authorities the person affected shall have recourse to law. In so far as no other jurisdiction has been established such recourse shall be to the ordinary courts”.

⁴⁸ Brinktrine, R., *Verwaltungsermessen in Deutschland und England* (Heidelberg: C.F. Müller, 1998) 459

⁴⁹ Hufen, F. *Verwaltungsprozessrecht*, (München: C.H. Beck Verlag, 1998) 18 with further references

⁵⁰ Sendler, H., “Über richterliche Kontrolldichte in Deutschland und anderswo” (1994) *NJW*, 1511 (1520)

in litigation and as a result violates Art 19(4) of the Basic Law and Art 6 of the European Convention on Human Rights.

III. Evaluation

In comparing the concept of discretionary powers one can observe that both legal systems grant discretionary powers to their administrative authorities and accept that they are an important feature of modern administration. Both in England and Germany the exercise of discretionary powers has to comply with the principles of the rule of law or the concept of the *Rechtsstaat*. Discretionary powers have to be granted on the basis of statutory authorisation. Nevertheless, in England prerogative discretionary powers, which are not based on statute, may provide the basis for the exercise of discretionary powers. The German concept of discretion is based on a highly abstract theory of the structure of statutory provisions. It identifies three different forms of discretion: *Einfaches Ermessen* (ordinary discretion), *Beurteilungsspielraum* (margin of appreciation) in the determination of undefined legal concepts and *Planungsermessen*. (discretion in the planning process. Each of these three concepts of discretion requires a different intensity of review. The intensity of the review of discretionary powers in the planning process is the least intensive form of review. An increasing number of cases illustrates that the courts have reduced the intensity of control of planning decisions. English law does not distinguish between these forms of discretion, even though the concept of the undefined legal concept is similar to a question of fact and degree.

Both legal systems provide for mechanisms of reviewing the decisions of public authorities. The main justification of judicial control of administrative action in England has long been the protection of the will of Parliament. In Germany, on the other hand, the historical development after 1945, in particular, has placed the courts into a position, which requires them to uphold individual rights against actions by public authorities.

The next part will deal with the grounds of review of discretionary powers. It illustrates the way in which courts apply standards of review, which define the border between the role of the courts and the decision-making bodies and thereby define the concept of discretion.

C. Comparative cases

I. Failure to exercise discretion

1. *England*

The law dealing with the control of discretionary powers shows a gradual development. The wealth of case law in the field of judicial review of discretionary powers has prompted numerous legal writers to collect cases under specific headings. Generally speaking two areas of review of the exercise of discretionary powers can be identified. The courts are concerned with the question whether an authority has “failed properly to retain that degree of free and unfettered power of judgment” or whether it “has exercised its power in a way which the reviewing court may categorise as an abuse of power”⁵¹ Craig has chosen similar categories such as the “Failure to Exercise Discretion” and the “Abuse of discretionary power”.⁵² Under the first heading five groups of cases can be identified, such as the review of self-created rules which structure discretion, unauthorised delegation of power, acting under dictation, fettering discretion by contractual or similar undertakings, fettering discretion by estoppel and error of law. Under the heading of abuse of power the courts judge on the question whether discretionary powers have been used for an improper purpose, whether irrelevant considerations have been taken into account and whether the exercise of power was unreasonable and irrational. The famous *Wednesbury* unreasonableness test is of major importance in deciding whether authorities have abused their powers. The application of the unreasonableness test raises questions of major constitutional importance. It has led to a major discussion of how far the courts should engage in the substantive review of administrative decisions. In this context the application of the principle of proportionality as a possible fourth ground of review as suggested in the *GCHQ* case has enriched the discussion.

⁵¹ Bailey, Jones & Mowbray, *Cases and Materials on Administrative Law*, 1997, 235

a. Review of self-created rules

Administrative discretionary powers give the authorities the choice between alternative forms of decision in each case. It is a common practice to structure discretion by formulating rules or guidelines “to bridge the gap between the general power and the particular case”.⁵³ “The central issue in the legal control of policies is now clear: it is the resolution of the apparent conflict between the interest of the decisions-maker in developing policies which determine particular decisions and the interest of the individual in obtaining discretionary decisions which take proper account of the special features of his claim.”⁵⁴ However, often self-created rules have restricting effect on the original discretionary power. There are a number of relevant cases, which illustrate well how the courts have developed principles of review of such policy decisions. The earliest case is that of *R v Port of London Authority ex p Kynoch Ltd*⁵⁵. Here the Port of London Authority was given discretionary power to grant licences for the construction of private wharfs. The applicant was refused the grant of a licence on the grounds that an existing policy contained the rule that in case the authority was planning to build the same type of wharf itself an application for the construction of a private wharf would be unsuccessful. Even though the Court of Appeal upheld the refusal of the grant LJ Bankes established an important principle. Accordingly, “an administrative body may have a substantive general policy; but secondly, it may apply its policy only after considering the merits of each situation.”⁵⁶ In *Lavender v MHLG*⁵⁷ the applicant was refused permission to extract sand, gravel and ballast from part of Rivernook Farm in Walton-on-Thames. The official in charge refused permission and the applicant appealed to the Ministry of Housing. The latter refused permission too on the ground that the Ministry of Agriculture had not given his permission. The decision was based on the policy of the Ministry of Agriculture that generally “land in the reservations should not be released for mineral working unless the Minister of Agriculture, Fisheries and Food is not opposed to working.” The decision was held to be invalid because the

⁵² Craig, *Administrative Law*, 1994, 384

⁵³ Galligan, D.G. ,”The Nature and Function of Policies within Discretionary Power” (1976) *Public Law*, 332, (333)

⁵⁴ *ibid.*, 332 (335)

⁵⁵ [1919] 1 KB 176

⁵⁶ Galligan, *supra* n. 53, 346

Minister of Housing did not exercise his discretion but delegated it to another ministry. So in one way this is a case of “improper delegation of discretion but it may also be regarded as the equally improper rigid application of a policy.”⁵⁸ Once again LJ Banke’s principle was applied in the case of *British Oxygen v Board of Trade*⁵⁹. Here the applicants applied for an investment grant under the Industrial Development Act 1966. The Board of Trade had discretion to award these grants and had established a policy according to which grants could not be awarded for expenditure on items which each cost less than £25. However, the company had spent more than £4 million on gas cylinders, each of a price of £20. According to the above stated rule and the Board of Trade having taken the merits of the case into account, the company was refused the grant. The House of Lords applied the LJ Bankes principle and upheld the Board’s decision. Even though Lord Reid confirmed that “the general rule is that anyone who has to exercise a statutory discretion must not “shut his ears to an application”, he said:” if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him.” In this case the Court applied the Bankes rules and considered the individual circumstances of the case. Lord Reid held that there is no great difference between a policy and a rule whereas Viscount Dilhorne thought it was difficult to distinguish the two but he admitted that the applicant in the case had to be allowed to bring arguments against the policy forward. However, as a consequence it was held that the policy did not restrict the Board’s discretionary power.

In the case of *R v Secretary of State for Transport ex p Sheriff*⁶⁰, the company Sheriff & Sons Ltd had been granted the sum of £250,000 according to section 8 of the Railway Act for the provision of rail freight facilities. However, the so called Memorandum of Explanation which was issued by the Department of Transport stipulated that any “commitment to a project for the provision of rail freight facilities in advance of a decision to make a grant would render the project ineligible for a grant.” This guidance, which was also, referred to as “rules, conditions and procedures” left no room for an exception or a waiver. The department’s reasoning was that if “works had begun, it could not be satisfied that a grant was needed.” The court ruled that the decision was

⁵⁷ [1970] 1 WLR 1231

⁵⁸ Galligan, *supra* n. 53, 338

⁵⁹ [1971] AC 610

unlawful because the memorandum was a rule, which fettered the Secretary's discretion to award grants under the Railways Act.

b. Unauthorised delegation of power

The principle against delegation which is also referred to as the maxim "delegatus non potest delegare" is designed to protect the exercise of discretionary power so that it can only be exercised by the person who is expressly given that power. However, in order to ensure the functioning of the administration there are legislative and judicial limitations to that principle.

In *Carltona*⁶¹ the appellants owned a food factory, which was requisitioned in 1942 by the Commissioners of Work. The appellants claimed that the notice to requisition was invalid because the persons constituting the authority had not been involved in the process. The Commissioners of Work had never met and the Minister of Works and Planning had carried out its functions. The assistant secretary had signed the notice. Lord Greene held that "In the administration of government in this country the functions which are given to ministers and constitutionally properly given to ministers because they are constitutionally responsible are functions so multifarious that no minister could ever personally attend to them. [...] Constitutionally, the decision of such an official is of course, the decision of the minister. The minister is responsible." The *Carltona* principle was confirmed in *R v Secretary of State for the Home Department, ex parte Oladehinde*.⁶² Here, the minister had delegated his power to deport to senior immigration officers. Lord Griffiths held that this was permissible provided that the delegations to officials "do not conflict with or embarrass them in the discharge of their specific statutory duties under the Act and that the decisions are suitable to their grading and experience."

⁶⁰ *The Times*, 18 December 1986

⁶¹ *Carltona v Commissioner of Works* [1943] 2 All ER 560 (CA)

⁶² [1991] 1 AC 254

c. Acting under dictation

When exercising a given discretionary power an authority is not allowed to act under the dictation of another body. This clear rule that one must not simply act under the dictation of others was well illustrated in the case of *Lavender and Son Ltd v Minister of Housing and Local Government*.⁶³ The applicants had applied for planning permission to extract sand and other substances from a site of high agricultural quality. The permission was refused. The applicants argued that the Minister for Housing and Local Government had fettered his discretion by dismissing the application on the grounds that it was his policy not to release land for mineral working unless there was no objection from the Minister of Agriculture. The court held that the decision of the Minister of Housing and Local Government had to be quashed because he had allowed for the final decision to be made by the Minister of Agriculture.

d. Fettering discretion by contractual undertaking

Another series of cases deals with the restrictions of discretionary powers through contractual or similar commitments on decision makers. The difficulty in these cases arises out of the necessity of modern administration to enter into contractual relationships with private parties. At the same time the authorities have to preserve their public law functions and exercise their discretionary administrative powers. Clashes between these two issues have been the content various judgments.⁶⁴ DeSmith suggests three general solutions: Generally, “a public authority cannot effectively disable itself by contractual or other undertaking from making or enforcing a bylaw, refusing or revoking a grant of planning permission, or exercising any other statutory power of primary importance such as a power of compulsory purchase, nor can it effectively bind itself to exercise such a power in any particular way. Thirdly, contracts entered into by the Crown can’t exclude the exercise of discretionary powers for the public weal.⁶⁵

⁶³ [1970] 1 WLR 1231

⁶⁴ In *Birkdale* for instance it was held that “if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or duties.” However, this should not be understood as a strict rule.

⁶⁵ De Smith, *Judicial Review of Administrative Action*, 1995, 516, 517

The case of *Steeple v. Derbyshire County Council*⁶⁶ is a good example for this group of cases. The county council owned an area of parkland, which they proposed to develop as a leisure centre with recreational facilities. An agreement was entered into between the council and a company whereby the company were appointed as consultants and managers of the development. The agreement provided that the council would take all reasonable steps to obtain such outline planning permission and other outline consents as were necessary to enable the proposed development to proceed. The agreement also provided that if the council failed, inter alia, to use their best endeavours to obtain such permission or consents, they would pay the company £116.875 liquidated damages. Notices were given by an officer of the council that they proposed to seek planning permission. [...]

On a claim by the plaintiff, who was the owner of land adjoining the proposed development and a local ratepayer, against the council, inter alia, for declarations that the grant of planning permission was void on the grounds, inter alia that the decision to grant planning permission was in breach of the rules of natural justice because the terms of the council's agreement with the company might lead a reasonable person to suspect that they were likely to be biased in favour of granting the applications for permission:

The court held that, although the decision of the planning committee had been fairly and properly made, natural justice required that the decision to grant planning permission should be seen to have been fairly made; that in deciding whether the decision was seen to have been fairly made the court had to ask whether a reasonable man, who was not present when the decision was made and was unaware that it had in fact been fairly made, but who was aware of all the terms of the council's agreement with the company, would think that there was a real likelihood that the agreement had had a material and significant effect on the planning committee's decision was not seen to have been fairly made and was either void or voidable as being in breach of natural justice.

The question was whether there was a failure to comply with any of the requirements of natural justice. The plaintiff contended that the decision of 10 December 1970 failed to

⁶⁶ [1985] 1 WLR 256

comply with the requirement of natural justice in one respect only; namely that, primarily because of the terms of the contract made with K.L.F. it was not seen to have been fairly made, in that - [...] the public had reason to suspect that the decision was a mere formality, to suspect at the very least that when the decision was made there was a strong bias in favour of the decision which was in fact made, and to suspect accordingly that it was not a proper decision at all. The plaintiff did not contend that the decision was in fact not fairly made. He did not seriously challenge the evidence of Mr. Crowther, the chairman of the planning committee, which was to the effect that the meeting at which the decision was made was open to the public and that about fifty members of the public attended it, that his committee had considered the objections received, that in the morning before debating the matter they visited the site and spoke to people there, that he Mr Crowther, thought that the contract with K.L.F. was subject to the obtaining of planning permission, that the committee looked at the matter only from the planning point of view and that the committee could have turned down the county council's application. I accept the evidence of Mr. Crowther and I am satisfied that the decision was in fact fairly and properly made.

The court held that to satisfy the requirements of natural justice it must not only have been properly made, it must also be seen to have been fairly made, but that, on the contrary, it was seen or was seen by the public at large to have been pre-judged, because having agreed with K.L.F. to use their best endeavours, and generally by reason of the terms of the contract which I have cited, they had given the appearance of having imposed upon themselves and upon the planning committee a fetter or restraint on their freedom to discharge that duty in the way prescribed by the Regulations and the Act 1971. [...] Fourthly, the court asked what amounts to a fetter upon the discretion in question. The court reached the conclusion "that anything constitutes a fetter for this purpose at the very least if a reasonable man would regard it as being likely to have a material and significant effect one way or another on the outcome of the decision in question." The court held that "in conclusion, it is probable that a reasonable man, not having been present at the meeting when the decision was made, and not knowing of my conclusion as to the actual fairness of it, knowing of the existence and of all the terms of the contract [...] would think that there was a real likelihood that those provisions in the contract which require the county council, and for that matter the joint venture

committee, to use their best endeavours to obtain planning permission, and the contract as a whole in the light of its provisions to which I have referred, had had a material and significant effect on the planning committee's decision to grant the permission; and accordingly, on that ground, I hold that that decision was either voidable or void." Other High Court decisions, however did not follow *Steeple*.⁶⁷ In *R v St Edmundsbury BC ex p Investors in Industry Commercial Properties Ltd* it was held that "the reasonable man test has no application in the case of an administrative decision", as opposed to a decision "of a judicial nature".⁶⁸

2. Germany

Three forms of illegality can be found in German Administrative Law: Failure to exercise discretion, abuse of discretion and excess of discretion (as dealt with under II. below). There is some debate in Germany whether excess of discretion should be considered as part as the category of abuse of discretion which illustrates the desire to conceptualise the grounds of review. The courts differentiate between two main types of error, the first being errors occurred within the decision-making process and the second errors with regard to the result of the decision as such in its substance.

a. Review of self-created rules.

This is a classic case in which the decision-maker errs in believing that he has to apply a self-created rule. The decision-maker believes that he his bound by a standard practice and that according to the principle of equality (as discussed below) he has to conform to the standard practice. An illegal standard practice, for instance does not require the decision-maker to be bound by it.⁶⁹

b. Unauthorised delegation of power

This category is not particularly important in Germany. This is due to the nature of the provisions at stake. Violations of provisions which deal with the jurisdiction of an official or an authority usually have no direct connection to the exercise of discretionary

⁶⁷ see *R v Sevenoaks District Council, ex parte Terry*, [1985] 3 All ER 226; *R v St Edmundsbury BC ex p Investors in Industry Commercial Properties Ltd* [1985] 1 WLR 1168

⁶⁸ [1985] 1 WLR 1168 [1193, 1194]

powers. These provisions are usually only internally relevant. Internal delegation is therefore only problematic if the provision was designed to be binding externally.⁷⁰

c. Acting under dictation

This category is similar to the category below under d.

d. Fettering discretion by contractual undertaking

The Floatglass-case, BVerwGE 45, 309 was concerned with the failure to exercise discretion

In 1970 a permit for the building of a factory producing float glass was granted to the D-Corporation on a piece of land. The applicant's house and 26 other private properties were located on a directly adjoining piece of land. In the north and east of the land in question were extensive residential areas. The Federal Law on building (*Bundesbaugesetz*)⁷¹ is the law governing the establishment of development plans and the granting of building permits. According to Art 1 para 4 sentence 2 (now Art 1 para 6) of the Federal law on Building a development plan shall only be established after thorough comparative examination (*Abwägung*) of the competing interests. These competing interests are the public and private protective interests (*Belange*). In winter 1970 the mayor and a local councillor had decided to offer the D-Corporation a large piece of land for sale for the erection of a factory. A few days later the local council approved this. The programme for the development of the region (*Gebietsentwicklungsplan*) had designated the land in question as residential area. The land development plan (*Flächennutzungsplan*) designated the area as landscape or area for the erection of small buildings. The plans were altered in order to accommodate the envisaged project. The area in question was designated for industrial development. Afterwards the D-Corporation applied formally for building permission. It was granted a building permit in October 1970. Only afterwards, in February 1970 the supervisory authority approved of the changes to the building scheme (*Bebauungsplan*).

⁶⁹ BVerwGE 92, 153 (154)

⁷⁰ Maurer, *Allgemeines Verwaltungsrecht*, 508 ff

⁷¹ Now called *Baugesetzbuch*

It was held that the comparative examination (*Abwägung*) is incomplete if the authority entered into either legal or factual commitments before exercising its discretion. This contravenes Art 1 para 4 sentence 2 of the Federal Law on Building (*BBauG*). However, such a deficit can be remedied if the prejudgment is justified, the division of competences has been complied with and if the decision was materially correct. This however, requires that the result complies with the requirement of comparative examination (*Abwägung*) as set out in Art 1 para 4 sentence 2 of the Federal Law on Building. Industrial and residential areas should be built in sufficient distance from each other. The appeal was allowed.

The court held that the administrative authority has to carry out a comparative examination (*Abwägung*) of the contradicting interests. If such examination does not take place at all the authority has violated its duty. The authority has acted against its duty to carry out a comparative examination (*Abwägung*) if it does not consider those questions, which should be considered within the given situation. Further, if the significance of the private protective interests has not been recognised and if the balance between the public interests and the private interests is disproportionate. These requirements refer both to the process of examination and the result of the examination. Regarding the process of examination the *Bundesverwaltungsgericht* agrees with the appellate court in so far as the initial decisions during the planning stage had shortened the process and therefore no proper examination (*Abwägung*) had taken place at all. [...] It is undisputable that in particular the planning of larger projects often requires the authorities to make decisions before the final examination stage. Discussions, agreements, representations and contracts which take place before the formal planning stage may be essential for good planning and in order to guarantee an effective realisation of the planning. It would be unrealistic to consider all these above-mentioned commitments during a planning decision as illegal.

Therefore prejudgments which are directed towards a comparative examination (*Abwägung*) can be in the interest of an effective planning procedure. Planning deficits, which are based on previous decisions, which influence the course of procedure, can therefore be remedied if three cumulative conditions are met. The prejudgment must be materially justified. The prejudgment has to be taken in accordance with the required

procedural rules, i.e. if the planning is within the council's authority any prejudgment has to take the council's view into account. The decision has to be materially correct. This however, requires that the result complies with the requirement of comparative examination (*Abwägung*) as set out in Art 1 para 4 sentence 2 of the Federal Law on Building.

The court has no doubt that residential and industrial areas should not be situated in direct neighbourhood. The positioning of residential and industrial areas bears the potential for conflict and cannot be dealt with by imposing restrictions on the industrial projects but should be avoided in the first place. Therefore the building permit is illegal and it violates the rights of the applicant based on article 14 Basic Law⁷².

3. Evaluation

The comparison shows that there is a certain amount of resemblance in the category of abuse of discretion. Both the English and German system have developed grounds of review to control that discretion is exercised unfettered. The German decision in the *Floatglass case* and the English decision in *Steeple v. Derbyshire County Council*⁷³ both reach the same result by quashing the building permission on the ground that the planning authorities' decision was illegal. Both courts apply the ground of review of fettering of discretion and the similarity of the court's approaches is striking. The High Court's decision is based on the reasoning that the contract which preceded the planning permission had had a material and significant effect on the planning committee's decision to grant the permission; and accordingly, on that ground, held that that decision was either voidable or void. The *Bundesverwaltungsgericht* states that the prejudgments, i.e. the offer of the piece of land in question had shortened the required process of examining competing interests during the planning stage and a correct examination of competing interests could not be carried out at all. However, the *Bundesverwaltungsgericht* would have been prepared to remedy the deficit in the exercise of the authorities' powers if the result in its substance had been correct and the

⁷² Art 14 I Basic Law provides:

"Property and the right of inheritance shall be guaranteed. Their content and limits shall be determined by law".

prejudgment had been made with the involvement of the council. The *Bundesverwaltungsgericht* was not satisfied with the planning decision in its substance and allowed the application. The High Court on the other hand was more concerned with issues of natural justice such as bias and applies the so-called reasonable man test. Accordingly the decision must not only have been properly made, it must also be seen to have been fairly made.

I. Abuse of discretion

1. *England*

a. *Use of power for an improper purpose*

There is no absolute discretion in public law. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely, that is to say, it can validly be used only in the right and proper way, which Parliament when conferring it is presumed to have intended.

The groundbreaking decision was *Padfield v. Minister of Agriculture, Fisheries and Food*⁷⁴

The Agricultural Marketing Act 1958 provided for a committee of investigation, which had to consider and report certain kind of reports, "If the Minister in any case so directs". Producers in the southeast of England complained that the differential element in the price fixed for their milk by the Milk Marketing Board was not sufficient. The minister had the discretion of referring such complaints to a committee on investigation. He did not do so, giving the reasons that the complaint was unsuitable for investigation because it raised wide issues and the producers were presented on the board and should be content with "the normal democratic machinery". However, in *Padfield* the Minister gave bad reasons, which showed that he was not exercising his discretion in accordance with the intentions of the Act. The whole aim of the minister's overriding power, however was to correct the "normal democratic machinery" if necessary. It was further

⁷³ [1985] 1 WLR 256

held that there is no general requirement that the authority should give reasons for its decisions. The Minister could have refused properly to act on a complaint without any reasons and that in such a case a complainant would have no remedy unless other known facts and circumstances appear to point overwhelmingly in favour of a different decision. The House of Lords held that where there was a relevant and substantial complaint the minister had a duty as well as a power to act. Otherwise he would deprive the producers of a remedy, which Parliament provided for them, i.e. defeat statutory intent and purpose.⁷⁵

b. *Unreasonableness*

The ground of review of unreasonableness is more controversial than the previously discussed categories of review. The law relating to the principle of unreasonableness has undergone a considerable development recently. The locus classicus for the ground of review of unreasonableness is the case *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*⁷⁶ Sir John Laws describes the *Wednesbury* case as the “legal equivalent of Beethoven’s Fifth Symphony: it has been hackneyed through no fault of its own.”⁷⁷ In keeping in line with the analogies in the musical world one could also describe it as the legal equivalent to Schubert’s Unfinished as it leaves scope for its development into a richer test. Under the Sunday Entertainments Act 1932 the Corporation gave permission to the appellants to run their cinema on Sundays. However, children under the age of 15 were not admitted. The appellants argued that this restriction was unreasonable. It was held that the subject matter of the condition was to be decided by the Corporation. Lord Greene held: “It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind.

⁷⁴ [1968] AC 997

⁷⁵ Wade, *Administrative Law*, 1992, 401, 402

⁷⁶ [1984] 1 KB 223

⁷⁷ Forsyth and Hare, *The Golden Metwand and the Crooked Cord*, 1998, 185

Lord Greene distinguishes between two forms of *Wednesbury* unreasonableness. Firstly, he identifies the test for irrelevant considerations as follows:” The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account.” This first limb of the *Wednesbury* test is more concerned with the process of the decision making itself.

The second limb of Lord Greene’s test, however is concerned with the substantive conclusion of the decision. Under this test Lord Greene, however is very eager to describe the limited role of the courts in reviewing the exercise of discretionary powers: “Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no unreasonable authority could ever have come to it.” He is clear in his point that a merits based review has to be avoided. “The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority, which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of powers which Parliament has confided in them.” The meaning of “unreasonable” is sometimes described as extreme behaviour, such as acting in bad faith, taking inappropriate considerations into account or strictly acting irrationally. Less technically it has been described as a decision, which evokes the remark “My goodness that is certainly wrong!”⁷⁸

The *Wednesbury* principle has developed into one of the “bedrocks” of modern administrative law in England.⁷⁹ This principle has served as a test to be applied in many other cases⁸⁰ and has undergone a development, which is not completed yet. The courts have shaped the test in that they have adopted different standards of review depending on the subject matter. Firstly, the courts have applied the rather strict form in

⁷⁸ De Smith, *Judicial Review of Administrative Action*, 1995, 550, May L.J. in *Neale v. Hereford & Worcester C.C.* [1986] I.C.R. 471, 483

⁷⁹ Sir John Laws in Forsyth and Hare, *The Golden Metwand and the Crooked Cord*, 1998, 186

⁸⁰ see *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374

its original meaning into a softer *Wednesbury* test. In the ITF⁸¹ case Lord Cooke formulated the *Wednesbury* test in a way which lowered the high hurdle as imposed by Lord Greene in the *Wednesbury* decision: He asked whether the decision was one which a reasonable authority could reach. The case was concerned with protests against the export of livestock. The Chief Constable of Sussex deployed manpower to enable to control the protests. However, due to limited resources he had to reduce the police presence to two days a week. ITF claimed that this decision was unreasonable. The House of Lords held that the decision was a proportionate measure. However, the test applied by Lord Cooke is a refreshingly new phrasing of the old *Wednesbury* principle. The fact that courts have begun to shape the traditional unreasonableness principle into a flexible tool, which applies different standards of review stands, raises the question whether the introduction of the principle of proportionality into English law is desirable and which from this should take.⁸²

Craig identifies three options open to the courts in dealing with this question. Firstly, the “retention of traditional *Wednesbury* alongside proportionality.” Accordingly, the courts could apply the traditional *Wednesbury* test outside those areas where they are obliged to apply the proportionality test such as under the Human Rights Act 1998 or in cases with EC law context. However, this solution appears to be too theoretical, as courts have already started to modify the *Wednesbury* test.⁸³

Secondly, the courts could develop *Wednesbury* in the way suggested by Lord Cooke in the ITF case. Accordingly, the traditional *Wednesbury* test would be retained in a modified version alongside proportionality. Sir John Laws describes the common law as containing the quality “which above all else allows it to harness old principles to new conditions without offence to the democratic arms of government.” He justifies the varying standards of the *Wednesbury* test with the nature of the common law. The principle of *Wednesbury* is not engraved in statute and is therefore able to be applied

⁸¹ *R v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 1 All ER 129

⁸² Craig, *Administrative Law*, 1999, 586; Fordham M., and de la Mare, T., in Jowell, J., Cooper, J., *Understanding Human Rights Principles* (Oxford: Hart Publishing, 2001) 27; Sir John Laws in Forsyth and Hare, *The Golden Metwand and the Crooked Cord*, 1998, 185

⁸³ Craig, *Administrative Law*, 1999, 598; see for a more detailed discussion of the principle of proportionality under the section “The development of the principle of proportionality under “European influence” below

flexibly. He supports the idea that the *Wednesbury* principle is “alive and well” that the concept of proportionality can be embraced by adapting the existing modes of review.⁸⁴

Finally, proportionality could become the general criteria for review. Advantages of such an approach are seen in the streamlining of tests applied with EC law context and actions under the Human Rights Act 1998. Further, the test applied under the proportionality test is more detailed and structured than the traditional *Wednesbury* test. Finally, this test could be applied with varying standards of review to take account of decision, which might not be suited for full judicial scrutiny.⁸⁵

However, whatever route is chosen the crucial point in the application of the principle of modified unreasonableness or proportionality is the standard of review, which is applied in a particular context. This issue is closely linked to questions such as burden of proof, investigation into facts by applying different modes of inquiry, be it inquisitorial or adversarial and the application of procedural guarantees such as the duty to give reasons.

c. The development of the principle of legitimate expectation under European influence

Another area of controversy is the doctrine of substantive legitimate expectation. Even though the term legitimate expectation had been used by judges in English at the end of the nineteenth century “it is generally accepted that the principle of legitimate expectations has only developed in recent years.”⁸⁶ The development of the principle in modern English Administrative Law has been influenced by the principle as applied in European law.⁸⁷ De Smith describes it as still being “in the process of evolution. It is founded upon a basic principle of fairness that legitimate expectations ought not be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in

⁸⁴ Sir John Laws in Forsyth and Hare, *The Golden Metwand and the Crooked Cord*, 1998, 201

⁸⁵ Craig, *Administrative Law*, 1999, 602

⁸⁶ Robert, T. *Legitimate Expectations and Proportionality in Administrative Law* (Oxford: Hart Publishing, 2000) 46

⁸⁷ *ibid.*, 49

government's dealings with the public.”⁸⁸ An increasing number of cases dealing both with procedural and substantive legitimate expectation have shaped this concept into an important principle of English Administrative law. The concept of procedural legitimate expectations is used to describe the “right, which the applicant claims to possess as the result of behaviour, by the public body, which generates the expectation.”⁸⁹ The concept of substantive legitimate expectations “refers to the situation in which the applicant seeks a particular benefit or commodity, such as a welfare benefit, or a licence.”⁹⁰ In cases in which the public body wants to deviate from an existing policy such as in *R v Secretary of State for the Home Department, ex p. Asif Mahmood Khan*⁹¹ overlaps between these two concepts can be detected. “It is also clear from cases commonly categorised as being about procedural expectations that the test laid down in such decisions has a substantive dimension. This is exemplified by *Khan*⁹², *Liverpool Taxis*⁹³ and other cases. If some undertaking had been given which was relied on by the individual then the public body was not able to resile from it through a change in policy without giving an opportunity for a hearing and the only if the public interest demanded that this should be so.

*R v Secretary of State for the Home Department, ex p. Asif Mahmood Khan*⁹⁴

A Home Office circular letter stated that although the Immigration Rules did not permit a foreign child subject to immigration control to enter the United Kingdom for the purposes of adoption, the Secretary of State would permit such entry provided certain specified criteria were met. The criteria involved the adoption being genuine and not merely a device for obtaining entry, that the child's welfare in this country be assured, that the courts here would be likely to grant an adoption order, and that one of the intending adopters be domiciled in the United Kingdom. The letter then stated the procedure to be followed by would-be adopters. This was to obtain an entry clearance from an entry clearance officer abroad. That officer would have to be satisfied of the

⁸⁸ De Smith, *Judicial review of administrative action*, 1995, 417

⁸⁹ Craig, *Administrative Law*, 1999, 611

⁹⁰ *ibid.*, 611

⁹¹ [1984] 1 W.L.R. 1337

⁹² [1984] 1 W.L.R. 1337

⁹³ [1972] 2 Q.B. 299

child's wishes and the wishes of the natural parents. The applicant and his wife wished to adopt a relative's child, living with its natural mother in Pakistan. Application for an entry clearance was made in Islamabad. All the various criteria listed above appeared to have been satisfied. However, in due course, following referral of the matter to the Home office, entry clearance was refused. This was on the ground that there were no "serious and compelling family and other considerations", such as would make refusal of permission to enter undesirable. The entry clearance officer's report to the Home Office had made clear the fact that the child in question was living in good conditions with his natural mother.

The court held that "there is not a word [in the circular letter] to suggest that in exercising his discretion the Secretary of State requires to be satisfied that the natural parents are incapable of looking after the prospective adoptee, or even that their ability or inability to do so was considered relevant. [...] The whole tenor of the letter is that, if the application was genuine, if the child's welfare was assured, if a court would be likely to grant an order and if the natural parents gave a real consent, the child would be let in and its ultimate fate left to the court here. [...] Here it is contended that the applicant that the applicant, by virtue of the terms of the Home Office letter, had a legitimate expectation that the procedures set out in the letter would be followed and that such legitimate expectation gave him sufficient interest to challenge the admitted failure of the Secretary of State to observe such procedures."

- (1) "Legitimate expectations" in this context are capable of concluding expectations which go beyond enforceable legal rights, provided they have some reasonable basis."
- (2) "The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority which has the duty of making the decision, if the authority has, through his officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."
- (3) [...] The justification for it is primarily that when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act

⁹⁴ [1984] 1 W.L.R. 1337

fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. [...] I have no doubt that the Home Office letter afforded the applicant a reasonable expectation that the procedures it set out.

The development of possible justifications for recognising the existence of substantive legitimate expectation can be illustrated by a variety of more recent cases. Sedley J. stated his reasons for recognising the existence of substantive legitimate expectation in the case of *R v Ministry for Agriculture, Fisheries and Food ex parte Hamble*⁹⁵: “the real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that the applicant will be listened to before the decision maker decides to take a particular step.” Sedley J. defined the principle of legitimate expectations by referring to case law of the European Court of Justice and Jürgen Schwarze’s research as follows: “Legitimacy in this sense is not an absolute. It is a function of expectations induced by government and policy considerations which militate against their fulfilment. The balance must in the first instance be for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the court’s criterion is the bare rationality of the policy-maker’s conclusion. While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court’s concern.”⁹⁶ *Craig* places much on the idea of legal certainty. This is an important part of legitimate expectation, as they aim to preserve expectations that an individual might have acted upon in certain cases. The main argument against the existence of substantive legitimate expectations is that it has an undesirable effect of fettering governmental policy choices. If there is to be effective government then it is argued by some that they must have total discretion to alter policies at any time. As *Craig* notes, however, any argument about the fettering of governmental policy is countered fairly effectively by the realisation that the fetter on policy is only temporal.⁹⁷ The strongest claim for substantive legitimate expectation arises from a clear and unambiguous claim. Another way of showing that there are substantive legitimate

⁹⁵ [1995] 2 All ER 714, 729

⁹⁶ [1995] 2 All ER 714, 731

⁹⁷ *Craig, Administrative Law*, 1999, 617-618

expectations are through a course of dealing where there is consistent conduct over a long period of time.⁹⁸

*R v North and East Devon Health Authority, ex parte Coughlan*⁹⁹

The concept of substantive legitimate expectation has been confirmed in the decision of *R v North and East Devon Health Authority, ex parte Coughlan*. Ms Coughlin had been the victim of a road traffic accident and as a consequence had been physically disabled. In 1993 the applicant was moved to a purpose built facility and was assured by the Health Authority that this would be her home for life. However, the Health Authority decided to close the house. The applicant challenged the decision, *inter alia*, that on the grounds of the promise made the applicant had a substantive legitimate expectation to stay in the house. It was held that the closure was not justified by overriding public interest and that the applicant had a substantive legitimate expectation. Since the decision in *Coughlan* it appears to be more likely to establish substantive legitimate expectation if the representation was made in a direct manner, if the expectation arises within a limited class of people, and if the individual relied to their detriment on the expectation.

However, even if substantive legitimate expectations are identified, there is the need for the individual to prove that the departure from the legitimate expectation was unreasonable. The question therefore is which test should be applied in determining the unreasonableness of the departure. Should it be the traditional *Wednesbury* test, a modified version of it or the test of proportionality? Both cases, *Hamble* and *Coughlan* seem to direct towards a test based on fairness and proportionality. Accordingly, the breach of a legitimate expectation is an abuse of power and that this is unlawful. Lord Woolf said in *Coughlan*: “For our part, in relation to this category of legitimate expectation, we do not consider it necessary to explain the modern doctrine in *Wednesbury* terms”¹⁰⁰

⁹⁸ see *R v Inland Revenue Commissioners, ex parte Unilever plc* [1996] S.T.C. 681

⁹⁹ [1999] L.G.R., 703

¹⁰⁰ [1999] L.G.R., 703

In conclusion it appears that the principle of substantive legitimate expectation has been accepted for the review of administrative discretion. In the case of *R v. Secretary of State for Education and Employment, ex parte Begbie*¹⁰¹, Peter Gibson LJ said “Mr Beloff submits that the rule that a public authority should not defeat a person’s legitimate expectations is an aspect of the rule that it must act fairly and reasonably, that the rule operates in the field of substantive as well as procedural rights. He cites authority in support of all these submissions and for my part I am prepared to accept them as correct, as far as they go.”

d. *The principle of proportionality and the protection of Human Rights under European influence*

Lord Diplock suggested the introduction of the principle of proportionality as a potential fourth ground of review in the case of *CCSU v Minister for the Civil Service*¹⁰². Inevitably such a transplantation of a European principle of German origin meant a challenge to the traditional common law approach. More precisely the Wednesbury principle of unreasonableness and the relationship to the principle of proportionality has since been at the centre of the discussion whether the European concept has been successfully integrated into English law.¹⁰³ The Wednesbury principle as established in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*¹⁰⁴ contains the rule that a discretionary decision of a public body is illegal if it is so unreasonable that no reasonable authority could ever come to it. The principle of proportionality in its European formulation however, embraces the test of whether the challenged act is suitable and necessary for the achievement of its objective, and one, which does not impose excessive burdens on the individual.¹⁰⁵ The proportionality test clearly requires “the express articulation and explicit weighing of the specific aims of a measure in relation to its impact on a right or interest invoked by the applicant.”¹⁰⁶ This test poses

¹⁰¹ [2001] 1 W.L.R. 1115 The case concerned the claim for legitimate expectation stemming from a pre-election statement with regard to assistance with independent school fees.

¹⁰² [1985] AC 374

¹⁰³ See de Búrca, G., “Proportionality and Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law” (1997) *European Public Law*, 561

¹⁰⁴ [1948] 1 KB 223

¹⁰⁵ Craig, P., de Burca, G., *EU Law* (Oxford: University Press 1998) 350

¹⁰⁶ See de Burca *supra* n. 103

two difficulties for a smooth accommodation into the existing system of Judicial Review of administrative action in English courts. The first difficulty is the degree of review of an original decision, which such a test would require. The weighing of public and private interests amounts to a form of review, which is closer to that of an appellate jurisdiction and goes beyond the traditional supervisory function of Judicial review proceedings.

The second possible obstacle could be seen in “the absence of a fundamental law” in the UK. Both concerns were clearly expressed in the case of *Brind v Secretary of State for the Home Department*¹⁰⁷ however, at the same time this decision marked the era of development of the recognition of Human Rights in Judicial Review. In 1988 the Home Secretary issued a directive under the Broadcasting Act 1981, prohibiting the broadcasting of “words spoken” by any person representing or purporting to represent certain organisations including Sinn Féin and the Ulster Defence Association. *Brind* raised two issues. Firstly, the question whether Human Rights Law had any room in judicial review and secondly whether the principle of proportionality should be used as a separate ground of review as suggested in the GCHQ case. In *Brind* the proportionality test was discussed intensively.

Having stressed that the Convention is not part of domestic law and that the courts have no power to enforce Human Rights directly, Lord Bridge added that ambiguous domestic legislation was intended to conform with the Convention by Parliament: “It is accepted, of course, by the appellants that, like any other treaty obligations which have not been embodied in the law by statute, the convention is not part of the domestic law, that the courts accordingly have not power to enforce convention rights directly and that, if domestic legislation conflicts with the convention, the courts must nevertheless enforce it. But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the convention, the courts will presume that parliament intended to legislate in conformity with the convention, not in conflict with it.”

¹⁰⁷ *R v. Secretary of State for the Home Department, ex parte Brind*, [1991]A.C. 696

Lord Templeman stressed that “in terms of the convention, as construed by the European Court of Human Rights, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent.” Lord Templeman was therefore the only one who suggested applying the proportionality test in general even though in this case he held it was not appropriate. Lord Ackner argued that the principle was incompatible with the Judicial Review approach, which does not review the merits of a case, also described as “the forbidden appellate approach”. Secondly he held that in the absence of a “fundamental law” there was no room for the principle: Lord Roskill and Lord Bridge concluded with Lord Ackner, however preserving the possible future incorporation of the ground of proportionality as a separate ground of review: Lord Roskill: “ I am clearly of the view that the present is not a case in which the first step can be taken for the reason that to apply the principle in the present case would be for the court to substitute its own judgment of what was needed to achieve a particular objective for the judgment of the Secretary of State upon whom that duty has been laid by parliament. But so to hold in the present case is not to exclude the possible future development of the law in this respect...”

Murray Hunt describes the decision as “double-edged sword” by establishing that unincorporated law is irrelevant, and at the same time favouring a refinement of the traditional approach in fundamental rights cases by lowering the *Wednesbury* threshold.¹⁰⁸

In a recent article Sir John Laws is concerned with the meaning and dangers of rights, which in his view have not been paid enough attention.¹⁰⁹ This is probably true, as the common law world does not possess a culture of rights in the way countries like Italy and Germany have developed it. Both Italy and Germany see in their Constitutions and the judicial review of the constitutionality of legislation a protection against “the return of the evil - the horrors of dictatorship and the consequent trampling on fundamental human rights by legislators subservient to oppressive regimes.”¹¹⁰ Therefore continental legal systems are aware of the rights that a written constitution actually ascribes to them.

¹⁰⁸ Hunt, M., *Human Rights Law in English Courts*, (Oxford University Press, 1997) 208

¹⁰⁹ Sir John Laws, “The Limitations of Human Rights” (1998) *Public Law* 254

¹¹⁰ Cappelletti, M., *The Judicial Process in Comparative Perspective*, 1989, 161

Due to this rights-based background a different attitude of continental scholars in analysing the legal development of the European Union can be witnessed. Politicians and academic writers on the continent are deeply concerned with the question of the legal basis for member state liability and the *Schutznormtheorie* (theory of the protective norm), which requires that the rule infringed by the member state must be for the protection of the individual.¹¹¹ In Alan Ryan's words "the British tradition cannot say anything convincing about our rights [...]."¹¹² This "national accusation" as Ryan puts it, is an exaggeration and used by Legrand to illustrate the importance of recognising the socio-historical and socio-cultural background of the common law legal culture when comparing it with the civil law tradition.¹¹³

The protection of Human Rights has however, progressed significantly in the United Kingdom. The explicit protection of Human Rights in the United Kingdom has found clear expression in the Human Rights Act 1998. The Act is merely a step in a process of a development, which can be described as a change in the legal climate. The Act has incorporated a number of the rights contained in the European Convention of Human Rights into English domestic law. It "should produce huge changes in the way our public authorities, including the courts and tribunals, approach all aspects of the law."¹¹⁴ Section 2(1) of the Act requires them to take into account any "judgement, decision, declaration or advisory opinion of the European Court of Human Rights." This means that UK courts must have regard to the case law of the European Court of Human Rights, which applies the principle of proportionality. However, the UK courts are under no duty to adopt exactly the same test.¹¹⁵ It has been noted "the most difficult and important problem facing British courts will be to develop (or rather invent) a coherent

¹¹¹ von Dannwitz, T., "Die gemeinschaftsrechtliche Staatshaftung der Mitgliedstaaten" (1997) *DVBl* 1; see the submission of the German Government in Judgment in joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, I - 1143; Ruffert, M., "Rights and Remedies in European Community Law: A comparative View", (1997) *CMLR* 309

¹¹² Ryan, A., "The British, The Americans, and Rights" in Lacey, M.J. Haakonssen, K. *A Culture of Rights: the Bill of Rights in philosophy, politics, and law – 1791 and 1991*(Cambridge: 1991) 391

¹¹³ Legrand, "How to compare", *Legal Studies*, 1996, 232, [237]

¹¹⁴ Feldman, D., "Proportionality and the Human Rights Act 1998", in Ellis, E., *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999) 117

¹¹⁵ Feldman, D., "Proportionality and the Human Rights Act 1998", in Ellis, Evelyn, *The Principle of Proportionality in the Laws of Europe*, 1999, 121

and defensible doctrine of proportionality”.¹¹⁶ It is most likely that the existing public law principles will influence the way in which proportionality is going to be applied in the future.¹¹⁷

However, the following cases illustrate that there are a significant number of cases which apply the language of proportionality and which have recognised the principle in cases decided even before the coming into force of the Human Rights Act.

aa. *Regina v. Secretary of State for the Home Department Ex parte Simms*¹¹⁸

This case was concerned with two prisoners serving life sentences for murder had their separate applications for leave to appeal against conviction refused by the Court of Appeal (Criminal Division.). The men continued to protest their innocence. In order to obtain the reopening of their cases they wished to have oral interviews with journalists who had taken an interest in their cases. Relying on the policy of the Home Secretary the Governors of the prisons were only prepared to allow the oral interviews to take place if the journalists signed written undertakings not to publish any part of the interviews. The journalists refused to sign the undertakings. The prisoners sought judicial review of the decision denying them the right to have oral interviews. They relied on the right to free speech not in a general way but restricted to a very specific context: They argued that only if they are allowed to have oral interviews in prison with the journalists will they be able to have the safety of their convictions further investigated and to put forward a case in the media for the consideration of their convictions. They sought to enlist the investigative services of journalists as a way to gaining access to justice by way of the reference of their cases to the Court of Appeal (Criminal Division).

¹¹⁶ Kentridge, S., ‘The Incorporation of the European Convention on Human Rights’, in the University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom* (Oxford, 1998) 70 as cited in Feldman, D., ‘Proportionality and the Human Rights Act 1998’, in Ellis, E., *The Principle of Proportionality in the Laws of Europe*, Oxford, 1999, 117

¹¹⁷ Feldman, D., *supra* n. 116, 143

¹¹⁸ [1999] 3 WLR 328

The House of Lords allowed both appeals and held that declarations should be granted in both cases to the effect that the Home Secretary's current policy is unlawful, and that the Governor's administrative decisions pursuant to that policy were also unlawful.

The case is a good example for the high intensity of judicial control applied in cases with a strong Human Rights context. The House of Lords emphasised the need for the protection of the right to freedom of expression: "In a democracy it is the primary right: without it an effective rule of law is not possible. Nevertheless, freedom of expression is not an absolute right. Sometimes it must yield to other cogent social interests. Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms (1953) is in the following terms."

The court went on to describe the content of this fundamental right: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." However the court made clear that this right may not be exercised in isolation of other rights but is subject to limitations: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The court further referred to the case of *Derbyshire County Council v. Times Newspapers Ltd*¹¹⁹ in which the requirements of necessary restrictions in a democratic society were defined as follows: "As regards the words "necessary in a democratic society" in connection with the restrictions on the right to freedom of expression which may properly be prescribed by law, the jurisprudence of the European Court of Human rights has established that "necessary" requires the existence of a pressing social need,

¹¹⁹ [1993] A.C. 534

and that the restrictions should be no more than is proportionate to the legitimate aim pursued.” In that context Lord Keith observed that he reached his conclusion on the issue before the House without any need to rely on the Convention. But he expressed agreement with the observation of Lord Goff of Chieveley in the *Guardian* newspapers case and added “that I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the Treaty in this particular field”.

Lord Steyn went on to interpret the wide enabling power by referring to the principle of legality:

“Literally construed there is force in the extensive construction put forward. But one cannot lose sight that there is at stake a fundamental or basic right, namely the right of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner’s conviction and to publicise his findings in an effort to gain access to justice for the prisoner. In these circumstances even in the absence of an ambiguity there come into play a presumption of general application operating as a constitutional principle as Sir Rupert Cross explained in successive editions of his classic work. *Statutory Interpretations*, 3rd edition, 1995), pp. 165-6. This is called “the principle of legality” [...] Applying this principle I would hold that the standing orders leave untouched the fundamental and basic rights asserted by the applicants in the present case.

Similarly, Lord Hoffmann also referred to the importance of the principle of legality in a constitution, which “acknowledges the sovereignty of parliament”:

“Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the

democratic process. In the absence of express language or necessary implications to the contrary, the courts must therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”¹²⁰

Lord Hoffmann’s speech is significant as it tackles the difficult question of parliamentary sovereignty and the protection of basic rights. He acknowledges that in other countries the legislature is often directly bound by the constitutional mandate to observe the protection of individual rights. In the absence of such a constitutional requirement the principle of legality serves as a legal tool to justify the role of the courts in protecting individual rights by way of controlling the exercise of public powers.

Lord Hobhouse of Woodborough expressly referred to the principle of proportionality. However, he used the word disproportionate as equivalent to unreasonable in the negative meaning of the word: He held that in “this extreme policy is both unreasonable and disproportionate and cannot be justified as a permissible restraint upon the rights of the prisoner. In certain situations a face-to-face visit by a journalist is appropriate as a necessary supplement to the other means of communication. The evidence shows that a prisoner has legitimate interest in seeking to obtain a reference back of his case to the Court of Appeal. He does not have the benefit of legal aid for this purpose. In practical terms the reference back will normally have to be on the basis of fresh evidence not previously available. Someone has to unearth that evidence if it exists. I would also agree with the concluding words of Latham J. Respect must be had for those who have the responsibility of running penal establishments. If basic rights are being asserted, the relevant criterion to apply in evaluating any conduct alleged to interfere with those rights is that adopted by the Court of Appeal in *Reg.v. Ministry of Defence, Ex parte Smith* [1996] Q. B. 517, 554. The court must be satisfied that the relevant decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker: the more substantial the interference with human rights, the more the

¹²⁰ [1999] 3 WLR 328 [341f-h]

court will require by way of justification before it is satisfied that the decision is unreasonable.

In conclusion the case of *Simms* is a good example for the development of the common law in the absence of a written constitutional document, which might impose a duty for the legislator to act in accordance with Human rights. Having said that, section 19 of the Human Rights Act 1998 requires a minister of the Crown in charge of a bill in either House of Parliament to make a statement of compatibility with the Convention rights before the Second Reading of a bill. *Simms* illustrates how English judges have embraced the protection of Human Rights, apply the principle of proportionality by referring to the requirement of a pressing social need to restrict a basic rights and therefore applying an intensive control to administrative power. Lord Hoffmann engages the traditional principle of legality to justify the role of the courts in protecting individual rights without encroaching upon the principle of parliamentary sovereignty.

The case of *Simms* applies the proportionality test in case with Human Rights context. It is an interesting example for the development of substantive review in English law as it uses the principle of legality as a justification for the increased intensity of control. The use of such a traditional principle appears to be a very effective way of justifying the increased standard of substantive review. However, the high standard of review in *Simms* and the express use of the principle of proportionality are due to its strong Human Rights context and is important to note that the intensity of review of discretionary decisions still varies greatly according to the subject matter. The principle of proportionality is clearly applied in cases with a Human Rights context, under the Human Rights Act 1998 or in the context with EC law. However, Lord Slynn made an important statement in the case of *R v Secretary of State for the Environment Transport and the Regions, ex parte Holding and Barnes and others* (referred to as *Alconbury*) concerning the spill-over effect into domestic law: “ I consider that even without references to the Human Rights Act the time has come to recognise that this principle (of proportionality) is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to

domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.”¹²¹

bb. *R v Secretary of State for the Home Department, ex parte Daly*¹²²

This case is another important example for the change in climate that can be observed in some recent decision by the House of Lords concerning the application of the test of proportionality in the context of Human Rights violations. Lord Steyn’s speech is important as he makes very clear observations regarding the application of the principle of proportionality in English law.

The case concerned a prisoner, Mr Daly who challenged the lawfulness of a policy under the Prison Act, which contains the requirement that a prisoner may not be present when his legally privileged correspondence is examined by prison officers. He submits that this policy is contravening Human Rights under the European Convention of Human Rights.

The judicial review test to be applied as described by Lord Steyn was as follows:

"When anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention. When considering the test of necessity in the relevant context, the court must take into account the European jurisprudence in accordance with section 2 of the 1998 Act." Lord Steyn further distinguished clearly the traditional *Wednesbury* test from the more “precise and sophisticated” test of proportionality. “The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*¹²³ the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is

¹²¹ [2001] EWHL 23, para 51

¹²² [2001] 2 W.L.R. 1622

¹²³ [1999] 1 AC 69

arbitrary or excessive the court should ask itself: "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Lord Steyn further held that there are overlaps between the *Wednesbury* test and the latter test, however he stated that the intensity of review under the proportionality test is more intensive. He held that the proportionality test involves the assessment of the balance with the decision maker had to strike, rather than just judging on the rationality or reasonableness of the decision. Secondly he stated that this test would have to pay attention to the weight given to interests and considerations and is therefore wider than the traditional approach. And finally he referred to the heightened scrutiny test in *R v Ministry of Defence, Ex p Smith*¹²⁴ which "is not necessarily appropriate to the protection of human rights. The "anxious scrutiny test" applied in this case imposed a high threshold test on which the challenge based on Article 8 of the ECHR failed (the right to respect for private and family life).¹²⁵

Lord Steyn concluded that "the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued". This application of this test may result in different results. He emphasised therefore that cases based on Convention rights must "be analysed in the correct way". However, referring to Professor Jowell's recent article, he held that this would not amount to a merits review.¹²⁶

Finally he referred to Laws LJ who emphasised in *Mahmood*, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything."¹²⁷

¹²⁴ [1996] QB 517, 554

¹²⁵ The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

¹²⁶ "Beyond the rule of law, Towards Constitutional Judicial Review", (2000) *Public Law*, 671, 681

¹²⁷ [2001] 1 WLR 840 at p 847, para 18,

The case of *Secretary of State for the Home Department v Rehman*¹²⁸ illustrates this point clearly. Lord Hofmann stated that “the need for restraint in second guessing policy decisions of the Home Secretary flows from a common sense recognition of the nature of the issue and the differences in the decision making process of the Home Secretary and the Commission ... This seems to me to underline the need for the judicial arm of government to respect the decisions of Ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security ... It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process.”¹²⁹

cc. *R (on the application of ProLife Alliance) v British Broadcasting Corporation*¹³⁰

The most recent statement as to the correct application of the principle of proportionality under the Human Rights Act 1998 was made in March 2002 in the case of *R (on the application of ProLife Alliance) v British Broadcasting Corporation*¹³¹. The case was concerned *with* the banning of a video, which was part of the party election broadcast of a registered political party, which was opposed to abortion. The video was planned to be used in the 2001 general election. The video showed clear images of aborted foetuses in a “mangled and mutilated state. The broadcasters refused transmission on the grounds of taste and decency (on the basis of s 6(1) of the Broadcasting Act 1990). The applicants submitted that the ban was in violation to their right to freedom of expression under Article 10 of the European Convention on Human Rights and that the ban was not “necessary in a democratic society” under Article 10(2).

The Court of Appeal held that the broadcasters had failed to “give sufficient weight to the pressing imperative of free political expression” and allowed the appeal.¹³² The court held that the “English court is not a Strasbourg surrogate”, but that under the

¹²⁸ [2002] 1 All ER 122

¹²⁹ *ibid.*, also see the decision of *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2001] 4 All ER, 961

¹³⁰ [2002] 2 All ER 756

¹³¹ *ibid.*,

¹³² *ibid.*, 757

Human Rights Act 1998 there was a duty “to develop by the common law’s incremental method, a coherent and principled domestic law of human rights.” This followed from section 6 and in particular section 2 of the Human Rights Act accordingly, the court had to “take account of the Strasbourg cases”.¹³³ The court emphasised the importance of freedom of speech: “Freedom of speech is always the first casualty under a totalitarian regime”¹³⁴ and phrases the essential question to the case as “was the ban necessary in a democratic society under Article 10(2)?”¹³⁵

In pointing out the heightened objections against prior restraint in the context of a Party Election Broadcast the court cited a decision by the German Federal Constitutional Court dating from 1978 when the Communist Party (KPD) was banned:

“... it must not be forgotten that it is impossible to compensate for the serious legal disadvantages that arise where an election broadcast is rejected after a summary consideration and this is subsequently proved wrong... owing to the proximity of the broadcasting slots in time to the election date, the latter will usually have passed.”¹³⁶

The court defined the role of the English courts as “owing a special responsibility to the public as the constitutional guardian of the freedom of political debate.” As to the test to be applied the court referred to the decision in *R v Secretary of State for the Home Department, ex parte Daly* which has been discussed above and held that the bare test of rationality or reasonableness is no longer sufficient in cases concerning the interference with fundamental rights.¹³⁷

The main criticism to the adoption of the principle of proportionality has been the difficulty of accommodating this invasive test into a system of judicial review, which emphasises the supervisory function of the courts. Therefore the question has been asked whether the introduction of the principle of proportionality “amount to a merits

¹³³ *ibid.*, 771

¹³⁴ *ibid.*, 772

¹³⁵ *ibid.*, 776

¹³⁶ *Kommunistische Partei/Marxisten* (1978) 2 BvR 523/75

¹³⁷ [2002] 2 All ER 773

based form of review”.¹³⁸ The most recent decision illustrates this concern when stating the opinion of the lower court that “even today, in cases such [as [the present, the court’s role remains supervisory. Great care must be taken to ensure that the Administrative Court does not assume the mantle of decision-taker.”¹³⁹ Commentators indicate that a more substantive test will not lead to a merits based review: “The court will not ask itself whether the decision is one that it would have made (a merits based approach); nor will it ask itself whether the decision was so unreasonable that it cannot be sustained (*Wednesbury*). Rather the court will require the decision which interferes with the human right of any individual is one that is for a permissible reason and one that is necessary in a democratic society.”¹⁴⁰

However, it remains to be seen what kind of rigour judges will apply in asking the questions under new test of proportionality. This will also depend on the extent to which evidence is permitted in the case and facts are reviewed.

I. Germany

a. Legitimate expectation under European influence

The principles of legal certainty and substantive legitimate expectation, equality and proportionality are well established in Germany to exercise control over administrative discretionary powers. The principle of legal certainty and substantive legitimate expectation is based on the Constitutional provisions in Articles 20¹⁴¹ or in 20 and 28¹⁴²

¹³⁸ Plowden, P., and Kerrigan, K., “Judicial Review –a new test?” (2001) *New Law Journal* 1291 [1292]; Jeffrey Jowell, “Beyond the Rule of Law: Towards Constitutional Judicial Review”, (2000) *Public Law* 671 [681]

¹³⁹ Scott Baker J in *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2002] 2 All ER 756 at 766

¹⁴⁰ Plowden and Kerrigan, “Judicial Review –a new test?” (2001) *New Law Journal* 1291 [1292];

¹⁴¹ Article 20 Political and social structure, defence of the constitutional order

“(1) The Federal Republic of Germany shall be a democratic and social federal state.

(2) All public authority emanates from the people. It shall be exercised by the people through elections and referendums and by specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) [...]”

¹⁴² Article 28 Federal guarantee of Land constitutions and local government

“(1) The constitutional order in the Länder shall conform to the principles of the republican, democratic and social state governed by the rule of law within the meaning of this Basic Law. [...]”

of the Basic Law.¹⁴³ They form the basis for the principle of the *Rechtsstaat*. The constitutional status of these principles has the effect that they enjoy equal status to legislation. As a result, in cases of conflict between the principle of administrative compliance with statute law and the principles a balancing process of weighing the competing interests has to be carried out.¹⁴⁴ Court decisions and academic literature have provided detailed criteria concerning the fair balancing of competing public interests and the right to the protection of legitimate expectation for both cases of revocation of unlawful administrative decisions and the withdrawal of lawful administrative decisions. A further distinction is drawn within both categories between those decisions by which benefits are conferred and those which imposed burdens on the individual citizen. In 1976 these criteria were codified in some detail in the Law on Administrative Procedure (*Verwaltungsverfahrensgesetz*).

The following case decided before the enactment of the Law on Administrative Procedure concerned the question whether the applicant could rely on the principle of legitimate expectation after an unlawful benefit had been revoked by the authorities.

aa. *The Widow case*¹⁴⁵

The case concerned the revocation of welfare benefits, which had been paid to a widow between 1953 and 1954 after she had moved from East to West Germany. The payments were revoked on the basis that the payments had been made unlawfully and the widow was required to repay the overpaid sums. The court upheld the widow's legitimate expectation that the payments were made lawfully. The decision by the Federal Administrative Court in 1959 was a major breakthrough for the acceptance of the principle of legitimate expectation and led to the inclusion of a provision in Article 48(2) Law on Administrative Procedure.¹⁴⁶

¹⁴³ Schwarze, *European Administrative Law*, 1992, 886

¹⁴⁴ *ibid.*, 887

¹⁴⁵ 9 BVerwGE 251

¹⁴⁶ Richter, I., Schuppert, G.F., *Casebook Verwaltungsrecht*, 2nd edition, (München: C.H. Beck Verlag, 1995)

Article 48 Revocation of unlawful administrative Act,

(1)

An unlawful administrative Act, even after it is no longer open to challenge, may be revoked, wholly or in part, with prospective or retrospective effect. An administrative Act which has founded or confirmed a right or a legally material advantage (administrative Act granting a benefit) may be revoked only subject to the restrictions of subparagraphs (2) and (4) hereof.

(2)

An unlawful administrative Act which grants a non-recurring or continuous monetary payment or a divisible payment in kind or forms the basis thereof, may not be revoked, in so far as the beneficiary has relied upon the administrative Act being maintained in force and that expectation, weighed against the public interest in revocation, requires protection. Expectation in general requires protection where the beneficiary has used the benefits granted or has made some disposition of them affecting his resources which he either cannot reverse or can reverse only incurring unreasonable disadvantages. The beneficiary cannot rely on expectation where he

1. has secured the administrative Act by intentional deception, threats or corrupt practices;
2. has secured the administrative Act by giving information which was incorrect or incomplete in a material respect;
3. knew, or did not know as a result of gross negligence, that the administrative Act was unlawful.

[...] In so far as the administrative act has been revoked, payments already made thereunder shall be reimbursed. As to the amount of restitution, the provisions of the *Bürgerliches Gesetzbuch* (Civil Code) relating to the restitution of unjust enrichment shall apply so far as relevant. If the conditions mentioned in subparagraph 3 hereof are satisfied the person liable to make the restitution cannot plead loss of the enrichment if he knew, or did not know as a result of gross negligence, the circumstances leading to the illegality of the administrative act.

(4) If the authority gains knowledge of facts justifying the revocation of an unlawful administrative Act, revocation shall be permissible only within a period of one year from the time at which facts came to its notice, save in circumstances referred to in the third sentence of sub-paragraph (2) hereof, subparagraph 1.

The protection of substantive legitimate expectation is therefore highly protected even if the original administrative act was unlawful. However, this generous approach has had to be adapted in the context of European provisions concerning the regulation of state aid. If the granting of state aid on the basis of EC legislation is in contravention of EC law or the rules on revocation of such an unlawful decision are applied. According to the German provisions the revocation would be in the discretion of the authorities. The European Court of Justice's decision in *Land Rheinland-Pfalz/Alcan Deutschland GmbH*¹⁴⁸ concerned the recovery of unlawfully paid state aid as it had been granted in breach of Article 93(3) of the EC Treaty, which require that the European Commission be informed before state is granted. Subsequently the European Commission requested that the state aid should be revoked. In application of the rules on the recovery of unlawfully granted payments as stated contained in Article 48 of the Law on Administrative Procedure (see above) the Federal Government informed the Commission "that there were substantial political and legal obstacle to the recovery". The Federal Administrative Court then referred three questions concerning the interpretation of the German provisions to the European Court of Justice: Firstly, it submitted the concern that the time limit of one year for the recovery as laid out in Article 48(4) of the Law on Administrative Procedure had elapsed and that therefore under German law revocation was not possible. Secondly, it referred the question, whether the state aid could be revoked despite the substantive legitimate expectation of the beneficiary, *Alcan*. (Article 48 (2) above) Finally it asked whether the German authority was obliged to revoke the decision despite the fact that under German law "such demand was excluded because the gain no longer existed in the absence of bad faith on the part of the recipient of the aid (Article 48(3) above). The European Court of Justice held that the authority had to revoke the decision regardless of the time limit as set out in Article 48 of the Law on Administrative Procedure. Secondly, the Court held that *Alcan* had no substantive legitimate expectation, as it should have been aware of the requirements of EC law under Article

¹⁴⁷ Case C-24/95

¹⁴⁸ Case C-24/95

93 EC Treaty. Finally, it held that the beneficiary could not claim that the gain no longer existed, even if he was not in bad faith.

The decision triggered of a “lively discussion” concerning the effects of EC law on established principles such as the protection of legitimate expectation.¹⁴⁹ It was argued that the Court acted *ultra vires* concerning the establishment of new rules for the recovery of state aid. However, the Federal Administrative Court followed the ECJ’s decision and accepted that in the context of recovery of state aid the highly protective provisions of German law have yielded to the interests of the Community in controlling the equal treatment of member states. However, it is unlikely that this reduction in protection will spillover to other areas where substantive legitimate expectation requires protection under the existing provisions.

b. The principle of equality

Further, there are direct limitations stemming from the Basic Rights such as the principle of equality in Art 3 Basic Law¹⁵⁰. The general principle of equality requires that the authorities exercise their discretion equally. Where, for instance, the authorities have developed a regular pattern of dealing with particular matters the equality principle will bind the decision-maker to conform to that practice in subsequent cases. The authorities are bound by their own practice and may only deviate from it where there is a reason in substance to do so. The following case illustrates the Federal Administrative Court’s reasoning concerning the question whether an individual may rely on the context of internal administrative instructions (*Verwaltungsvorschriften*). It may be uncontroversial that an internal administrative instruction has a factual effect (*faktische Außenwirkung*) on the position of the individual citizen who is adversely affected by it. However, whether an individual may rely on the internal administrative instruction to reach a more favourable decision relies on the question whether the internal administrative instruction has a legal effect on the individual (*rechtliche Außenwirkung*). It is now generally accepted that the

¹⁴⁹ Schwarze, J. “Europäische Rahmenbedingungen für die Verwaltungsgerichtsbarkeit”, (2000) *NVwZ* 241 [251]; see further for a detailed discussion on the recovery of state aid and the German principle of substantive legitimate expectation, *ibid*, *Das Verwaltungsrecht unter Europäischem Einfluss*, (Baden-Baden: Nomos, 1996) German report

¹⁵⁰ Article 3 Basic Law

factual effect of an administrative instruction also results in a legal effect on the individual.¹⁵¹ The following case illustrates that there is some controversy over the legal basis for this effect as well as concerning the distinction between different types of administrative instruction.

Army Service case [BVerwGE 34, 278]

The applicant was in full-time education at a State school for Mechanical studies. The army authorities decided not to recruit him before 31 March 1969 in order to enable him to complete his course. In early March 1969 he commenced a degree in engineering, which he expected to complete in March 1972. In April 1969 the applicant was recruited to the army service. The applicant appealed against this decision. The law governing the recruitment of men to the compulsory army service is the *Wehrpflichtgesetz*. According to art. 12 para 4 sentence 1 a national serviceman can apply for a postponement of service if the service would impose a burden of personal, in particular domestic, economic or professional nature. Accordingly the completion of large parts of a degree is considered as a burden. This was clearly not the case here as the applicant had only just begun his degree. The lower administrative court, however, decided in favour of the applicant. It based its decision on an administrative instruction (*Verwaltungsvorschriften für die Musterung und Einberufung ungedienter Wehrpflichtiger*) issued by the ministry of defence which stated that national servicemen who take a course in engineering or building cannot be compelled to the service even if they had only just started the course.

The *Bundesverwaltungsgericht* has repeatedly decided that administrative instructions in addition to their merely internal effects can have external effects, which create rights for the citizen. Such effect is referred to as self-imposed limitation of public bodies (*Selbstbindung*). Administrative instructions can lead to a self-imposed limitation only in such cases in which discretionary powers have been vested upon a public body by law.... Here administrative instructions serve the purpose of confining discretion in order to guarantee a consistent exercise of such a power. The legal basis for the self-imposed limitation is not a generally binding nature of administrative instructions but

“(1) All people are equal before the law.”

¹⁵¹ Maurer, *Allgemeines Verwaltungsrecht*, München, 1999, 608

rather based on the principle of equality enshrined in Art 3 Basic Law. This principle requires the equal exercise of discretionary powers. The court held that if a public body applies administrative instructions regularly in the exercise of discretion then it violates the principle of equality if it does not apply the same in similar cases. The citizen has the right to challenge a decision in which the public body has deviated from its standard practice without sufficient grounds.

However, the administrative instructions in this case are not designed to confine the authorities' discretionary powers. They are designed to interpret the statute (*Wehrpflichtgesetz*). The instructions can be regarded as a tool for the construction of the statutory requirements but not as a confinement of the exercise of the discretionary power. The instruction is not binding and do not have any external legal effects. Therefore they do not create any self-imposed limitations. There is no room for the application of the principle of equality or the principle of legitimate expectation.

This case has illustrated the importance of the principle of equality in Germany, which operates as a legal basis for the fair and consistent exercise of discretionary powers. The German court however, draws a distinction between different forms of administrative instructions, those, which are able to bind a public body because they are merely concerned with the confinement of discretionary powers, and those, which are designed, to aide the interpretation of the objective elements of a statute. The latter form of administrative instruction does not create any external legal effects. The reason for this is that the authorities have no competence to interpret the law. The *Bundesverwaltungsgericht* does not regard the principle of legitimate expectation as a legal basis for the external effect of administrative instructions. Administrative instructions are directed only to administrative authorities internally so that no legitimate expectation is created which could result in a self-imposed limitation of the authorities. The principle of legitimate expectation is only applicable if an internal instruction can be qualified as a direct representation to a limited class of people.¹⁵²

¹⁵² *ibid.*, 609 ,610 with further references

However, those instructions, which are designed to confine discretionary powers, may be binding and the citizen has a right derived from the equality principle to challenge a decision, which deviates from the standard practice of the public body. This requires the establishment of a continuity of practice in dealing with similar cases. The application of the equality principle, therefore has been criticised for being incapable of explaining the external legal effect of administrative instructions, which have never been applied before. For these cases the courts have developed the fiction of anticipated administrative practice (*antizipierte Verwaltungspraxis*) which assumes a violation against the equality principle in similar future cases. Finally, it has been argued that internal administrative instructions can be relied on without having to rely on the equality principle or the principle of legitimate expectation. This view, however, is controversial and has been denied by the European Court of Justice in which it held that the German administrative instructions concerning the implementation of the air pollution Directive (*TA Luft* – the Technical Instruction on Clean Air Maintenance) were insufficient.¹⁵³

c. The principle of proportionality

Compared to all other legal systems “under German law, the proportionality principle has found its clearest expression both in the case law and in the available literature.”¹⁵⁴ The principle of proportionality plays a very important role in reviewing the legality of discretionary decisions in the administrative courts.¹⁵⁵ Dating back to a decision by the Prussian *Oberverswaltungsgericht* in 1882 the *Bundesverfassungsgericht* has based it on the principle of the *Rechtsstaat* and the Basic Rights.¹⁵⁶ There are three requirements, which have to be complied with in the application of the principle: “First, the state measure concerned must be suitable for the purpose of facilitating or achieving the pursued objective. Second, the suitable the measure must also be necessary, in the sense that the authority concerned has no other mechanism at its disposal which is less restrictive of freedom. [...] Finally, the measure concerned may not be disproportionate

¹⁵³ EUGH, *NVwZ* 1991, 866, 868;

¹⁵⁴ Schwarze, *European Administrative Law*, 1992, 685

¹⁵⁵ Brinktrine, *Verwaltungsermessen in Deutschland und England*, 1998, 129

¹⁵⁶ BVerfGE 23, 127 (133); BverfGE 69, 1 (35)

to the restrictions which it involves.”¹⁵⁷ The principle enjoys constitutional status¹⁵⁸ and has to be applied by all public authorities in the exercise of their powers.¹⁵⁹ Because of its importance when exercising public powers it is contained expressly in some statutes such as the law regulating the police. The following case is one of the numerous decisions by the *Bundesverwaltungsgericht*, which held an administrative decision unlawful on the grounds of a violation of the principle of proportionality.¹⁶⁰ It is an uncontroversial case which however, illustrates well the rational approach by the German court.

However, three cases decided in the 1990’s illustrate that the standard of review applied by Administrative Courts and by the Constitutional Court is in a state of flux and not always uncontroversial. As will be illustrated in cases below the standard of review applied by the Federal Administrative Court has varied depending on the subject matter. Another case will illustrate the strict application of the principle of proportionality in the Federal Constitutional Court which has led to controversy within the panel. Finally, the *Bundesverwaltungsgericht* has applied a reduced intensity of review in a case concerning the exercise of the German air-force.

aa) *Driving license for the transport of persons case*

Bundesverwaltungsgericht, [BverwG, *NJW* 1995, 3334]

The appellant was a busdriver with 18 years work experience. In 1992 the relevant authority refused his application for an extension of his licence. The reason for the refusal was the fact that he had reached the age of 50 and had failed to submit a medical and psychological certificate containing details about his personality as a whole. Instead the applicant had submitted an undetailed certificate by a doctor specialising in occupational medicine confirming his fitness for the driving of a bus. The *Straßenverkehrszulassungsordnung* (Law on the admission to Highways) is the basic text governing licences for buses and other vehicles. According to section 15 of the

¹⁵⁷ Schwarze, *European Administrative Law*, 1992, 687

¹⁵⁸ BVerfGE 61, 126 (134)

¹⁵⁹ BVerfGE 23,127 (133)

¹⁶⁰ see Brinktrine, *Verwaltungsermessen in Deutschland und England*, 1998, 129 with further references

above law the applicant for an extension of the driving licence of buses has to submit either a certificate by a specialised doctor or a certificate issued by an institution specialised in medical and psychological reports. Further regulations by the ministry of the Interior lay down that a more detailed report is required for applicants who have reached the age of 50. The concrete content, which such a report should have, is not laid down by the regulations. The authority considered the short medical certificate, which was submitted by the applicant alone, as insufficient and required the applicant to submit a medical and psychological certificate issued by a recognised institution. The applicant refused any further examinations claiming that the requirement of such a certificate was disproportional and was refused the extension of his driving licence. The lower and higher administrative courts dismissed his application and he then appealed to the *Bundesverwaltungsgericht* on a point of law.

The *Bundesverwaltungsgericht* held that the requirement of a detailed medical and psychological report violated the principles of legal certainty and proportionality. A medical report should concentrate on particular issues concerning the age-related abilities such as attention span and stamina. The court held further that the requirement that such a certificate had to be issued by a recognised institution rather than a specialised doctor was disproportionate.

Generally a medical certificate is sufficient as proof for the fitness of an applicant. However, the authority is empowered to request a more detailed medical report. The law does not contain any specifications as to when one or the other is required. However, the order in which both proofs appear within the law implies that a certificate is required in general whereas a report will be required if specific circumstances such as age may give particular reason for a more detailed medical and psychological examination. However, if the authority decides that a full medical report is necessary the principle of legal certainty and proportionality require the authority to specify which particular issues are to be covered by the medical expert. In this case the examination would have to be restricted to the abilities of a driver, which with an increase of age tend to be affected such as the attention span, stamina, the ability to react quickly and to concentrate. The authorities though, failed to specify the content of the required detailed examination and therefore violated the principle of proportionality. The

requirement to submit a report issued by a recognised institution rather than a single specialised physician also violates the principle of proportionality.

This case illustrates the stringent approach by the *Bundesverwaltungsgericht* in applying the principle of proportionality to the authorities' decision. The court identified the purpose of the law as protecting the public from danger stemming from bus drivers who do not have the physical ability to drive a bus safely, i.e. the court identified qualities such as attention span and stamina. However, in reviewing the discretion which was given to the authority in deciding whether they required a full medical report the court balanced the interest of the general public against the interests of the individual bus driver. Without referring to Human Rights or Basic Rights the court held that no full medical report including a psychological assessment was required. In order to comply with the principles of legal certainty and proportionality the authority was under a duty to specify which tests should have been carried out. This would have been a less restrictive measure. The case illustrates the emphasis on the analysis of the purpose of the enabling statute in asking whether the request of a full medical report was necessary to achieve the objective of the (*Straßenverkehrszulassungsordnung*) Law on Admission to Highways. It carried out test which required the balancing of the competing public and private interests at stake and reached the conclusion that the authority could have reached an alternative course of action, i.e. the request of a *detailed* report concerning specific qualities which are vital to the fitness of the applicant in order to drive a bus as opposed to a full medical report.

It has been criticised that the principle of proportionality is applied too often and that the judge who decides that the decision is not suitable, not necessary or disproportionate is likely to replace the decision of the authorities with his or her own view.¹⁶¹ With regard to the separation of powers between the legislature and the court this point has been raised in 1995 in the dissenting speeches by three of the judges in Germany's highest court, the Federal Constitutional Court:

¹⁶¹ Schwerdtfeger, G. *Öffentliches Rech in der Fallbearbeitung*, 10th edition, (München: C. H. Beck, 1993) para 99

bb) *East German spies case*
[BVerfGE *NJW* 1995, 1811]

The decision by the Federal Constitutional Court in 1995 is interesting in this context as it illustrates an extensive use of the principle of proportionality which has been described as embarking “on a problematic course of striking down federal legislation on the basis of mere policy arguments.”¹⁶² The decision concerned the conviction of East German spies under the West German Criminal Code for espionage before the reunification. They had not acted from the territory of the Federal Republic.¹⁶³ The applicants challenged their convictions on the basis that they were in contravention to the equality principle as their West German counterparts were not liable in the absence of any East German Criminal Law after the Reunification. The Constitutional Court did not find a violation of the equality principle as East and West German spies did not belong to the same category of persons. The Constitutional Court held, however that different from the convictions of spies having acted on West German territory the convictions were disproportionate. It held that “in the light of the “unique situation”, i.e. that the protecting and supporting state had ceased to exist, [...] the prosecution of espionage activities which were conducted strictly from East German territory was disproportionate having regard to the purposes which could legitimately be pursued through criminal law.”¹⁶⁴ The three dissenting judges¹⁶⁵ criticised the majority for having overextended the principle of proportionality as they had in effect granted amnesty for East German spies. The Court, however did not have the power to act like a legislator. An amnesty for espionage activity, had at no point been agreed upon by the partners of the Treaty of Unification. The dissenting judges further stated that the majority had used the principle of proportionality in order to disguise considerations of policy, which cannot be dealt with in correctly applying the principle. The guiding principles should have been the principle of legal certainty and the protection of legitimate expectation. The expectation of the spies was, however not to be protected as they relied on the fact that German reunification would not take place in the foreseeable future. Such an expectation was not to be worthy of protection under the Federal

¹⁶² Nolte, G., Rädler, P., *Rapports: Germany*, (1995) *European Public Law*, 494 at 501

¹⁶³ (1995) *NJW* 1811; see short summary in Nolte, G., Rädler, P., *supra* n. 162, 503

¹⁶⁴ Nolte, G., Rädler, P., *supra* n. 162, 501

Constitution. The judges pointed out that the principle of proportionality is in danger of being over-stretched into a wide constitutional principle (*verfassungsrechtliche Generalklausel*). The competing interests at stake cannot be decided by the Court alone but have to be defined in accordance with existing values, here the Criminal Law.

cc) *Low level flights case* [BverwG JZ 1995, 510]

Academics and to an extent the Administrative Courts in opposition to the Constitutional Court have therefore always been concerned with a strengthening of the administration. It is interesting to note that there appear to be varying standards of review depending on the subject matter. A more recent decision by the Federal Administrative Court illustrates the application of a lower standard of review than the standard applied by the Federal Constitutional Court in the context of low-level flights carried out by the German airforce.¹⁶⁶ Here, the Federal Administrative Court refrained from an intensive review of the decision of the Federal Ministry of Defence to allow flights below the regular flight level. The governing statute authorises such flights if they are necessary to fulfil compelling state interests. The Federal Administrative Court restricted its review to the question whether the Ministry had taken into account all relevant circumstances and whether they had considered the interest of the affected local communities and citizens adequately. It thereby granted the Ministry a margin of appreciation which is usually confined to planning decisions.

The contrast between the approaches taken by the Federal Administrative Court and the Constitutional Court was well illustrated by a case which was concerned with the margin of appreciation of exam bodies in the following controversial case. What is taking place is an increasing juridification of the exercise of administrative discretion is however, mainly due to the intensive protection of Basic rights.¹⁶⁷ An important case of the Federal Constitutional Court decided in 1991 emphasised that the protection of individual rights plays a vital role in the review of discretionary powers. Therefore a change in the application of the principle of proportionality, which is based on the

¹⁶⁵ Judges Klein, Kirchhof and Winter

¹⁶⁶ (1995) JZ, 510; see short summary in Nolte, G., Rädler, P., *supra* n. 162, 153

¹⁶⁷ Maurer, *Allgemeines Verwaltungsrecht*, 1999, 144.

protection of the Basic Rights and the principle of the *Rechtsstaat*, is unlikely. The position of the Federal Constitutional Court in this case differs significantly from the Administrative courts. It is a decision by the Federal Constitutional Court concerning constitutional complaints by candidates in the law state exam who alleged a potential violation of their right to choose freely a profession (Article 12 Basic Law).

d. Human Rights protection, discretion and undefined legal concepts

aa. *Assembly- case* [BVerwGE 26, 135]

Apart from the equality principle as discussed above other Basic rights may set clear limitations to the exercise of administrative discretion. The following case illustrates the approach taken by Federal Administrative Court in reviewing the exercise of discretionary powers based on a statute, which limits the right to freedom of assembly as contained in Article 8 of the Basic Law.¹⁶⁸

The applicant was a member of the “International association of conscientious dissenters”. About 8 members met in May 1962 to demonstrate against nuclear tests, which were planned by the United States. They met in front of the American Consulate General to express their views. Half an hour later the police appeared and dissolved the demonstration. The applicant’s complaint against the dissolution was unsuccessful. The police argued that the demonstration had not been registered and that no leader was identifiable. The law governing the organisation of demonstrations and their dissolution is the law on assembly (*Versammlungsgesetz*). According to section 14 of this law demonstrations in the open air have to be registered with the relevant authorities. According to section 15 the police may dissolve a demonstration if it is not registered. This law constitutes a restriction of the right to freedom of assembly protected under Article 8 Basic Law. Therefore the Federal Administrative Court was concerned with the constitutionality of the authorising statute. German law poses restrictions on these enabling statutes if they potentially interfere with Basic Rights (*Schranken/Schranken*).

¹⁶⁸ Article 8 Basic Law

(1) All Germans have the right to assemble peacefully and unarmed without prior notification or permission.

Accordingly, the legislator has to respect other constitutional rights such as the right to equality and the constitutional principle enshrined in Article 19(2) that in no case the essence of a basic right may be encroached upon. The proportionality principle plays an important role in that the legislator has to balance the individual freedom carefully against the protection of the public interest. The court held that the provisions concerning the registration and the dissolution of a demonstration contained in the law on assembly (*Versammlungsgesetz*) complied with these requirements. The court held that the nature of demonstrations in the open air carries potential risks for the public order and security. Accordingly, authorities need to be informed in advance in order to take appropriate measures for the protection of the public order. Further, the court held that the decision to dissolve the demonstration was the lawful exercise of the police officers discretion under the statute. According to section 15 the police may dissolve a demonstration if it is not registered. The exercise of discretion would be unlawful if it was exercised in a way, which would contravene the intention of the statute. For example, it would be unlawful if the officer had dissolved the demonstration in order to prevent the expression of particular political or philosophical views. The discretion has to be exercised according to the purpose of the statute. The decision was also proportionate because the police was concerned that the demonstration could expand to a degree, which would jeopardise the public order. Further, the demonstrators were able to register another demonstration to be held during the next few days, which would give the police the chance to be prepared. For the same reasons there was no violation of the right to equal treatment.

bb. *Law State Exam case II*, [BVerfGE 84, 34]

One of the controversial areas of judicial review of undefined legal concepts for the German courts has been the appeal against examination results. The administrative courts clearly have jurisdiction over these cases because in some subjects such as medicine, the teaching profession and the legal profession the Universities do not carry out the finals but by the state as so called state exams. The results in these exams are classified as administrative acts, which are open for appeal to the administrative courts. The jurisprudence developed by the administrative courts in these cases was marked by a restrictive approach. The administrative courts saw in the review of examination results a highly sensitive issue, which could not easily reviewed by a court, which would

have no expertise in the matter unless the examination at stake was a law exam. In the administrative court's view pedagogic-scientific value judgments of examiners were only subject to limited review. The courts restricted their scrutiny to the questions whether the examiners based his or her decision on incorrect facts, erred in general principles of assessment or took irrelevant considerations into account. However, the Federal Constitutional Court ruled in 1991 that Administrative Courts may fully review the decisions by exam boards.

The applicants for the constitutional complaint were both candidates in the state exams for lawyers. The first applicant had unsuccessfully appealed against the exam result awarded in the second state exam. In his view the marks he had been given for his oral presentation were too low. In the candidate's view the examiners had based the assessment on the fact that the candidate had followed a legal opinion other than that contained in the leading case law and academic opinion. He also appealed against the result of his oral examination.

The second applicant had failed his First State exam for the second time. He appealed against the result given for his dissertation. The Administrative Courts held that neither of the decisions could be annulled because the examiners had acted within their margin of evaluation (*Beurteilungsspielraum*). According to the Administrative Courts the content of the decision could not be subject to judicial review. The constitutional complaints were admissible but unsuccessful on the merits. According to Art 12 Basic Law examinations, which lead to a profession or occupation, have to be designed in compliance with the Basic Right to choose a profession or occupation.

Art 12 provides that:

(1) All Germans have the right freely to choose their occupation or profession, their place of work, study or training. The practice of an occupation or profession may be regulated by or pursuant to a law.

Therefore, candidates should have the right to appeal against the final examination results. However, the decision by the higher court may not amount to a second-guessing of the original decision.

The case law developed by the Administrative Courts on the margin of evaluation for the administrative authorities sufficiently protects the right under Art 19(4) Basic Law to the extent that it is granted for decisions regarding evaluations specific to exam situations. However, the courts may review disputes between the examiner and the candidate relating to questions on the subject matter.

Art 19 (4) provides that:

Where public authority violates rights the person affected shall have recourse to law [...].

Art 12(1) Basic Law contains the principle that an answer in an exam which leads to a profession or occupation, which contains an acceptable solution (vertretbar), based on logical arguments may not be considered a wrong answer.

The *Bundesverfassungsgericht* held that laws which regulate the training for an occupation and which contain provisions on required assessments and examinations interfere with the right to freely choose an occupation or a profession guaranteed in Art 12 (1) Basic Law. This applies to the first and second State exam for lawyers.

The state exams interfere with the right to choose a profession because the result in the exam is decisive concerning the choices a candidate can make over his professional development. However, judicial review of such examination decisions is limited by the fact that the assessment procedure is marked by a number of difficulties, which can hardly be tackled in a court proceeding. The marking process is influenced by subjective impressions and the coincidental preference of an examiner for a specific subject. The internal appeal body (*Widerspruchsbehörde*) merely reviewed whether any substantial errors were made in the assessment of the candidates.

The applicants take the view that the Administrative courts should have reviewed the exam results more intensely. The case law of the Administrative courts regarding the granting of a margin of evaluation does not fully comply with the guarantees contained in Art 19 IV Basic Law. (Art 19 IV Basic Law provides that:

Where public authority violates rights the person affected shall have recourse to law....) Hereby not only access to justice but also efficient judicial protection is safeguarded. The citizen has the right to efficient judicial protection. Generally the courts are under a duty to fully review both facts and legal questions underlying an administrative decision. If part of the decision is concerned with the application of an undefined legal concept such intensive retrospective judicial review will also be carried out. Restrictions to the intensity of judicial review generally only apply to the review of discretionary decisions. The decision whether or not a candidate is entitled to be rewarded a pass in a state exam involves the application of an undefined legal concept. This has to be distinguished from a discretionary powers (inserted by the author). However, exams, which restrict the access to certain professions, require difficult evaluations, which have to be carried out within the context of the whole examination. This requirement flows from the equality principle contained in Art 3 Basic Law. As a result the decision maker should be granted a margin of evaluation, which is free from judicial control.

However, this margin of appreciation only covers questions concerning the examiners evaluation. Purely academic questions regarding the content of an answer, however, can be fully reviewed. The review of such questions will normally require an expert to assist the judges. However, such practical obstacles are no reason to restrict the effective judicial protection guaranteed in Art 19 IV Basic Law.

Here, the legal limits to discretion imposed on to the legislator by the constitution in the Constitutional Court's Jurisprudence and the mechanisms of Judicial Review through the Administrative Courts as well as the final jurisdiction of the Constitutional Court leave the authorities with a rather limited area of discretionary power. It is questionable whether this approach is feasible. It may lead to an overburdening of Administrative court judges who in the light of this decision will have to review decisions of high technical and subject-specific nature requiring the support of expert witnesses.

III. Excess of discretion (*Germany* only)

Limitation to zero

German Administrative Law has developed a further limitation of the exercise of discretion by recognising the concept of “reduction of discretion to zero”. According to this concept there are cases in which despite of the discretion granted to the authorities, only one course of action will be legal. In these cases the discretionary freedom is seen to develop into a duty to act in a particular way. The groundbreaking decision was delivered by the *Bundesverwaltungsgericht* in 1960¹⁶⁹. Here the builder of a house was misusing the house so that it caused harm to legally protected interests of the neighbours. Even though the intervention by the building inspectors was discretionary the court held that in cases of high intensity of disturbance or danger to the rights of individuals the only legal measure was the intervention. Therefore there was only one correct way of acting, which transformed the discretionary power of the authorities into a duty to act. The concept that discretionary powers can be reduced so much that in fact a bound decision is required is not alien to English lawyers.¹⁷⁰

IV. *Evaluation*

This part has illustrated the standards of review engaged by English and German courts in reviewing the exercise of discretionary powers. Both legal systems have developed grounds of review, which are applied to review the substance of the decision, i.e. the principles of unreasonableness, legitimate expectation, equality and proportionality. The development of these principles in England is due to a fairly recent trend of the

¹⁶⁹ BVerwGE 11, 95, 97

¹⁷⁰ English courts have also dealt with the question whether discretionary provisions should be interpreted as containing a duty to act in a particular way. In *Julius v. Bishop of Oxford* (1880) 5 App. Cas. 214, the appellant complained to the Bishop of Oxford about the practices of the local rector. The statute in question was the Church Discipline Act which contained the disputed phrase “it shall be lawful” for the bishop [...] to issue a commission [...] for the purpose of making an inquiry. The question for the courts was to interpret this phrase as either being merely permissive and enabling only or as imposing a duty on the bishop to issue the said commission. It was held that this section of the Act conferred complete discretion onto the Bishop. However, it was also held per Lord Blackburn that “enabling words are always compulsory where they are words to effectuate a legal right.” No such right was identified in this case but in other cases it was decided that for instance that local authorities who are responsible for the approval of building plans were required to approve plans which complied with the bylaws.

courts to embrace principles as applied in the European courts. However, the rigour with which these principles are applied varies between the two legal systems.

The principle of substantive legitimate expectation in Germany is well established and codified in detail. Equally well established is the principle of proportionality as applied in Germany. It consists of three limbs and in short requires that means or measure must be suitable and necessary for achieving an aspired result and that the means and end stand in a reasonable proportion. The three limbs of the principle are interconnected and overlap. But they are still exclusive in the sense that each of them must be satisfied for the validity of the administrative action. The principle requires a proper balancing between the injury to an individual and gain to the community caused by an administrative measure and prohibits those measures whose disadvantages to the individual outweigh the advantage to the community. In English law proportionality is not often explicitly adopted as a ground of review but it was suggested that it appears under the guise of *Wednesbury* unreasonableness. This is said to occur first, where decisions have been struck down because of improper balance of material considerations and secondly in cases of unreasonably oppressive decisions.¹⁷¹ In *R v Home Secretary, ex parte Brind*¹⁷² the broadcasting ban imposed by directives made by the Home Secretary were challenged. In this case two of the judges indicated that it might be applied in the future. For once it was argued that the principle was incompatible with the Judicial Review approach which does not review the merits of a case, also described as "the forbidden appellate approach". Secondly it was held that in the absence of a "fundamental law" there was no room for the principle. The difficulties in importing the principle of proportionality are of conceptual nature. The German approach concentrates on the review of the actual result of an administrative decision using a stringent balancing formula with equal weight to individual rights and the common interest. The traditional *Wednesbury* unreasonableness test is more concerned with the negative formulation of what is unreasonable focusing more on the solution finding process rather than on the review of the result. The proportionality test is by contrast concerned with the legitimacy of the interference with rights. The

¹⁷¹ Jowell, J., Birkinshaw, P., *Tendencies towards European Standards in National Administrative Law*, in Schwarze J., *Das Verwaltungsrecht unter Europäischem Einfluß* (Baden-Baden: Nomos, 1996), English Report

German approach is marked by the application of a detailed test, asking whether the interference was suitable, necessary and overall proportionate. It is also the vigour with which this test is answered which is crucial.

However, the cases of *ex parte Simms* and *ex parte Daly* have illustrated a remarkable development in English law. Here, the House of Lords applied a test, similar to the one applied in Germany by asking whether the interference with the right to freedom of expression was necessary, requiring the existence of a pressing social need, and that the restrictions should be no more than is proportionate to the legitimate aim pursued.”¹⁷³

In Germany, on the other hand a reduction of some of the standards of review has either been required by the European Court of Justice, as witnessed in the *Alcan* decision or criticism has been uttered as to how the principle of proportionality is applied. The dissenting judges in the *East German spy* case criticised the application of the principle as an excuse to exercise quasi-legislative functions. The *Low level flight* decision indicates that the standard of the application of the principle may vary depending on the context. However, with regard to the standard of review of undefined legal concepts the Federal Constitutional Court has indicated a high level of review on the basis of Human Rights protection (*Law State exam case*).

D. Further European influences

I. The standard of review of the European Court of Justice

The previous section has illustrated the different standards of judicial review of discretionary powers in both jurisdictions. This part is concerned with the guidelines given by the European Court of Justice in setting standards for judicial control. The first case is a decision by the European Court of Justice, which had been addressed by the English High Court with a question regarding the scope of judicial review required by Community law. The ruling makes interesting reading because it deals with two alternative forms of review. The ruling shows that European law does not require any standards of review, which go further than the approach taken by English courts. The

¹⁷² [1991] 1 AC 696

more intensive review approach taken by German courts therefore goes beyond what is required by European standards and places itself in splendid isolation.

In *Upjohn Ltd v. The Licensing Authority Established by the Medicines Act 1968 and others*¹⁷⁴ the European Court of Justice had to deal with the question whether national courts (here the Court of Appeal) were under an obligation to substitute their assessment of the facts for that of the competent national authorities. The case was concerned with the question to which effect the standard of review in domestic courts should be guided by the European Court of Justice's view. It was concerned with the review of discretionary powers of the Licensing Authority regarding the revocation of a marketing licence of medicines. The applicant was Upjohn Ltd ("Upjohn") who is the United Kingdom operating company of The Upjohn Company of Kalamazoo, Michigan, United States of America, a research-based world-wide pharmaceutical undertaking which produced a drug called Triazolam, a prescription drug for the treatment of insomnia. As a consequence of a case in the United States in which a woman killed her mother while under the influence of Triazolam the Licensing Authority had decided to suspend the Triazolam marketing licences for three months. This decision was renewed every three months. The revocation was based on the Medicines Act 1968 in connection with the Council Directives 65/65/EEC, 75/318 and 75/319 as amended by Council Directive 83/570/EEC. Accordingly, an administrative phase is instituted when the Licensing Authority is considering the revocation or marketing of a licence and the holder of the marketing licence may argue his case and, in particular, submit any relevant documentation and be assisted by experts of his choosing in order to establish that the medicinal product which the authorities are investigating possesses the characteristics of *safety, therapeutic efficacy* and *quality*. The Licensing Authority informed Upjohn that all marketing licences for Triazolam were going to be revoked with immediate effect as conclusions made by the "Persons Appointed" were rejected on the issues of dose equivalence and safety margins. Upjohn commenced proceedings for judicial review and took the view "that the judicial procedure in force in the United Kingdom is contrary to Community law, which, in its opinion, requires member States to institute a procedure for judicial review of decisions taken by national authorities

¹⁷³ [1999] 3 WLR 328 [338g-h]

enabling national courts to verify the reliability of the scientific evidence on which the administration bases its decisions to revoke marketing licences, and thus to assess afresh the issues of fact and law and to rule, in particular, on whether the decision taken is “correct” and complies with the principle of proportionality. In other words, the national court ought to verify that the decision taken by the Authority is the proper decision and, if necessary, substitute its own decision for that of the Authority.”¹⁷⁵

However, the European Court of Justice held that Community law did not require national courts to substitute their assessment of the facts for that of the competent national authorities. The Court made clear that in cases “where a Community authority is called upon, in the performance of its duties, to make complex assessments, it enjoys a wide measure of discretion, the exercise of which is subject to a limited judicial review in the course of which the Community judicature may not substitute its assessment of the facts for the assessment made by the authority concerned. Thus, in such cases, the Community judicature must restrict itself to examining the accuracy of the findings of fact and law made by the authority concerned and to verifying, in particular, that the action taken by that authority is not vitiated by a manifest error or a misuse of powers and that it did not clearly exceed the bounds of its discretion.”¹⁷⁶

This case illustrates that the standard of review as applied by English courts with regard to the characteristics of *safety*, *therapeutic efficacy* and *quality* is in line with the standards applied by the European Court of Justice. The European Court of Justice did not require a test that would go further than the review of discretionary decisions as to whether they were flawed by a “manifest error”, or a “misuse of power” or an “excess of power”. As opposed to the findings by the European Court of Justice, the view taken by Upjohn regarding closer scrutiny of the reliability of the scientific evidence on which the original decision by the Licensing Authority would have found strong support in German courts as the next example will show. The European Court of Justice categorised the questions above as discretionary whereas the German courts would have

¹⁷⁴ (Case C - 120/97), 21.1.1999

¹⁷⁵ *Upjohn Ltd v. The Licensing Authority* established by the Medicines Act 1968 and others, Case C-120/97 [1999] 1 C.M.L.R. 825 [834]

¹⁷⁶ *Upjohn Ltd v. The Licensing Authority* established by the Medicines Act 1968 and others, Case C-120/97 [1999] 1 C.M.L.R. 825 [847]

considered them as undefined legal concepts with the consequence of a full review. It has been suggested that the consequence for the German courts might be that the interpretation of the substantive law as contained in the implementing legislation in Germany will have to be conform to the content of the Directive.¹⁷⁷ Accordingly, the German courts might have to refrain from a full control of these concepts. In this context, *Schwarze*, however, argues that the European Court of Justice does not require the German courts to reduce their standards of review.¹⁷⁸

The following section explains this different approach in some more detail.

II. The standard of review in Germany

Licence for pesticides [BVerwGE 12, 81]

The following case, which has no European law context, has been chosen to illustrate the high intensity of judicial control in reviewing the so-called undefined legal concepts. The scrutiny of judicial control of the two related concepts (undefined legal concepts and discretion) differs. Generally speaking, the interpretation of undefined legal concepts is reviewed fully by the courts. This scrutiny even includes the correct application of law to the fact of the case. This often requires that the courts take fresh evidence, for example by hearing expert witnesses.¹⁷⁹

This general principle, which still is applied by the Administrative Courts, however has been widely criticised in academic writing since 1955.¹⁸⁰ Bachof has developed the doctrine of margin of appreciation (*Beurteilungsspielraum*). As a consequence the doctrine of margin of appreciation (*Beurteilungsspielraum*) has led to a restriction of the full scrutiny approach of the courts when reviewing undefined legal concepts. The current discussion focuses on the question whether the concept of the norm in its form as described above should be given up in order to conform to European standards. The distinction between undefined legal concepts such as *public weal* or *danger to youths*

¹⁷⁷ Götz, V., "Europarechtliche Vorgaben für das Verwaltungsprozeßrecht", (2002) *DVBl* 1, [5]

¹⁷⁸ Schwarze, J., "Europäische Rahmenbedingungen für die Verwaltungsgerichtsbarkeit", (2000) *NVwZ*, 241 [249]

¹⁷⁹ Redeker/von Oertzen, *Verwaltungsgerichtsordnung*, 1997, 708; Nolte, G., Rädler, P., "Judicial Review in Germany" (1996) *European Public Law* 26 [28]

¹⁸⁰ Redeker/von Oertzen, *Verwaltungsgerichtsordnung*, 1997, 694 with further references

and discretionary powers merely covering the legal consequences of a norm where there is a choice of action is not known in English or European law. In clearly defined circumstances has the Federal Administrative Court granted some subjective area of evaluation with regard to undefined legal concepts to the authorities, which are not fully reviewable.¹⁸¹

To name a few examples, the Court has held that those decisions, which are based on circumstances, which are not comprehensible or cannot be repeated, are not fully reviewable. Under this heading fall decisions about personal abilities such as the suitability of a civil servant for a post. Highly controversial still is the area of decisions in examination situations and a variety of cases can be found. Other main groups in which the power to review decisions is restricted are decisions based on scientific or artistic considerations and for which the legislator has provided for the decision to be made by a specially qualified person within the administration. Examples would be the decision on the admissibility of a child to a special needs school or the requirements to be added to the list of architects. A margin of appreciation is further recognised for decisions, which are taken by specially designated agencies such as the Federal Scrutiny Agency (*Bundesprüfstelle*) on the question whether publications represent a danger to youth. However, as we will see below in a controversial decision in 1983 the Constitutional Court has reversed the position of the administration and ordered more judicial scrutiny in cases of constitutional relevance.¹⁸² Other groups of decisions for which a margin of appreciation was granted include decision, which involve a prognosis regarding political, economical, social or cultural developments or decisions regarding highly technical issues or planning considerations.¹⁸³

The remaining question is to what extent is judicial scrutiny limited in these cases in which a margin of appreciation is granted? A general standard for the limitation of judicial scrutiny appears to be difficult. The case law seems to have developed independent rules in each group of cases. The finding of facts remains fully reviewable.

¹⁸¹ Decisions in examinations, assessment of personnel in Civil Service, decisions of valuation by experts, for instance the Federal Scrutiny agency under the Law about Distribution of Writings Dangerous to Youths, policy decisions of the administration

¹⁸² BVerfGE 83, 130

¹⁸³ Redeker/von Oertzen, *Verwaltungsgerichtsordnung*, 1997, Art 114, 703ff

Furthermore procedural issues are reviewable, in particular the right to a hearing. However, procedural defects can be cured according to Art 45 of the Law on Administrative Procedure or considered irrelevant according to Art 46 of the Law on Administrative Procedure.¹⁸⁴ The power to review the decision is restricted to a legality review.

The following example is a decision by the *Bundesverwaltungsgericht*, dated 10 November 1988.¹⁸⁵

The case was concerned with the refusal of a licence for pesticides. The applicant was engaged in the production and marketing of pesticides. The Federal Licensing Authority refused the application for a renewal of existing licences and a new licence for a new pesticide. The reason for refusing the applications was that research had shown pesticides of that kind had harmful effects unacceptable to scientific knowledge. The lower administrative court (*Verwaltungsgericht*) allowed the claim in part and instructed the Licensing Authority to renew part of the licences for two years and ten months. The court held that during this time no harmful effects on nature were to be expected. The revision was allowed in part. The interesting part of the decision concerns the interpretation of the legal basis for granting licences of such kind. The

¹⁸⁴ Art 45 Law of Administrative Procedure, 1976 (*Verwaltungsverfahrensgesetz*): Curing of Defects of Procedure and Form

“(1) Unless it makes an administrative act void under Art 44, a violation of the provisions relating to form or procedure is inconsequential, if:

1. an application required for the taking of an administrative act is made after the act;
2. the required reasons are given after the act was issued;
3. the required hearing to a participant is given after the act was issued;
4. the decision of a committee whose participation in the taking of the administrative act is required has considered it afterwards;
5. the required participation of another authority takes place afterwards.

(2) Actions under clause (1) no. 2 to 5 may take place only before the conclusion of the procedure and in case no procedure takes place before the filing of a suit in an Administrative Court.

Art 46 Consequences of Defects of Procedure and Form (old version before 1996)

Quashing of an administrative act which is not void under Art 44, cannot be claimed on the ground that it has been taken in violation of the provision on procedure, form or territorial competence, if no other decision could have been taken in the matter.

Note the change in the wording in Art 46 after the reforms in 1996, see for more details Chapter Four below Consequences of Defects of Procedure and Form (new version from 1996)

Annulment of an administrative act which is not void according the provision in Art 44 cannot be sought if the flaw relates only to either the procedure, the formal aspects or the local administrative competence if it is obvious that the breach had no influence on the decision on its merits.

Pflanzenschutzgesetz (Statute on the protection of plants) as amended in 1986 is the basic text governing licences for pesticides in Germany. It sets out the requirements for the award of a licence in Art 15 section 1. Accordingly the following requirements have to be met:

- (1) the pesticide has to meet the requirement of efficacy
- (2) it should not jeopardise public health
- (3)(a) it should not have any harmful effects on human health, the well being of animals or on fresh water resources.
 - (b) it should not have any “other effects”, in particular “on the ecological system which according to scientific knowledge are unacceptable”

The requirement at stake was that contained in section 3b, according to which pesticides should not have any “other effects”, in particular “on the ecological system” which according to scientific knowledge is unacceptable.

The lower administrative court erred in the interpretation of that requirement by assuming that a licence should only be refused if with high probability the pesticide has harmful effects on the ecological system. However what is meant is that harmful effects should be excludable with a high probability. As a result it reached a judgment partly in favour of the applicant.

The defendant Authority submitted that the question of whether the pesticide has any “other effects on the ecological system” is an undefined legal concept (*unbestimmter Rechtsbegriff*) and subject to only restricted review by the courts. The Authority argued that deciding such a question is a value judgment which depends on the choice between alternative points and that the Authority had discretionary powers to decide the matter (*Beurteilungsspielraum*). As a result judicial review was restricted to particular errors being made in the exercise of the discretionary powers.

¹⁸⁵ (1988) 81 BVerwGE, 12

However, the *Bundesverwaltungsgericht* did not share the view of the Licensing Authority and the lower administrative court and held that the courts are required to review the value judgment involving an undefined legal concept fully. This means their review is not restricted as in the case of discretionary powers. The lower court was under a duty to review the balancing of competing issues and the value judgement in full, which includes a full review of the underlying facts of the case. At this point the *Bundesverwaltungsgericht* refers to its earlier decisions regarding the full review of concepts such as “danger” and “probability”. Therefore the question of whether the pesticide would have “any other effects” had to be decided afresh by the administrative authority. The court is required to review the correct application of the law to the facts, which can include the taking of fresh evidence and the questioning of expert witnesses on complex issues of a scientific or technical nature.

III. Evaluation

The case of *Upjohn Ltd v. The Licensing Authority Established by the Medicines Act 1968 and others*¹⁸⁶ which we dealt with above was concerned with the question to which extent the effectiveness of European Community law requires the application of a particular standard of review in national judicial review systems. The decision illustrates that the European Court of Justice does not require a stricter standard of review than it would apply itself. It held that the standard of review applied by the English court was sufficient. The German case has illustrated the higher standard of review in the context of undefined legal concepts, which in English and European law would be considered as questions falling within the discretion of the authorities. The concept of undefined legal concepts and their full judicial review is not known in English or European law. The case of *Upjohn* has illustrated that the European Court of Justice refers to its own standards of review, which in this cases were similar to the standards applied by the English court. As a consequence interference with the German standard of review is not to be expected¹⁸⁷.

¹⁸⁶ (Case C - 120/97), 21.1.1999

¹⁸⁷ Schwarze, “Europäische Rahmenbedingungen für die Verwaltungsgerichtsbarkeit” (2000) *NVwZ* 241 [249]

E. Limitations to convergence

In England the constitutional framework is characterised by the principle of Parliamentary sovereignty which in traditional terms limited the reviewing powers of the judges to the protection of the legislative intent. It is not for the judges to second-guess an authorities' decision, the judges function lies in the assurance that Parliament's will has been carried out. This principle is the basis for the judicial restraint, which has traditionally been applied. Unlike the German Administrative judges, English judges do not carry out a mandate enshrined in a constitutional provision to provide effective judicial protection for the rights of individuals. Even though this traditional judicial restraint has changed enormously over the last decades which witnessed an increasing creativity of the judges to expand judicial review, more recent decisions under the new powers in the Human Rights Act 1998 indicate a careful use of the new judicial review "tools". In Germany, on the other hand the control of discretionary powers is driven by the protection of individual's rights, which might potentially have been abused by public authorities. The principle of judicial protection against unlawful acts of public authorities is laid down in the constitutional provision of Article 19(4) Basic Law. German courts do not only review the decision itself but also carry out a detailed review of the constitutionality of the enabling statute. The principles of proportionality and equality are frequently applied tools engaged in this process.

Further, limitations to a convergence are clearly set by the different procedures applied by the courts. The differences between the adversarial and the inquisitorial procedure have already been discussed in some detail in Chapter Two. The grounds of review such as irrationality and proportionality in English law are harder to prove in a system which does lay the onus of proof on the applicant. Further, the difficulties in obtaining an order for discovery of documentation make it hard for applicants in English courts to obtain information about the authorities' reasoning. German Administrative courts, on the other hand, inquire into the facts applying a variety of means of evidence. The onus of proof does not necessarily rest upon the applicant because it is accepted that some facts may not lie within the sphere of the citizen.

D. Conclusion

The comparison of Judicial review of discretionary powers in England and Germany has shown that both systems recognise the existence of an area of administrative activity, which cannot be fully reviewed by the courts. In both systems discretionary powers are a product of the conflict between modern administration and the rule of law. The freedom of the administration requires both legal boundaries and judicial control. Discretion has been described as a hinge, which brings together legislation, the execution of laws and judicial control. This applies equally to both countries. Similar developments can be traced which at least led to the common form of modern type of state based on the rule of law with judicial control of the administration.¹⁸⁸

However, in Germany the discretionary administrative powers are required to be expressly authorised by law. As shown in the demonstration case the legislature must clearly delimit the scope of interference with fundamental rights. The authorisation of discretionary powers is therefore rather detailed. In England on the other hand wide discretionary powers are given to the administration. They are mainly based on statute but discretionary powers can also be based on prerogative powers or on the common law. In Germany the concept of discretion is characterised by a highly abstract theory of the localisation of discretionary powers in a norm. Discretion found on the *Tatbestand* of a provision has been distinguished from discretion on the *Rechtsfolgenseite* of a provision. The former has been described as undefined legal concepts and only in a limited number of cases the courts have allowed a margin of appreciation (*Beurteilungsspielraum*) to be applied in the determination of these concepts. As a result these undefined legal concepts are usually fully reviewable by the courts. This flows from the principle of effective judicial protection as enshrined in Article 19(4) Basic Law. This article plays a pivotal role in the modern theory of discretion and it sets in itself the constitutional limits to any changes in the theory of discretion. Another category of discretion is that of discretion in planning decisions (*Planungsermessen*), which has been classified as *Finalnorm*. Here, the authority has wider powers with regard to the overall balancing of interests. English law, on the other hand does not

contain an abstract theory of the structure of the norm. In comparison, the concept of discretion is narrower in German law due to the restrictions imposed by the requirements as described above and the complex theory of the structure of the norm and where discretionary powers should be located.

On the surface the grounds of review bear some resemblance. However, even if some overlaps can be observed such as the cases mentioned concerned with fettering of discretion one can observe major differences with regard to the conceptual approach of discretion. The undefined legal concepts in German Administrative law narrow the scope of discretionary powers as illustrated by the comparison of the cases *Upjohn Ltd v. The Licensing Authority* and *Licence for pesticides*. Even though harshly criticised in German academia the recent decision of the *Bundesverfassungsgericht* in the *state exam case* indicates rather a trend to more scrutiny rather than liberalisation of the German conceptual approach. At the centre of the discussion in Germany stands Article 19(4) of the Basic Law, which requires the effective judicial protection of individuals. English law, on the other hand, contains no constitutional principle, which requires full judicial control. Here, the protection of the intention of Parliament is the traditional basis for the review of discretionary powers.

The grounds of review and the questions asked display some similarities on the surface. Both jurisdictions apply numerous grounds of review and some are identical in name such as fettering of discretion and the proportionality test. However, the rigour with which the questions posed are answered differs in English and German courts. The comparison has identified the reasons for the different judicial approaches. Firstly, English and German judges in administrative law cases find themselves in different constitutional frameworks when asked to review an executive decision. Secondly, the inquisitorial procedure applied in the German Administrative courts enables German judges to carry out a much more thorough reconstruction and review of the case in front of them.

¹⁸⁸ Oeter S. in Frowein J.A. (Hrsg.), *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung*, Max -Planck-Institut für ausl. öffentliches Recht und Völkerrecht, 1993, 267

However, the cases discussed under abuse of discretionary powers and proportionality in both jurisdictions illustrates highly interesting developments. The English cases display an enormous willingness by English judges, inspired by European principles to expand the intensity of review beyond what might be justified as carrying out Parliament's intention. They have developed English law to embrace the principle of proportionality and substantive legitimate expectation. It might be unclear to this moment whether the traditional *Wednesbury* unreasonableness test will cease to be applied or whether it will be amended to embrace the proportionality -test eventually. This is one of the qualities of English Administrative law. It has shown enormous flexibility in developing itself further and the study of case law can be delightful. The courts apply varying standards of review depending on the context. Clearly, in cases with a strong Human Rights context, the review will be more intensive than in other areas. The justifications for the intensity of judicial control appear to vary as well. The cases of *Simms* has illustrated the use of the principle of legality, for instance, which has been applied to interpret the source of the administrative power in a way that does not restrict fundamental rights in an unjustified way. The application of the Human Rights Act 1998, however will lead to further changes in the approaches courts take in reviewing discretionary decision. Courts will have to engage into a more detailed legality review of enabling statutes and apply stricter standards in the review of substantive questions more evenly. The cases of *ex p Daly* and of *ProLife* indicate clearly that the principle of proportionality is accepted as a standard of review in Human Rights cases.

Particularly in England, a change in the legal climate can be noted with regard to applying more substantive standards of review. What in England is the need for an increase in substantive review in cases with a Human rights context is counter-parted in Germany with the demand for less intensive review and the trend towards the application of varying standards of review (see planning law for instance). The reasons for the need for change is the fact that the position of the administration in Germany has been weakened and the constitutional right to judicial protection has been transformed into an over intense controlling mechanism with overworked courts and delayed procedures. The principles of equality, substantive legitimate expectation and proportionality are well established in the German Administrative Law. A fine distinction is drawn between the application of the equality principle and the principle

of substantive legitimate expectation in cases where internal rules of the administration are applied differently or change. The decision by the European Court of Justice in *Alcan* indicates that the protection of substantive legitimate expectation goes further than the standards set by the European Court of Justice. In the interest of protecting the objectives of Community law German law had to adapt and lower the standard of review in these cases. No effect on other cases, where substantive legitimate expectations are protected under German law will however, be expected. On the contrary, in cases with a Basic Rights context the German Constitutional Court has increased the scope of judicial review. The latter is a trend to be witnessed therefore both in England and Germany. Particularly, in the context of Human Rights protection in England one can therefore witness movements towards bridging the gap between the English and German administrative legal system. Further, the quest for an increase in power for the German administration can be interpreted as a move towards reducing the difference to countries like England, where the administration has traditionally enjoyed greater powers.

With regard to the quest for less intensive review in cases without a Basic Rights context and the slow erosion of principles such as the concepts of free evaluation in Germany constitutional restraints such as contained in Article 19(4) Basic Law will hinder major reforms. The case law of the European Court of Justice indicates that there is no obligation to reduce the standard of review in Germany concerning the review of undefined legal concepts. Nevertheless, it may serve as an impulse for a revision of the German complex concept of discretion. It is concerning that due to this unique concept judges are getting involved into highly technical decisions, which often can only be taken with the help of expert witnesses. With regard to the principle of substantive legitimate expectation in the context of the recovery of unlawfully granted state-aid it is clear that German law has to accept a reduction in the standard of protection it offers. The stringent application of the principles of substantive legitimate expectations, equality and proportionality is an expression of the purpose of administrative law in Germany. Günter Frankenberg noted that the transformation of relationships of power

between the state and the citizen into relationship of law is at the heart of German Administrative law.¹⁸⁹

Similarly, in England the development of clear principles and standards to intensify a more substantive review of the actions of the administration will have to overcome the difficulties of combining the new principles of substantive review with the traditional supervisory function of judicial review. The fear of engaging in a merits based review has been expressed widely and commentators in favour of substantive review seem convinced that the courts will acknowledge the limitations in competence of their own role.¹⁹⁰ The comparison has shown, though that the introduction of these new principles, inspired by European laws, will not amount to a mere transplant of “foreign” concepts. Rather, these principles will “take a different shape in English soil”.¹⁹¹ A form of “cross-fertilisation”¹⁹² is taking place according to which the British style is europeanised, however it will not surrender its national characteristics.

Only time will tell to which extent the increasing protection of Human Rights strengthens the role of the courts. The comparison with the German Judicial review system might lead to the conclusion that this will not be without a price to pay, i.e. that the development of a rights based culture might encroach upon the freedom of the executive.

¹⁸⁹ Frankenberg, G., “Remarks on the Philosophy and Politics of Public Law”, (1998) *Legal Studies*, vol 18, 177, 179

¹⁹⁰ Jowell, J., “Beyond the Rule of Law: Towards Constitutional Judicial Review” (2000) *Public Law* 671 [681] ; see Lord Steyn, in *ex parte Daly* [2001] 2 W.L.R. 1622

¹⁹¹ Jowell, J., Birkinshaw, P., in *Das Verwaltungsrecht unter europäischem Einfluß*, 1996, English Report

¹⁹² Bell, J., in Beatson, J., Tridimas, T., *New Directions European Public Law* 1998, 147

CHAPTER FOUR

THE LEGAL CONSEQUENCES OF PROCEDURAL DEFECTS IN THE ADMINISTRATIVE PROCEDURE

A. Introduction

Both in England and Germany the proper performance of procedures in the decision making process of public authorities is recognised as an expression of the rule of law or the *Rechtsstaatsprinzip* respectively. In England, procedural safeguards are increasingly important as a means of controlling, confining and structuring discretion. The notion of administrative procedural protection has therefore become an important topic in the laws of the two member states. The importance of procedural protection in complex decision making processes is increasing in both countries, not least because of European impulses, particularly in the field of environmental protection. However, in Germany, despite a relatively modern Law on Administrative Procedure (1976) the status of Administrative procedural law is in a state of flux. The codified principles of a right to a hearing and the duty to give reason have an important role to play in the administrative decision making process. However, the relevance of these procedural safeguards is slowly eroding. This process has been accelerated by the so-called *Standortdiskussion*, which has partly put the blame on the complex and lengthy procedures of German administrative procedures for the lack of foreign investment. The term *Standort Deutschland* (location Germany) has become a keyword in post-Unification Germany, which is still struggling with the economic burdens of the political success. In the hope of accelerating the administrative process the Bundestag has introduced reforms in 1996, the so-called *Beschleunigungsgesetze*.¹, which legalise the curing of procedural defects up to the end of the trial in the last instance. Accordingly, for example the denial of the right to a hearing may be cured in trial. This will inevitably lead to extra burdens for the Administrative courts. Further, the quality of administrative decisions will suffer from the more relaxed attitude of administrators who will rely on the “in-trial

¹ *Genehmigungsbeschleunigungsgesetz - GenBeschlG*, dated 12.9.1996 BGBl. I, 1354

curing” (*Heilung im Prozeß*).² It is not yet clear to which extent the Administrative courts will apply these reforms. In particular, in the indirect implementation of European law such as the application of the *Umweltverträglichkeitsprüfung* conflicts between German law and the jurisprudence of the European Court of Justice are likely.³ The comparison with the English principles of natural justice and fairness will illustrate that procedural protection enjoys a higher status in English law. Even though the principles are not codified English courts are more willing to strike down a procedurally flawed decision as *ultra vires*. More recently the ground of review of unfairness has been applied in cases, which did not fit into the traditional categories of procedural impropriety. This indicates that the division between procedure and substance of a decision is beginning to blur. This chapter will analyse the reasons for the traditional difference in the attitudes to procedural protection. It will also show that the differences

In this chapter particular attention will be paid to the right to a hearing and the duty to give reasons and the consequences for non-compliance with these procedural safeguards.

B. National reports

I. England

1. The rules of natural justice

In English law questions of procedure have traditionally played an important role. This is not only evident in the sophisticated rules of evidence in the adversary court procedure but also a characteristic feature of today’s English Administrative procedure. However, the rules of Administrative Procedure which the third ground of review of procedural impropriety embraces and which were spelt out by Lord Diplock in his famous *GCHQ*⁴ ruling are the product of a more recent development in English Administrative Law. Rules of procedure may be contained in statutes or delegated

² Hufen, F., *Fehler im Verwaltungsverfahren*, 3rd edition (Baden-Baden: Nomos, 1998) 7; Goller, B., and Schmid, A., “Reform of the German Administrative Courts Act”, (1998) *European Public Law* 31 [35]

³ Hufen, F., *supra* n. 2, 385 with further references

⁴ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

legislation or in the rules of natural justice or procedural fairness as it is more commonly referred to today. The rules of natural justice, which have been formulated by the courts, contain two main principles, which are the principle of *audi alteram partem* and the rule against *bias*. These are two very old principles which are associated with the Old Testament and which have been the content of many cases since the 17th century⁵. The earliest case reports back to a case in 1615, which concerned the reinstatement of James Bagg who had lost his office without having been given notice or the chance of a hearing.⁶ Another case was that of Dr Bentley in 1723 who was successful in having his academic degrees in the University of Cambridge restored after they had been taken away without notice to him.⁷ As a matter of principle offices could not be removed without complying with the principle that the officer had to be given notice and had to be heard before removal. This related to offices which were freehold or which could only be forfeited for cause. It did not relate to a discretionary power to remove the office holder at pleasure. However, the importance of these principles decreased. In the nineteenth century the *audi alteram partem* principle regained some of its relevance when it was decided that it should apply to the conduct of arbitrators and tribunals, which were concerned with decisions with civil consequences to individuals.⁸ The attitude of the courts was then to require that judicial or quasi-judicial bodies must observe the principle. Consequently natural justice was not to be observed in purely administrative decisions.

The case of *Cooper v Wandsworth Board of Works*⁹ illustrates how unreliable the distinction between administrative and judicial decisions is. In that case clearly administrative decisions were classified as judicial. The case concerned a house, which was demolished because it was not built in accordance with the Metropolis Local Management Act 1855. The owner of the house had not been given any notice of the demolition. Section 76 contained a provision that before building a foundation for a new house, the owner of the new house had to give seven days notice to the board. This

⁵ De Smith, *Judicial Review of Administrative Action*, 1995, 7-010

⁶ Bagg's Case (1615) 11 Co.Rep.93b, cited in De Smith, *Judicial Review of Administrative Action*, 1995, 7-011

⁷ *R v Chancellor of the University of Cambridge* (1723) 1 Str. 557 cited in De Smith, *Judicial Review of Administrative Action*, 1995, 7-011

⁸ De Smith, *supra* n. 7, 7-011

⁹ (1863) 14 CBNS 180

provision ensured that the board could take the necessary steps with regard to the drains. Under the Act the authorities were entitled to demolish a house if no such notice had been given to the board. The plaintiff admitted that he had not waited for seven days after he had sent the notice and that he nevertheless had started digging. The Court of Common Pleas held that the plaintiff had been deprived of a right to a hearing. Even though the statute did not mention such a right the Court considered a hearing in this case to be recognised: “No man is to be deprived of his property without his having an opportunity of being heard...” The Court held that the district board exercised functions, which are similar to the nature of judicial proceedings; “because, certainly when they are appealed from, the appellant and the respondent are to be heard as parties, and the matter is to be decided at least according to judicial forms.”

However, the principle of *audi alteram partem* gradually declined. This was particularly due to the necessity of emergency decisions during wartime. Secondly, the development of wide discretionary powers to make policy decisions equally did not allow judicial review of the merits of a decision and the imposition of procedural standards to be observed by the decisionmaker.¹⁰ Even though some statutes contained the common law requirement of a right to a hearing it nevertheless lost its former meaning. The Prevention of Terrorism Act 1989, for instance, contains in Schedule 2 section 3 on Exclusion orders the right to make representations: “If after being served with notice of the making of an exclusion order the person against whom it is made objects to the order he may- (a) make representations in writing to the Secretary of State setting out the grounds of his objections; and (b) include in those representations a request for a personal interview with the person or persons nominated by the Secretary of State [...]” Case law further limited the principle in the first half of the twentieth century.

In 1915 the case of *Local Government Board v Arlidge*¹¹ clearly illustrated that the right to a fair hearing did not apply in circumstances where the authority did not act in a judicial capacity. In this case a closing order according to the Housing and town Planning Act 1909 was served on the property of Arlidge which had followed the report

¹⁰ De Smith, *supra* n. 7, 7-19

of a housing inspector. According to this report the house was unfit for habitation. Arlidge was denied access to the report and was not given the right to a hearing before the board. The Act did not contain any provisions regarding a right to a hearing. The House of Lords held that the board was entitled to apply such a procedure. The Act contained the right of appeal to the Local Government Board, which could not dismiss an appeal without holding a public inquiry. The House of Lords held that “such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organisation with executive functions.” Therefore the House of Lords saw no need to impose a duty on the authority to hear the applicant orally.

In 1964 the decision in *Ridge v. Baldwin*¹² marked a turning point in the attitudes of the courts towards the application of the rules of natural justice. It “removed some restrictions on the rule’s application that had developed since 1914 in lower courts, and led to an “explosion” of natural justice cases.”¹³ The case concerned the dismissal of Charles Ridge who was appointed chief constable of the County Borough of Brighton. Ridge and two of his colleagues were indicted for conspiracy to obstruct the course of justice but Ridge was acquitted. Nevertheless, in the following months the Watch Committee decided to discharge Ridge of duties as chief constable because they held him to be unfit for office following the evidence heard at the trial. Accordingly, the trial judge, Donovan J. Described the chief constable as someone who “had been shown not to possess a sense of probity or of responsibility sufficient for the office which he held, and so had been unable to provide the essential leadership and example to the police force under his control which his office properly required.” He was given no notice and no opportunity to a hearing. The case reached the House of Lords and it was held that the decision had been made in breach of the rules of natural justice. In this case “the House of Lords revived the principles of natural justice”.¹⁴ First of all it revived the 19th century jurisprudence and secondly the House of Lords disapproved with “some of the impediments which had been created in the twentieth century: the requirements of a *lies inter partes* and a superadded duty to act judicially were said to be false

¹¹ [1915] AC 120

¹² [1964] AC 40

¹³ Bailey, Jones & Mowbray, *Cases and Materials on Administrative Law*, 1997, 419

constraints.”¹⁵ The decision of *Ridge v Baldwin* is mainly important because of the explicit revival of the concept of natural justice and the inspiration it has offered for consequent decisions. However, the decision itself does not define the boundaries of the rules of natural justice sufficiently.

In *Lloyd and others v McMahon*¹⁶ Lord Bridge explained the flexibility of the rules of natural justice as follows: “ My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”

The content of the right to a hearing has been discussed in *Bushell v Secretary of State for the Environment*¹⁷, which was concerned with the question of whether the applicant had a right to cross-examine the opponents of the case. The case dealt with complaints by local residents against the building of two stretches of motorway. According to the Highways Act 1959 the Secretary of State held a local public inquiry. In this inquiry the respondents were not allowed to cross-examine the representatives of the department to challenge statistical methods used to predict future traffic needs. Lord Lane held that there may be situations in which the right to cross-examine might be important, for instance in cases where the accuracy of a witness statement is questionable. However, he held that in the case of a local inquiry such as the present case no such right existed. Dicta about the right to cross-examine should not be taken out of context. This would

¹⁴ Craig, *Administrative Law*, 1999, 406

¹⁵ *ibid.*, 406

¹⁶ [1987] 1 A.C. 625

¹⁷ [1981] AC 75

be misleading. It depends on the circumstances of the case, the purpose of the hearing, the issue involved and the nature of the evidence.¹⁸

Another case that dealt with the quality of the right to a hearing was that of *R v. Board of Visitors of H.M. Prison, The Maze, ex parte Hone*.¹⁹ The appellant served a life prison sentence in Northern Ireland. He was in breach of the Prison Rules (Northern Ireland) 1982 and charged with an offence against discipline. The Board of Visitors confirmed the charge and the appellant were sentenced to 30 days confinement to a cell and a loss of privileges for a further 60 days. The appellant filed the case for judicial review arguing that he had been denied the right to legal representation before the board. The House of Lords held that there was no such right except in circumstances where the prisoner is charged with a criminal offence or the equivalent of that. The House held that the rules of natural justice may give rise to a right to legal representation before the board of visitors but that this would depend on the circumstances in the particular case.

A variety of exceptions to the right to a hearing exist. DeSmith summarises them as

1. "Express statutory exclusion of a fair hearing;
2. Where the legislation expressly requires notice and hearing for certain purposes but imposes no procedural requirement for other purposes;
3. Where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action;
4. Where for other reasons it is impracticable to give prior notice or opportunity to be heard;
5. Where a procedurally flawed decision has been followed by an ex post facto hearing or by an appeal, which complies with the requirements of fairness;
6. Where the decision complained of is only a preliminary to a decision subject to procedural fairness;
7. Where the defect of natural justice has made no difference to the result;
8. Where to require fairness or natural justice would be futile;
9. Where no prejudice has been caused to the applicant."²⁰

¹⁸ Professor Jackson, 1980, 96 L.Q.R. 497

¹⁹ [1988] 1 A.C. 379

²⁰ De Smith, *supra* n. 7, 475-504

With regard to number 5 an “increased willingness” by the courts can be seen to be satisfied with the “curing of defective decisions in form of a subsequent hearing in an appeal.²¹ In *Calvin v. Carr*²² the applicant owned a racehorse, which took part in a race organised by the Australian Jockey Club. After the horse had not performed very well a steward’s inquiry was held. The inquiry resulted in the decision that the owner of the horse had to be disqualified from the club because he was in breach of the Club’s racing Rules. The owner had not been heard in the original inquiry. He appealed against the decision to a committee of the Club, which dismissed his appeal. The Appellant further took legal action against his disqualification in the Supreme Court of New South Wales. His main argument was that the original inquiry had deprived him of a fair hearing. Consequently the Club had acted in breach of Natural Justice. The action was dismissed by the Court and brought before the Privy Council. The Privy Council dismissed the appeal on the grounds that the breach of Natural Justice had been cured by the hearing in front of the Committee of the club. The Court held, though, “that no clear and absolute rule can be laid down on the question whether defects in Natural Justice appearing at an original hearing, whether administrative or quasi judicial, can be “cured” through appeal proceedings.” The reason for the absence of such a rule lies in the diversity of the factual situations of all these cases in which this issue arises. In his speech Lord Wilberforce points to two groups of cases. Cases relating to social clubs, on the one hand allow the conclusion that the lack of a hearing is cured by a consequent hearing in an appeal.²³

On the other hand, there are cases where the defect in the first hearing cannot be cured by a subsequent hearing as stated by Megarry J. In *Leary v. National Union of Vehicle Builders*²⁴: “If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that the ought to be satisfied with an unjust trial and a fair appeal? As a general rule. I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.”

²¹ De Smith, *supra* n. 7, 490

²² [1980] A.C. 574

²³ As examples the following cases are stated: *De Verteuil v. Knaggs* [1918] A.C. 557, 563; *Posluns v Toronto Stock Exchange and Gardiner* (1965) 53 D.L.R. (2d) 193; *Re Clark and Ontario Securities Commission* (1966) 56 D.L.R. (2d) 585; *Re Chromex Nickel Mines Ltd* (1970) 16 D.L.R. (3d) 273

²⁴ [1971] Ch. 34

Lord Wilberforce agreed that the latter principle might apply in trade union cases, for instance where appeals might not be impartial enough to carry out hearings as fair as at the first level. However, he argued that “it is for the court [...] having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association.” Lord Wilberforce’s principles not only apply to sporting bodies but also to administrative bodies exercising statutory powers.

2. The duty to act fairly

In *R v National Lottery Commission, ex parte Camelot Group plc*,²⁵ the Queen’s Bench Division of the High Court decided in October 2000 that the National Lottery Commission acted in breach of its duty to act fairly in the bidding process for the award of the new licence to run the National Lottery. The National Lottery is run by granting a seven-year licence to the company, which is most successful in the bidding process. This process is organised by the National Lottery Commission. The licence of the then operator of the Lottery, Camelot Group Plc was to expire on 30 September 2001 and therefore the Commission set up the bidding process and received two bids, one from Camelot and one from The People’s Lottery (“TPL”). By August 2000 the Commission reached the decision that it had found neither of the two bidders to have met the statutory criteria for granting a licence under the National Lottery Act 1993. However, it decided that it would negotiate exclusively with TPL for one month so that TPL could improve its bid. The case was concerned with the issue of fairness, i.e. whether it was fair to exclude Camelot from any possibility to further allay the Commission’s concerns regarding its bid. The court held that the exercise of the powers under the National Lottery Act 1993 was subject to the rules of procedural fairness. The court cited Lord Bridge’s decision in *Lloyd v McMahon*²⁶ in which he held: “when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.” The court held that “the Commission’s

²⁵ *The Times*, 12 October 2000

decision to negotiate exclusively with TPL was, in all the circumstances, so unfair as to amount to an abuse of power.” The further added that the decision not to allow Camelot the same opportunity like TPL was alternatively *Wednesbury* unreasonableness: “[...] to deny the same opportunity to Camelot fell outside the range of decisions open to a reasonable and properly informed decision-maker.” The court also made clear that the claimant did not have to show that without the unfairness a different decision would have been reached. Unfairness by itself should be enough. However, the court remains a discretion to refuse a remedy if the unfairness would have made no difference.²⁷: “It is [...] common ground that, at the very least, considerable caution is required before the court concludes that a breach of procedural fairness has not affected the substantive result.”²⁸ The decision in *Camelot* has introduced the new ground of review of fairness, which has also inspired the judges in the subsequent decision of *Interbrew SA & another v The Competition Commission & The Secretary for State for Trade and Industry*²⁹

3. Duty to give reasons

English law still does not fully recognise a general duty to give reasons for administrative decision makers. Tribunals and Ministers as mentioned in the Tribunal and Inquiries Act 1992 are under a duty to give reasons. The absence of general duty to give reasons in English law has been discussed intensely.³⁰ There are clear advantages in requiring the authorities to state reasons for their decisions. Amongst these are the elimination of extraneous considerations, the encouragement to a careful examination of the relevant issues, the consistency in decision-making, guidance to others on the body’s likely decision-making process in the future.³¹ The JUSTICE/All Souls Report³²

²⁶ [1987] AC 625

²⁷ (2001) *New Law Journal*, June 15, 902

²⁸ *R v National Lottery Commission, ex parte Camelot plc* per Richards J, [2001] All ER (D) 1205

²⁹ [2001] All ER (D) 305

³⁰ Richardson, G., “The duty to give reasons: potential and practice, (1986) *Public Law*, 473; R. Thomas, R., “Reason-giving in English and European Community Administrative law”, (1997) *European Public Law*, 213; Birkinshaw, P., *Freedom of Information*, 2nd edition, (London: Butterworths) 287-316; Craig, P. “The Common law, Reasons and Administrative Justice”, (1994) *CLJ*; Fordham, M., “Reasons - the Third Dimension” (1998) *JR* 158; Sir Patrick Neill QC, “The duty to give reasons: The Openness of Decision-making”, in Forsyth and Hare, *The Golden Metwand and the Crooked Cord*, 1998; Andrew Le Sueur, “Taking the soft option? The duty to give reasons in the draft Freedom of Information Bill” (1999) *Public Law*, 419; Holt, M., “Revisiting the Justice/All Souls Report” (2000) *Judicial Review*, 56

³¹ De Smith, *Judicial Review of Administrative Action*, 1995, 459

contained the comment that “No single factor has inhibited the development of English administrative law as seriously as the absence of any general duty to give reasons.”³³ However, since the decision in *Padfield v Minister of Agriculture, Fisheries and Food* in 1968 the courts have slowly developed the duty to give reasons. Even if this still does not amount to a general duty to give reasons, the number of cases in which the courts have argued that it would not be fair to deny reasons are increasing. The attitude that fairness requires the giving of reasons is based on the idea that it is important for the parties “to enable [them] to know the issues to which [the court] addressed its mind and that it acted lawfully.”³⁴ The case of *R v Civil Service Appeal Board, ex parte Cunningham* was concerned with the dismissal of a 45-year-old prison officer after he allegedly assaulted a prisoner. He won his appeal to the Civil Service Appeal Board, which then assessed the amount of compensation for unfair dismissal at £6,500. The Board did not state the reasons for its decision. The applicant applied for judicial review because the amount was considerably lower than an industrial tribunal would have assessed. The case could not have been heard in front of an industrial tribunal. The House of Lords held that “the board was required to give reasons for the way in which it had reached the award made to the applicant and in the absence of such reasons the award, when compared to awards made by industrial tribunals in comparable circumstances, was so low as to be prima facie irrational. The decision in *Doody v Secretary of State for the Home Department*³⁵ further developed the duty to give reason. “It is true to say that the decision in *Doody* may well be influenced by considerations of the ECHR. Nonetheless it is a striking vindication of the duty to give reasons for adverse decisions where necessary as a distinct feature of administrative justice.”³⁶ The applicants were four prisoners who served a mandatory life sentence of imprisonment for murder. The question was whether they were entitled to be given reasons for the recommendation of the Lord Chief Justice and the trial judge to the Home Secretary with regard to the length of the remaining prison sentence. The House of Lords held “that the law does not at present recognise a general duty to give reasons for an

³² *Administrative Justice: Some Necessary Reforms* (Oxford University Press, 1988)

³³ para 3.119, recalling a comment made by the JUSTICE Committee report of 1971.

³⁴ *R v Civil Service Appeal Board, ex parte Cunningham*, [1991] 4 All ER, 320

³⁵ [1994] 1 A.C., 531

³⁶ Jowell, J., and Birkinshaw, P. in Schwarze, J., *Administrative Law under European Influence*, English Report

administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied [...].”³⁷ The House of Lords therefore stated clearly that a prisoner is entitled not only to know the number of years as constituting the penal element of the recommendation but also the reasons for this decision. [...] The prisoner cannot rationalise his objections to the penal element without knowing how it was rationalised by the judges themselves”. These cases fall into the category of cases where the nature of the process itself requires reasons on the basis of fairness. Here, the personal liberty of prisoners was at stake. Rather than establishing a general duty to give reasons in form of legislation, English law prefers a pragmatic style and approaches the issue with the question of whether “the refusal to give reasons was fair.”³⁸ Another category of cases as identified by Sedley J. in the case of *Institute of Dental Surgery* are those cases in which there is “something peculiar or aberrant in the decision itself which in fairness calls for reasons to be given.”³⁹ The case concerned an application for judicial review of a decision, which rated a dental school lower than expected resulting in a reduction of the funds the school was entitled to receive. The court however held that the applicant was not entitled to be given reasons for the decision because it was of a purely academic nature. This decision has been criticised because it is important to know the reasons for a decision of that nature in order to improve certain areas within the department, be it the quality of the research output or other factors.⁴⁰ The Privy Council’s decision in *Stefan v GMC* ⁴¹ reaffirmed that there is no general duty to give reasons. However, the House of Lords stated that the absence of such a general duty was now the exception rather than the norm. They added that the Human Rights Act 1998 might lead to a review of this area with regard to the compatibility under Article 6(1) of the Convention.

The establishment of a general duty to give reasons has been recommended by the House of Commons Select Committee on Public Administration in its report on the

³⁷ [1994] 1 A.C., 531 [564]

³⁸ Thomas, R., “Reason-giving in English and European Community Administrative Law” (1997) *European Public Law*, 213, [215]

³⁹ *R v Higher Education Funding Council ex parte Institute of Dental Surgery* [1994] 1 All ER 651

⁴⁰ Sir Patrick Neill, “The duty to give reasons” in Forsyth and Hare, *The Golden Metwand and the Crooked Cord*, 1998, 183

⁴¹ [1999] 1 WLR 1293

Freedom of Information Draft Bill.⁴² However, the Freedom of Information Act 2000 did not quite follow that route and adopted a so-named soft law option, “it envisages a web of quasi legislation”.⁴³ The Freedom of Information Act 2000 requires every public authority to adopt and maintain a scheme, which relates to the publication of information, a so-called publication scheme.⁴⁴ Further, “in adopting or reviewing a publication scheme, a public authority shall have regard to the public interest – in the publication or reasons for decisions made by the authority.”⁴⁵ The adoption of such publication schemes has been criticised because it might result in “diversity when certainty and clarity are needed”.⁴⁶

4. Legal consequences of procedural errors

Despite the fact that the right to a hearing has become an important part of procedural protection its non-observance does not automatically lead to the invalidity of the decision. As outlined above there are a number of exceptions to the right to a hearing. The consequences of a breach of a statutory right to a hearing will depend on whether the right is directory or mandatory.⁴⁷ The courts have dealt with the argument that no prejudice has been caused to the applicant because the flawed decision would inevitably have been the same carefully. “It is not for the courts to substitute their opinion for that of the authority constituted by law to decide the matters in question. Further, “natural justice is not always or entirely about the facts or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, “Justice must not only be done, it must also be seen to be done.” These cases support the view that the fundamental principle at stake is that public confidence in the fairness of adjudication or hearing procedures may be undermined if decisions are allowed to stand despite the absence of what a reasonable observer might regard as an adequate hearing,

⁴² H.C. 570, 1998-99, para. 50

⁴³ Le Sueur, A., “Taking the soft option? The duty to give reasons in the draft Freedom of Information Bill” (1999) *Public Law* 419

⁴⁴ Clause 19 (1) (a)

⁴⁵ Clause 19 (3) (b)

⁴⁶ Le Sueur, *supra* n. 43, 423

⁴⁷ Cane, *An Introduction to Administrative Law*, 1996, 192

rather than that injustice lies only in holding an individual bound by a decision whose substantive reliability is cast in doubt by the existence of procedural irregularities.”⁴⁸

5. Procedural protection under the Human Rights Act 1998

The discussion above has been concerned with the protection of procedural rights at common law. However, the Human Rights Act 1998 has “brought home” the dimension of the protection of rights under the European Convention of Human Rights. English court is now under a duty to interpret legislation in the light of Convention rights. According to section 2 of the Human Rights Act national courts must take into account the jurisprudence of the institutions in Strasbourg, even though they are not bound by it. Amongst these is the case law on Article 6(1) of the Convention which *inter alia* imposes a duty to provide a hearing by “an independent tribunal established by law”. The case of *R v Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Ltd.*⁴⁹ will be discussed below under European influences. The case further raised the issue whether English judicial review procedures are sufficient to cure an error occurred in the procedure stage.

II Germany

The law on administrative procedure (*Verwaltungsverfahrensgesetz [VwVfG] 1976*)

Today the law on Administrative procedure is a substantial part of the modern *Rechtsstaat*. However, the codified law of Administrative Procedure is relatively young. Only since 1976 has it been contained in codified rules of administrative procedure (*Verwaltungsverfahrensgesetz [VwVfG] 1976*). They are designed primarily to protect the individual’s position in securing and obtaining his or her rights against the authorities. It is designed to provide the citizen with access to the procedural safeguards contained in the law and to make the law more transparent⁵⁰. It is important to point out

⁴⁸ De Smith, *Judicial Review of Administrative Action*, 1995, 500

⁴⁹ House of Lords, 9 May 2001

⁵⁰ Schlegelberger, cited in Kopp, *Verfassungsrecht und Verwaltungsverfahrenrecht*, 1971, 264; The law on administrative procedure and administrative court procedure is available in paperback for the cost of less than three pounds and available in any good bookshop.

that its main general principles have been developed through case law and academic writing. The codification of these principles, which was mainly designed to unify the laws on administrative procedure which were in operation across Germany, is the culmination of a development which reaches back into the 17th century when first attempts to codify principles of administrative law were made.

The desire to codify some of the principles of good administration can be traced back to Veit Ludwig von Seckendorf who published his “Teutschen Fürsten-Stat” as early as 1656⁵¹ He was concerned with the fast and correct exercise of public power and required the legislator to enact proper laws to maintain order. One of the most important public lawyers of the 18th century, Johann Heinrich Gottlob von Justi published in 1759 his work “Grundsätze der Policey-Wissenschaft”.⁵² He used the terms administration and police synonymously and demanded legislation for the administration, which would enhance the strength and power of the administration. Around one hundred years later, in 1866 Lorenz von Stein required a codification of administrative laws. However, he was of the view that it was impossible to codify the entire body of Administrative law. With the emergence of a constitutional state in the 19th century, for the first time the requests for simplicity and effectiveness of the administration had to yield to an attitude which would protect the individual against unlawful exercise of power through authorities. This trend to protect the individual against administrative intrusion continued until the time of the Weimar constitution and was rediscovered and strongly emphasised after the Second World War. Accordingly, the *Badische Verfahrensordnung* from 1884⁵³ and the Preußische Gesetz über die allgemeine Landesverwaltung from 1883⁵⁴ contained provisions for access to files, evidence and procedures. A landmark in the development of the German Law on Administrative Procedure was the Austrian Federal Law on Administrative Procedure 1925. The Länder Thüringen and Württemberg were the first to adopt Acts on Administrative Procedure as early as 1926. Clearly, there is a parallel to the procedures applied in reaching judicial decisions. However, the main problem, which the legislator

⁵¹ Frankfurt/Main, 1656 cited in Schmitt-Lermann, H., “Der Musterentwurf eines Verwaltungsverfahrensgesetzes”, (1964) *JZ* 402

⁵² second edition, Göttingen, 1759 cited in Schmitt-Lermann, H. *supra* n. 51, 402

⁵³ GVBl, 385

⁵⁴ GS, 192

faced in the process of codification of the Administrative Procedure, was that the rules of the adjudicative process could not be transferred exclusively to the administrative procedures. This is due to the fact that the authority is not a neutral third party but it is involved in the process of decision-making and its decision has direct consequences for its own interests. As a result of these difficulties the Law on Administrative Procedure contains elements of procedural law as well as purely substantial law. For instance, the concept of the Administrative Act is contained in the Law on Administrative Procedure (Art 35 VwVfG).⁵⁵ The main aims of the codification have been the unification of the variety of rules applied in different parts of the country (due to its federal structure), the rationalisation of the administration and the Entlastung of the legislator by a unified law.⁵⁶ The lively discussions in the 1960's in academic writing regarding the process of codification illustrate how difficult it was to reach consensus in these questions. In deciding which issues should be included into a code on administrative procedure the guiding example was the Administrative Court Procedure Act 1960 and other laws on court procedure. Accordingly, provisions had to be made for instance regarding the parties to a process, the fact finding, right to a hearing and access to files.⁵⁷

2. The right to a hearing

The right to a hearing as contained in the modern Code on Administrative procedure is a reflection of the general principles of judicial procedures. A constitutional right to a hearing is also contained in the Basic Law as a direct response to the disregard of individual rights during the Third Reich. Accordingly, Art 103(3) Basic Law states:

“ In the courts everyone shall be entitled to a hearing in accordance with the law.” However, Art 103 applies only to judicial procedures and the right to a hearing in Administrative procedure does not enjoy constitutional status.⁵⁸ However, it is accepted generally that the right to a hearing is based on the constitution, whether on Art 1 and the Rechtsstaatsprinzip or on the analogous application of Art 103 is not quite clear.⁵⁹

⁵⁵ Badura in Erichsen, *Allgemeines Verwaltungsrecht*, 1988, 376

⁵⁶ Maurer, *Allgemeines Verwaltungsrecht*, 1999, 96

⁵⁷ in Schmitt-Lermann, H., *supra* n. 51, 404

⁵⁸ Schwarze, *European Administrative Law*, 1992, 1256

⁵⁹ Maurer, *Allgemeines Verwaltungsrecht*, 1999, para 19 Rn 20

Art 28 Law on Administrative Procedure⁶⁰

The hearing of parties

(1) Before an administrative act may be adopted which interferes with the rights of a party involved, that person must be given the opportunity of expressing his opinion on the facts relevant to the decision.

(2) A hearing need not be given where it is not required by the circumstances of the individual case, in particular where:

1. An immediate decision appears necessary on the grounds of danger if there is a delay or danger to the public interest
2. A hearing would endanger the observance of a time limit crucial to the decision;
3. It is not intended to depart in any manner, which would be detrimental to a party from the factual statements, which he has made in a petition or a declaration;
4. The authority wishes to adopt a general disposition, large numbers of similar administrative acts, or administrative acts using automatic equipment;
5. Measures are to be taken by way of administrative enforcement.

(3) A hearing shall not take place where it would conflict with a compelling public interest.

The right to a hearing is restricted to such cases in which the administrative act interferes with the right of the party involved. The Federal Administrative Court held that a right to a hearing is only available if the administrative act alters the legal position of the party in a negative way, i.e. reduces or takes away an existing legal status.⁶¹ However, the exact meaning of this statement has been discussed widely. On the one hand it is argued in legal writing that the right to a hearing covers only those situations in which a genuinely unfavourable decision is made. This does not include the refusal of a benefit. On the other hand, other decisions such as the refusal of a licence or a benefit require a hearing as well because they are equally burdensome for the applicant.⁶²

Further, a variety of exceptions as contained in Art 28 para 2 and 3 of the Law on Administrative Procedure apply. In particular, cases of urgency fall under this exception, because danger might result from delay or time limits would elapse. A hearing may also be denied if it contradicts the public interest, for example in case of

⁶⁰ Translation by Schwarze, *European Administrative Law*, 1992, 1256/1257

⁶¹ BVerwGE 66, 184

⁶² Maurer, *supra* n. 59, para 19, Rn 20, Schwarze, *supra* n. 58, 1259

danger to national security. As a result the scope of the right to a hearing is not very broad and the provisions dealing with the curing of defects within the administrative procedure, which have been amended in 1996, as will be discussed below further reduce the relevance of the right to a hearing in German Administrative procedure.

3. The duty to give reasons

The duty to give reasons is a significant requirement for the procedural legality of an administrative act.⁶³ According to Art 39 of the Law on Administrative Procedure:

(1) A written administrative act or an act confirmed in writing must contain written reasons. In the reasons important factual and legal grounds, which the authority has taken into consideration in arriving at its decision, have to be communicated. Reasons for discretionary decisions should also exhibit the viewpoints on which the authority has exercised its discretion.

The latter provision regarding discretionary decisions has been criticised for allowing the authorities too much discretion. According to its critics administrative bodies should be obliged to issue reasons for discretionary decisions in particular, because the administrative body itself can only name those reasons. The main aim of the duty to give reasons is to enable the authority to assess its own reasoning. The giving of reasons forces the authority to assess the factual and legal requirements of the administrative act carefully. Further, it enables the citizen to review the decision and decide whether or not to appeal against it or not. Finally, the giving of reasons facilitates the work of the appeal body or the courts in judicial review proceedings because the reasons for the decision are more transparent.⁶⁴ The duty to give reasons has to be seen in close connection to the right to a hearing and the constitutional guarantee to access to justice as contained in Art 19(4) Basic Law.⁶⁵

Exception from the general duty to give reasons are contained in Article 39 section 2:

⁶³ Schwarze, *supra* n. 58,, 1386

⁶⁴ Maurer, *supra* n. 59, para 10, 13

Reasons are not required,

1. To the extent the authority conforms to an application or follows a declaration and the administrative act does not affect the rights of a third party;
2. To the extent the opinion of the authority on the factual or legal position is already known or is easily discernible even without written reasons to him for whom the administrative act is addressed or who is affected by it.
3. If the authority takes similar administrative acts in large numbers or with the help of automatic equipment and in the circumstances of the particular case reasons are not expected;
4. If this is contained in a legal provision
5. If a general order is publicly notified.

4. Legal consequences of procedural errors

Despite the fact that the right to a hearing and the general duty to give reasons are codified provisions and have gained fundamental importance in the administrative procedure the legal consequences of a lack of an opportunity to be heard or the omission of reasons may not necessarily lead to the illegality of the administrative act. The Law on Administrative Procedure provides for very detailed provisions on how to treat a procedurally flawed decision:

Generally, a procedural flaw in an administrative act may lead to different legal consequences. These legal consequences of procedural errors in the administrative process are governed by sections 44 to 46 Law on Administrative Procedure 1976 (*Verwaltungsverfahrensgesetz*). Depending on its nature a procedural flaw in the administrative process may lead to different legal consequences. An administrative act may either be annulled (section 44) or its procedural flaws may be cured (section 45) or a procedural flaw may be held to be irrelevant (section 46).

In serious cases as described in Article 44 the administrative is null and void.

Article 44

Nullity of Administrative Act

⁶⁵ Badura in Erichsen, *Allgemeines Verwaltungsrecht* 1988, 418

- (1) An administrative act is null and void to the extent it suffers from an especially grave defect and the defect is evident on the appreciation of the surrounding circumstances.
- (2) Without prejudice to the provisions of clause (1) an administrative act is void.
 1. If it is expressed in writing but does not disclose the authority that has taken it;
 2. If under the law it can be taken only by the delivery of a document but its form is not satisfied;
 3. If it is taken by an authority outside its competence as laid down in section 3 (1) No. 1 without being authorised to do so;
 4. If for factual reasons nobody can perform it;
 5. If it requires the commission of an illegal act which creates liability for punishment or fine;
 6. If it violates the principle of good morals.
- (3) An administrative act is not void merely because-
 1. The provisions about the territorial competence have not been observed except in case of clause (2) No. 3;
 2. a person excluded under section 20 (1) Nos 2 to 6 has participated.
 3. A committee required by law to participate in the taking of an administrative act has not passed the decision prescribed for taking of administrative act or did not have the quorum;
 4. Any other authority required by law to participate has failed to do so.
- (4) (5).

The principle that less serious procedural flaws may be cured at a later stage is contained in Article 45:

Curing of Defects of Procedure and Form

- (1) Setting aside the cases in which an administrative act is void according to Art 44, a violation of the provisions relating to form or procedure is inconsequential, if:
 1. an application required for the taking of an administrative act is made after the act;
 2. the required statement of reasons are given after the act was issued;
 3. the required hearing to a participant is given after the act was issued;
 4. the decision of a committee whose participation in the taking of the administrative act is required has considered it afterwards;
 5. the required participation of another authority takes place afterwards.

According to No 2 the lack of reasons for an administrative act may be cured by providing for reasons at a later stage. The lack of a hearing may also be cured by allowing the applicant to be heard after the issue of the act. The crucial question is,

however, until what time a procedural error may be cured. Article 45 used to provide for a time limit at the end of the pre-trial procedure:

Article 45 (2) (old version)

Actions under section (1) no. 2 to 5 may be taken only before the conclusion of the pre trial procedure (*Vorverfahren*) and in case no such pre-trial procedure takes place before the filing of a suit in an Administrative Court.

However, the reforms of the Administrative Procedure Law in 1996 now provide for the opportunity to cure procedural errors as late as until the end of the court trial in the last instance:

Article 45 (2) (new version)

Action under section (1) can be taken until the end of a court trial in the last instance.

Accordingly the administration is now permitted to cure a procedurally flawed administrative act which might otherwise be rendered illegal and transform it into a legal one. The purpose of the extended opportunity for the administration to transform illegal acts into legal ones is the ideal of an accelerated court procedure.⁶⁶ The extended option of curing of procedural flaws aims to reduce the number of applications for judicial review in the same matter. This occurred in cases where the courts quashed decisions on procedural grounds and the applicants subsequently applied for judicial review in the same matter on different grounds. The main changes therefore concern the timing for the curing of procedural effects. In summarising the above stated until 1996 procedural flaws could be remedied by the relevant authority until the end of the administrative proceedings, in other hands as long as the administration was in charge.⁶⁷ According to the new Article 45 section 2 administrative authorities may now transform an illegal administrative act into a legal act until the end of the administrative court trial in the last instance. According to Article 45 section 2 of the Law on Administrative Procedure reasons for an administrative decision may be given as late as in the court trial stage. This provision has been controversial as it jeopardises the purpose of reasons giving which amongst others can be described as providing the authority with an

⁶⁶ *Deutscher Bundestag*, Drucksache 13/3993 of 6 March 1996, p. 1; 13/1433 of 18 May 1995, p.1.

⁶⁷ Hatje, A., "Die Heilung formell rechtswidriger Verwaltungsakte im Prozeß als Mittel der Verfahrensbeschleunigung" (1997) *DÖV* 477

opportunity to review its own decision. It may also indicate the authority did not investigate the facts of the case properly.⁶⁸

A similar development has taken place with regard to the curing of flaws in the consideration process in the context of discretionary decisions. The reasons as required by Article 39 should display the considerations which led to the discretionary decision. Until the reforms of 1996 a defect in the consideration process led to the incurable illegality of an administrative act once the court trial had started.⁶⁹ However, according to the new Article 114 sentence 2 Law of Administrative Court Procedure⁷⁰ considerations for discretionary decisions may now be completed until the end of the court trial. This new provision is concerned with the curing of a substantive flaw in the consideration process, however it appears in close connection to the issue of curing of the lack of reasons giving. Lack of reasons as described above is however, concerned with a procedural flaw. Article 114 deals with decisions for which reasons have been given, however the reasons are insufficient and are supplemented at the court stage. The new provision is closely related to the previous jurisprudence of the Federal Administrative Court, which has established three criteria subject to which a flawed discretionary decision may be cured in the court proceedings.⁷¹ The principle is based on the consequences flowing from the inquisitorial principle according to which the court has to take into account all evidence that is offered.⁷²

However, there are exceptions to the general rule, which are as follows:

Reasons may not be supplemented if they lead to a change in the nature of the decision.

If the supplemented reasons change the procedural position of the applicant in the court proceedings.

If it concerns a decision to be taken by a collegiate which cannot be reproduced at court stage.⁷³

⁶⁸ Hufen, F., (1998) *Verwaltungsprozessrecht*, 3rd edition (München: Beck-Verlag, 1998), 448

⁶⁹ Article 113(1) Law on Administrative Court Procedure

⁷⁰ new version after the 1996 reform

⁷¹ more recently *BVerwGE* 105, 55 = *NJW* 1998, 2233

⁷² Hufen, *supra* n. 68, 449

⁷³ Hufen *supra* n. 68, 450

However, a recent decision by the Federal Administrative Court has clarified some of the uncertainties concerning the scope of the supplementation of the considerations. Considerations concerning the exercise of discretionary powers may be supplemented but not fully exchanged.⁷⁴

In order to enable the Administrative authorities to cure procedural flaws within the court proceedings changes had to be made to the Law on Administrative Courts (*VwGO*) as well. Accordingly, Article 94 sentence 2 Law on Administrative Courts the court may now stay the proceedings so that the administrative authority may remedy the procedural flaws. These legislative changes to the *VwVfG* illustrate the tendency to minimise the legal consequences that follow from the violation of procedural requirements. This opening of the court proceedings for the purpose of curing of defects which occurred within the administrative procedure have been criticised by the judiciary in particular, because this is in contrast to the right to a fair trial as it places the authorities into a more favourable position.⁷⁵ Secondly, it is argued that the new provisions violate the right to be heard by an unbiased judge as provided for in Article 97 Basic Law. This principle could be violated by the fact that the judge may stay the proceedings so that the authority may receive the opportunity to cure the procedural error.

Finally some procedural errors cannot be cured or simply have not been cured. However, another provision in the Law on Administrative Procedure provides that they may not even require curing if no other decision could have been taken in the matter. Originally, this provision concerned only non-discretionary decisions:

Article 46 (old version)

Annulment of an administrative act which is not void according the provision in Art 44 cannot be sought if the flaw relates only to either the procedure, the formal aspects or the local administrative competence if no other decision could have been taken in the matter.

Art 46 Consequences of Defects of Procedure and Form (new version)

Annulment of an administrative act which is not void according the provision in Art 44 cannot be sought if the flaw relates only to either the procedure, the formal aspects or the local

⁷⁴ BVerwGE 106, 351; Schenke R.P, "Das Nachschieben von Ermessenserwägungen – BVerwGE 106" (2000) *JuS* 231 [233]

⁷⁵ Hatje, *supra* n. 67, 477

administrative competence if it is obvious that the breach had no influence on the decision on its merits.

The reforms in 1996 have not been uncontroversial. It has been argued that the extensive curing of procedural flaws within the court procedure is in stark contrast to the association of the administrative process with the protection of Human Rights under the Basic Law.⁷⁶ However, this might be a contradiction but the German tradition shows that procedural guarantees are worthless if the decision of the authority is wrong in substance. Most importantly, therefore is that the decision in itself is correct and does not breach the Human Rights standards as set out in the Basic Law.⁷⁷

The relevance of procedural errors is therefore decreasing in Germany. This might raise the question in the future whether that part of German Administrative procedure law is still in accordance with the German Basic Law and European standards. Hatje argues that the new provision amounts to a violation of the constitutional principle of effective judicial protection in Article 19IV Basic Law.⁷⁸ The curing of procedural errors might soon result in a reaction by the European Court of Justice, which will require a duty to give reasons in connection with the indirect administration of Community law.⁷⁹ Germany traditionally take a liberal approach regarding the application of strict procedural rules. This is mainly due to the fact that as illustrated in the foregoing chapter the intensity of judicial review is greater than in English law. The scope of review is restricted to legal norms, which create subjective rights for the individual (Art113 (1), and (5) Administrative Court Procedure Act. Consequently procedural errors do not automatically give rise to a claim. The Administrative procedure has only a serving function and therefore the main emphasis is laid on the substantial decision.⁸⁰ The emphasis on substantive review in Germany is deeply rooted in the German legal tradition and expressed in the inquisitorial procedure as applied by the Administrative courts.

⁷⁶ Maurer, *supra* n. 59, para 10, 43

⁷⁷ Maurer, *supra* n. 59, para 19, 9/10

⁷⁸ Hatje, *supra* n. 67, 477, 481

⁷⁹ Classen, C.D., *Die Europäisierung der Verwaltungsgerichtsbarkeit*, (Tübingen: J.C.B. Mohr (Paul Siebeck), 1995), 174 who refers to EuGH, Slg. 1987, 4097 (4117), Rs 222/86 - Heylens

III. Evaluation

Both administrative law systems recognise the right to a fair hearing. The provisions on administrative procedure play an important role in safeguarding individual protection. Therefore the emphasis is laid on the subjective legal protection of the citizen against administrative action. In contrast, the French and the Italian administrative legal systems emphasise a more objective purpose of procedural safeguards with a variety of provisions dealing with the consultation of other authorities or organs in the administrative decision making process.⁸¹ Both in England and Germany the rules on procedure for administrative decision-making have been modelled on the court procedures, which had been operating before the emergence of administrative law procedures. This historical development of administrative procedure as a reflection of the principles of the court procedure in each country explains the different approaches. The comparison shows that both systems have developed the right to a hearing. In England it is contained in the rules of Natural Justice, which originated in the 17th century and which have undergone phases of revival and decline and which since the 1960s constitute an important part of Administrative justice in England. In Germany, the right to a hearing does not have quite as far-reaching historical roots but has been clearly formulated by the German Administrative courts during the *Weimar* Republic and have been revived after the Second World War. With the codification of the Administrative Procedure Law in 1976 it has found statutory recognition in the general principles of Administrative law procedure as well as in special statutes.

In both legal systems the denial of a right to a hearing constitutes a ground for review. Both systems contain a variety of exceptions to the right to a hearing, in form of case law or as codified exceptions contained in Art 28 of the Administrative Procedure Act. Further, the notion that defective decisions can be cured in subsequent appeal procedures is equally an issue in English decision and it is a codified and recently modernised principle in German law. The National Reports have shown that English judges are increasingly “willing to accept that an appeal has “cured” a defective

⁸⁰ *ibid.*, 122

⁸¹ Schmidt-Assmann, E. “Das Verwaltungsverfahren und seine Folgen”, (1993) *European Review of Public Law*, 1993, 99

decision.⁸² Further, the case of *Cheall v Association of professional, Executive, Clerical and Computer Staff*⁸³ illustrates that in cases where the decision maker exercises no discretion the defect in the decision, i.e. the denial of a hearing may be irrelevant if it has made no difference to the result. However, English courts are not as rigorous as German Courts in applying these principles.

The German Code of Administrative Procedure, ironically, displays an increasing devaluation of procedural guarantees within the administrative procedures. The right to a hearing and the duty to give reasons are still important features of the decision-making process. However, flawed decisions can now be cured until the end of judicial review proceedings. Therefore in Germany the court proceedings often replace the administrative decision making process. Administrative judges are bound to proceed according to the inquisitorial principle. Accordingly, the judge is under the duty to undertake investigations in his own right and his investigation is not limited to the submissions by the parties. The judge can allow the authorities a period of up to three months to cure defects in its decision making process. This approach reflects an attitude, which is at the cost of a strong position of public authorities. This is due to the fact that German courts insist that there is only one correct application of the law which is expressed by the inquisitorial procedure applied by the administrative courts leads to a far more searching substantive review of the case. In particular in cases where the authorities had no discretion, the German courts apply the rule that a procedural defect will have no consequences “if no other decision could have been taken in the matter”.⁸⁴ This rule has now also been extended to discretionary decisions in the reformed version of Article 46.

In English law, the right to a hearing as part of the rules to Natural Justice are “in essence a skeletal version the elaborate rules of judicial procedure to be found in their fullest form in the Rules of the Supreme Court.”⁸⁵ Accordingly, the adversarial system

⁸² De Smith, *Judicial Review of Administrative Action*, 1995, 490

⁸³ [1983] Q.B. 126

⁸⁴ Article 46 of the Administrative Procedure Law ; see Nolte, G., “General principles of German and European Administrative Law - A Comparison in Historical Perspective”, (1994) *Modern Law Review*, 191

⁸⁵ Cane, *An Introduction to Administrative Law*, 1996, 163

is concerned with allowing the parties to present their case and their “version of the truth and leave it to an impartial third party to decide which version more nearly approximates to the truth”.⁸⁶ As a consequence under the adversarial procedure the issue of fact-finding is a matter for the parties. The English tradition of adversarial adjudication is described well by Pollock and Maitland:

“The behaviour, which is expected of a judge in different ages and by different systems of law, seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches in his laboratory and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We are so often reminded of the cricket-match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, “How’s that?”⁸⁷

B. Comparative cases

I. Legal effects of denial of a hearing

1. England

English courts are equally concerned with the question of how likely is it that a hearing would have changed the final outcome of a case. It is submitted as: “any remedy would be pointless, because it would not benefit the applicant, who has already received all that he would obtain by way of relief, the applicant has not suffered any real prejudice, the decision would have been no different if the decision maker had followed the precepts of natural justice.”⁸⁸ However, this type of question takes the courts beyond

⁸⁶ *ibid.*,

⁸⁷ Pollock, F., and Maitland, F.W., *The History of English Law before the Time of Edward I*, 1898, 670-671 cited in Allison, J.W.F., *A Continental Distinction in the Common Law, A Historical and Comparative Perspective on English Public Law*, 2000, 216

⁸⁸ De Smith, *Judicial Review of Administrative Action*, 1995, 498

the question of whether a decision was taken in a procedurally proper manner. It touches upon issues of substance and the courts have not dealt with that question as easily as the German courts: “Where, ex hypothesis, the adjudicatory body has failed to observe natural justice, its protestations that a hearing would have made no difference must in principle be viewed with scepticism.”⁸⁹

aa. The court decision on this issue reveal three types of answers to the question of whether a hearing would have made a difference to the outcome of a case: Firstly, the courts have denied the existence of the principle of *audi alteram partem* or fairness altogether if they found it unlikely that a hearing would have made a difference as in *Cinnamond v British Airports Authority*⁹⁰. This case was concerned with six car-hire drivers who were refused entry to Heathrow airport. They all had offended the byelaws for loitering and offering services to passengers and had not paid the fees, which were imposed upon them. The authority had failed to give them an opportunity to be heard before given them notice of the prohibition order. Lord Denning held that because of their misconduct they had no legitimate expectation to a hearing. Lord Justice Brandon held that “[...] it seems to me that no prejudice was suffered by the minicab drivers as a result of not being given that opportunity.” Lord Denning’s speech suggests that they had no right to a hearing because they had no legitimate expectation whereas Lord Brandon’s speech reveals a slightly different position. He expresses the argument that a hearing would have not made a difference to the plaintiff’s position: “[...] no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing.”

bb. Secondly, the courts have exercised their discretion in awarding a remedy when they considered it unlikely that the hearing would have made a difference. In *Glynn v Keele University*⁹¹ the Vice-Chancellor of the University of Keele took disciplinary action against the plaintiff who had sunbathed naked on the University campus. He imposed a fine on the student and excluded him from residence in any University owned accommodation on campus for the whole of the academic year in 1970/71. The plaintiff

⁸⁹ Bailey, Jones & Mowbray, *Cases and Materials on Administrative Law*, 1997, 441

⁹⁰ [1980] 1 WLR 582

⁹¹ [1971] 1 W.L.R. 487

was not granted a hearing before this decision was reached. The plaintiff does not dispute the fact that he had taken part in the incident but sought an injunction against the University. The court held that the vice-chancellor had acted in a quasi-judicial function and had therefore been in breach of the rules of natural justice when denying the plaintiff a right to a hearing. However, the court decided to exercise its discretion by not granting an injunction. The judge considered the situation if a hearing would have been afforded to the plaintiff: “So the position would have been that if the vice-chancellor had accorded him a hearing before making his decision, all that he, or any one on his behalf could have done would have been to put forward some general plea by way of mitigation. I do not disregard the importance of such a plea in an appropriate case, but I do not think the mere fact that he was deprived of throwing himself on the mercy of the vice-chancellor in that particular way is sufficient to justify setting aside a decision which was intrinsically a perfectly proper one.”

cc. Thirdly, in some cases the courts have interpreted the concept of fairness to answer the question whether the decision was fair and reasonable as indirectly stated in *Chief Constable of North Wales Police v Evans*⁹². This case was concerned with an order by the chief constable of North Wales Police, which required the plaintiff to resign or be dismissed. Inaccurate rumours concerning the private life of Constable Evans such led to this order. However, Constable Evans was not explained the background of that decision and was not given the opportunity of a fair hearing. Lord Bridge of Harwich, in his speech agreed that there had been a breach of natural justice. However, he clearly dissented from the findings of the Court of Appeal, which stated that “Not only must [the probationer constable] be given a fair hearing, but the decision itself must be fair and reasonable.” If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.”⁹³ Lord Hailsham of St. Maryleborne L.C. held that “It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies

⁹² [1982] 1 W.L.R., 1155

⁹³ [1982] 1 W.L.R., 1155, 1160-1161, 1174-1175

making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.”

2. Germany

Buschhaus II (Powerstation)⁹⁴

This case concerns the application of Article 46 of the Law on Administrative Procedure according to which a procedural error may be regarded as irrelevant.

In 1984 a powerstation known as *Buschhaus II* in Northern Germany received permission to commence its operation. The planning process regarding this PowerStation had commenced in 1978 when a public local inquiry was held. The plaintiffs, a one-year old child and its father who live nearby appeal against the permission for the station to go into operation. They submit, *inter alia*, that they were not allowed a hearing before the station was granted permission to operate. The law governing the running of power stations is the *Bundesimmissionsschutzgesetz* (Federal protection law against emissions). According to section 10 paragraph 1 section 2 of this law the authorities were under a duty to enable the general public to inspect the plans as early as 1978. Accordingly, the public should have had the opportunity to inspect the plans during normal office hours. However, the planning authority failed to comply with this requirement because the plans were accessible for inspection at restricted times only. Because of this procedural error the *Bundesimmissionsschutzgesetz* (Federal protection law against emissions) provided for another hearing before the powerstation would commence its operations in 1984. However, the public was denied the right to a hearing. The plans revealed that the emission was minimal and that no danger to health was given. The court held that the initial inquiry was procedurally flawed because access to the plans was restricted to short periods during the week. It further held that the denial of a right to a hearing before the start of operation of the powerstation was a second procedural defect in the planning process. Nevertheless, the court held that a hearing would have made no difference to the decision on its merits. . According to Article 46 of the Law on Administrative Procedure the annulment of an administrative act which is not void according the provision in Art 44 cannot be sought if the flaw

⁹⁴ BverwG, *DVBl* 1983, 271

relates only to either the procedure, the formal aspects or the local administrative competence if it is obvious that the breach had no influence on the decision on its merits. The court held that the right to a hearing is important because the running of a powerstation interferes with the Basic Rights of the applicants. However, procedural rights of that kind are only complementing the protection of the Basic Rights. Procedural safeguards, however, become meaningless if a violation of substantive basic rights is clearly not the case. The court further held that the authorities could have made no other decision because they had no discretion in deciding whether to grant permission for the powerstation to run.

3. Evaluation

The cases have illustrated that like the German courts English courts, too, are sometimes concerned with the question which effect a defect in the procedure has had for the outcome of a case. However, unlike the German court, the courts refuse to concern themselves with matters of substance. The English approach is a careful disguise for answering a question which is too concerned with issues of substance and which might amount to a second-guessing of the original decision. As illustrated, they either deny the applicability of the rules of natural justice or exercise their discretionary powers to refuse a remedy. As a result, English courts reach similar decisions with different means. It is, however, not always clear how the courts identify the cases in which they refuse relief.⁹⁵

II. Deficient reasons made good in course of proceedings

1. *England*

*R v Westminster City Council, ex parte Ermakov*⁹⁶

The following case illustrates well that English courts take procedural requirements quite seriously. As discussed above, no general duty to give reasons exists in the common law. However, statutes may require the decision maker explicitly to state reasons for their decisions. This is the case in the Housing Act 1985. Section 64 of the 1985 Act requires that reasons should be given at the same time as the decision is

⁹⁵ De Smith, *Judicial Review of Administrative Action*, 1995, 499

communicated. In *R v Westminster City Council, ex parte Ermakov*⁹⁷ the applicant, a national of the Republic of Uzbekistan applied to the respondent council to provide housing for himself and his family on the ground that they were homeless. The applicant's statement contained detailed information for their wish to live in the UK after their relatives had made their lives in Greece, where they last resided in their own house unbearable by persecuting them and threatening their lives. Subject to its powers under the Housing Act 1985 the local council had to ascertain whether the applicant had become homeless intentionally. Further, the local council was under a statutory duty to provide reasons for a decision made in this matter. However, the council was not successful in gaining information about the applicant's situation in Greece, as it did not receive any reply to its letters to persons in Greece who could corroborate the applicant's statement. The council then decided that the applicant had become homeless intentionally and notified him of his reasons. The reasons given were that the council was not satisfied that the applicant had experienced harassment and that it was therefore reasonable for him and his family to remain in Greece. The applicant sought judicial review on the grounds that the council had failed to carry out proper inquiries, that it wrongfully assumed that the lack of response meant that the homeless was caused intentionally, that the applicant had not been formally heard, that it failed to assess whether the applicant suffered from the harassment. The heart of the problem in this case was the fact that the council's employee who was in charge at the time swore an affidavit, which contained the true reasons for his decision: Accordingly, he had turned down the applicant because he accepted the applicant's statement to be true but nevertheless decided that it would have been reasonable for him and his family to continue to occupy the accommodation in Greece.

The Court of Appeal decided that it would in appropriate cases admit evidence to "elucidate, or exceptionally correct or add to the reasons given by a housing authority", but that "it would be very cautious about doing so".⁹⁸ The case shows how serious the court is about the fulfilment of the statutory requirement of the duty to give reasons. It is of the opinion that admitting the affidavit containing in its view wholly different

⁹⁶ [1996] 2 All ER 302

⁹⁷ *ibid.*

⁹⁸ *R v Westminster City Council, ex parte Ermakov*, [1996] 2 All ER, 302

reasons, “nullifies the very objects and advantages underlying the requirement to provide reasons.”⁹⁹ The court referred to authoritative case law such as *R v Croydon London Borough, ex parte Graham*¹⁰⁰ and reached the conclusion that insufficient reasons lead to the unlawfulness of the decision and that the court should be “circumspect about allowing material gaps to be filled by affidavit evidence”.

The introduction of the true reasons was also turned down “for good policy reasons”. The court held that “to permit wholesale amendment or reversal of the stated reasons is inimical to the purpose of reasons giving [i.e.the information of parties why they have won or lost]”, it further “encourages a sloppy approach by the decision-maker” and “gives rise to potential practical difficulties”. Concerning the latter point the court referred to the problem of applications for cross-examination and discovery, “both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate”.¹⁰¹

2. Germany

Extradition-case

[BverwGE NVwZ 1999, 425]

This case is very important because the Federal Administrative Court for the first time dealt with the new provision in Article 114 sentence 2 Law on Administrative Court Procedure which provides an opportunity for the administrative authority to amend its considerations in a discretionary decision as late as during the court proceedings.

The applicant was an asylum seeker of Kurdish origin. Between the years 1992 and 1994 he committed several crimes in connection with activities in support of the PKK in Germany. In 1994 the authorities ordered him to leave the country. In exercising its discretion the authority failed to consider the exception in section 55 Law on Asylum (*Ausländergesetz*). Accordingly an alien subject may remain in the country if there are factual or legal reasons which make the order to leave the country impossible. Nevertheless, the authority supplemented its considerations in the administrative court

⁹⁹ *ibid.*, 310

¹⁰⁰ (1993) 26 HLR 286

¹⁰¹ *R v Westminster City Council, ex p. Ermakov* [1996] 2 All ER, 316 (3)

proceedings and came to the same conclusion. The court held that according to section 114 of the Law on Administrative Court Procedure the court may complete its reasoning until the end of the court trial. It emphasises that the provision confirms what had been accepted in the jurisprudence of the Federal Administrative Court for many years. Accordingly the reasons may be supplemented if the delayed reasons existed at the time of the decision, the decision is not changed in its nature and if the applicant's procedural position is not affected.¹⁰² The court made clear that Article 114 merely permits the supplementation of the reasons and not a complete exchange of the reasons. In this case the court held that the authority was permitted to supplement its decision, however that the decision reached was unlawful because the applicant had a right to remain in the country according to the exceptions stated in section 55 of the Law on Asylum.

3.Evaluation

The cases illustrate well that both jurisdictions might have come to the same result in the case of *Ermakov*. Even though the German law is more accepting of the idea that flaws in the reasoning process may be cured within the court process, there are limitations to this approach. Nevertheless, the starting positions are different. In Germany, a lack in the consideration process of a discretionary decision, which is displayed in the provided reasons, may be cured as late as at trial. The latest reforms of the Administrative Court Procedure Act have incorporated this jurisprudence of the highest Administrative Court into Article 114 sentence 2 allow the curing of defects in the reasoning of discretionary decisions until the end of the judicial review trial. The arguments brought forward for this approach emphasise the inquisitorial role of the court in considering all factual and legal issues underlying the decision and this may include the assessment of additional reasons given by the authority. The general rule that deficient reasons may be cured, however is subject to restrictions. Accordingly, considerations may not be completely exchanged. Therefore, even the German courts might have reached the conclusion in the case of *Ermakov* that the delayed reasons could not have been brought into the proceedings.

¹⁰² BVerwGE 3 C47.81 – Buchholz 418.02 Tierärzte Nr 2

The English case has shown, that there is no general principle which allows the curing of procedural flaws such as deficient reason giving. However, there is case law mentioned which equally allows the delayed giving of reasons in court if no reasons had been given at all.¹⁰³ Secondly, the courts are cautious to permit evidence which may elucidate or correct or add to the reasons in cases where there is a statutory duty to give reasons. Further, a statement of principle was cited that “The idea that material gaps in the reasons can always be supplemented ex post facto by affidavit or otherwise ought not to be encouraged”. The court in *Ermakov* rejected the argument that the correction of the reasons was a merely technical matter. Therefore it appears that in English law the completion of reasons is only permitted in limited circumstances whereas the position in Germany is marked by an approach which generally permits the curing of deficient reasoning safe under particular circumstances. The caution exercised by the English courts can be explained by the will to fulfil Parliament’s intention which is reflected in the Housing Act. Section 64 requires a decision and at the same time reasons. Highly interesting are the policy arguments advanced by the English court which equally have been raised by critics of the new German provisions, i.e. that allowing delayed reasons runs counter to the purpose of reason giving and leads to a sloppy approach by decision-makers.¹⁰⁴ German critics even fear an increased case load to the administrative courts because of an increase in badly prepared decisions.¹⁰⁵ The final argument that hearings would be made longer and more expensive as equally been raised by critics of the German provisions. Nevertheless, arguments in favour of the new provision have been based on the duty of the court under the inquisitorial procedure to take into account this type of evidence whereas in the English courts the admission of affidavit evidence is a matter for the judge’s discretion.

In conclusion, the position taken by the English courts favours a stronger role to be played for administrative authorities: The court held that the authority should not just be left with the mechanical or formal function to perform; rather it should reconsider the decision properly. In Germany, on the other hand, administrative decisions are

¹⁰³ *R v Swansea City Council, ex p John* (1982) 9 HLR 55

¹⁰⁴ Bonk H.J., “Strukturelle Änderungen des Verwaltungsverfahrens durch das Genehmigungsverfahrens-Beschleunigungsgesetz” (1997) *NVwZ* 324

¹⁰⁵ Goller, B., Schmid, A., “Reform of the German Administrative Courts Act”, (1998) *European Public Law* 31 [36]

increasingly shifted into the administrative courts. Whether this will lead to an acceleration of the court proceedings as intended by the new legislation is doubtful.

C. European influences

1. *England*

Procedural rights at common law and Article 6(1) of the European Convention on Human Rights

Article 6(1) of the European Convention on Human Rights was at stake in the recent case of *R v Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Ltd.*¹⁰⁶ In this case the Divisional Court had held that, where the Secretary of State calls in a planning application for his own determination or if he decides a planning appeal himself or if he confirms his own highway or compulsory purchase order a breach of Article 6 (1) of the European Convention on Human Rights occurs. The complaint was based on the fact that the Secretary of State in that function did not act as an independent and impartial tribunal. Accordingly the Divisional Court granted a declaration of incompatibility under section 4 of the Human Rights Act 1998. However, the House of Lords reversed the decision and held that the availability of judicial review was sufficient to comply with Article 6(1) of the Convention. The main questions in *Alconbury* was whether Secretary of State's power to appoint planning inspectors and judge cases himself inconsistent with the concept of an independent tribunal as specified in Article 6(1) of the European Convention on Human Rights. The Queen's Bench Division was of the view that it was not. The next issue was whether the inherent supervisory jurisdiction of the UK's superior courts was sufficient to satisfy the provisions of Article 6(1) and therefore able to "save the process". The procedural protections granted by Article 6(1) do not have to apply at every stage in the decision making process but must be present at the final stage. In *Albert v Belgium* the European Court of Human Rights had held that "The Convention calls for one of the following two systems: Either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but

¹⁰⁶ [2001] 2 All ER

are subject to control by a judicial body which has full jurisdiction and does provide the guarantees of Article 6(1).”¹⁰⁷ The Queen’s Bench Division was of the view that judicial review was too restricted to procedural issues that they were not enough to “save” the process. Surprisingly, the House of Lords did not agree. The House of Lords decision interpreted the European jurisprudence on Article 6 and judicial review as drawing a line between decisions of policy and decisions of quasi-judicial nature. In the former no full jurisdiction was required. Lord Hofman held that “there is nothing to suggest that, in finding the primary facts and in drawing conclusions and inferences from those facts, an inspector acts anything other than independently, in the sense that he is in no sense connected with the parties to the dispute or subject to their influence or control; his findings and conclusions are based exclusively on the evidence and submissions before him.” The House of Lords agreed that in matters of policy the Secretary of State was not independent but that he did not have to be. He clarified that judges should not interfere with matters of policy: “The 1998 Act was no doubt intended to strengthen the Rule of Law but not to inaugurate the rule of lawyers.”

One could argue that this decision was a politically expedient decision as a declaration of incompatibility would have had massive consequences on the entire planning law system. Nevertheless the House of Lords’ decision marks a more subtle development in Human Rights jurisprudence. *Alconbury* illustrates the view of the House of Lords as to the scope of the existing principles of judicial review. Lord Nolan held that judicial review could include the review of questions of fact. Lord Slynn’s view on the application of the principle of proportionality: “I consider that even without reference to the Human Rights Act the time has come to recognise that this principle [of proportionality] is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.”

¹⁰⁷ *Albert v Belgium* (1983) 5 EHRR 533 at 542

2. Germany

aa. Potential for conflict in the indirect administration of EC law

Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private projects on the Environment (85/337/EEC)

Here it is doubtful whether the developments in German Administrative law regarding the reduction of legal consequences of procedural errors is going to be compatible with European standards when it comes to the indirect administration of European Community law.¹⁰⁸ The radical rectification of procedural errors has been described as in contrast to the standards set up by the European Court of Justice¹⁰⁹ So far no conflict between the case law of the European Court of Justice and the German Administrative Courts on the issue of procedural errors and their legal treatment exists. However, it is only a question of time until a case will be decided applying the reformed rules on procedural errors in the context of indirect administration of European law. In particular those areas of European law, such as the law on the environment, which have added an increasing body of procedural safeguards to existing national law, will serve as potential battlefields between Germany's relaxed attitude towards procedural irregularities and the European principle of effective judicial protection of individuals. The Act on the Implementation of the Council Directive of 27 June 1985 on the Assessment of the Effects of Certain Public and Private projects on the Environment (85/337/EEC), the Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung*¹¹⁰) serves the purpose of ensuring that for a variety of projects amongst them power stations, refineries and shipyards to name just a few effective preventative environmental protection is guaranteed on the basis of uniform principles. The so-called environmental impact assessment represents an integral part of procedures applied by authorities when deciding upon the approval of projects. An important feature of the environmental assessment is the involvement of the public.¹¹¹ However, according to the case law of the *Bundesverwaltungsgericht* procedural errors

¹⁰⁸ Hufen, F. *Fehler im Verwaltungsverfahren*, 1998, 360

¹⁰⁹ Hatje, A. „Die Heilung formell rechtswidriger Verwaltungsakte“, (1997) *DÖV* 477 [480]; Classen, *Die Europäisierung der Verwaltungsgerichtsbarkeit*, 1995, 174

¹¹⁰ February 12, 1990, *Bundesgesetzblatt* 1990 I p. 205, as last amended December 17, 1993 *Bundesgesetzblatt* 1993 I p. 2734

¹¹¹ Art 2 section 1 of the Act

are only relevant if the correct application of the procedure would have made a difference to the decision on its merits or if it was possible that the decision would have been a different one had the error not occurred. Therefore it has been questioned whether the German provisions on curing procedural errors can only be applied restrictively on procedural provisions in a Community law context such as the Impact Assessment Act. The European Court of Justice has made it clear that the application of national procedural law should not render it practically impossible to carry out the obligations of Community law provisions. It is therefore important to examine the position of the European Court of Justice itself with regard to the consequences of procedural irregularities.

b. In the case of *UNECTEF v Georges Heylens and Others*¹¹² the European Court of Justice illustrated the importance of reason giving for the protection fundamental freedoms. Georges Heylens was a Belgian football trainer with qualifications subject to Belgian law. He was employed as a football trainer of a French team in Lille. The French Ministry of Sport refused to recognise his trainer's Diploma as being equivalent to the French Diploma. The Ministry of Sport did not give any reasons for the refusal. The European Court of Justice held that "where in a member state access to an occupation as an employed person is dependent upon the possession of a national diploma or a foreign diploma recognised as equivalent thereto, the principle of the free movement of workers laid down in Article 48 of the Treaty requires that it must be possible for a decision refusing to recognise the equivalence of a diploma granted to a worker who is a national of another member state by the member state to be made the subject of Judicial proceedings in which its legality under Community law can be reviewed, and for the person concerned to ascertain the reasons for the decision."

The case of *Heylens* has been mentioned by German commentators who criticise the recent reforms of the Administrative Procedure Law and Administrative Court Procedure Law. Hufen doubts that procedural errors in the context of implemented secondary EC legislation may be considered as irrelevant subject to the new Article 46

¹¹² Case 222/86

of the Administrative Procedure Law.¹¹³ Hatje emphasises the importance of the duty to give reasons as a general principle of European Law.¹¹⁴ The European Court of Justice has frequently stated that errors in procedures which are required under Community law are always relevant. The case of *British Aerospace Public Ltd Company and Rover Group Holdings plc v Commission*¹¹⁵ it was decided that a decision by which the Commission finds that aid granted by a Member State to an undertaking is illegal, because it was in breach of a previous decision authorising aid to the same undertaking subject to certain conditions, and by which it orders reimbursement of the aid must be annulled where it has been adopted without the procedure laid down by Article 93(2), second subparagraph, being followed. The omitted procedure would have given the parties concerned the opportunity to submit their comments. The Court did not allow to cure this omission within the court procedures but annulled the decision. With regard to the German legislation allowing the curing of procedural defects in the court procedures, the jurisprudence of the European Court of Justice sets boundaries, which will have to be complied with.¹¹⁶

c. Administrative Courts and the procedural protection under Article 6(1) of the European Convention on Human Rights

*König v Federal Republic of Germany*¹¹⁷

The procedures available in the European Court of Human Rights have comparably little importance in Germany. Germany does not have to defend itself as much as for instance the United Kingdom, because Human Rights are enforced by way of proceedings in the *Bundesverfassungsgericht*. The European Court of Human Rights is only the competent court if national procedures, including those of the *Bundesverfassungsgericht* are exhausted. Having said that, however, in case these national procedures are not sufficient because of their length in particular, recourse to the European Court of Human

¹¹³ Hufen, *Fehler im Verwaltungsverfahren*, 1998, 360

¹¹⁴ Hatje, "Die Heilung formell rechtswidriger Verwaltungsakte im Prozess als Mittel der Verfahrensbeschleunigung", (1997) *DÖV*, 477 [484]

¹¹⁵ Case C-294/90; European Court reports 1992 Page I-00493

¹¹⁶ Classen, D., "Strukturunterschiede zwischen deutschem und europäischem Verwaltungsrecht, Konflikt oder Bereicherung?", (1995) *NJW* 2457 [2459] with further references; Nolte, G., "General Principles of German and European Administrative Law", (1994) *57 Modern Law Review* 191 [198]

¹¹⁷ (1998) 5 B.H.R.C. 293.

Rights is open.¹¹⁸ Article 6(1) of the Convention has therefore been continuously invoked against the Federal Republic of Germany. There are no cases in the field of tortious liability in which the Court has ruled that Germany was in violation of Article 6(1). However, both in Civil matters and in Administrative law matters German courts have been held liable for a violation of Article 6(1) of the ECHR.

In this case Germany for the first time was sentenced for overlong proceedings before an Administrative court. The applicant, Dr Eberhard König, a German doctor. In 1967 his authorisation to run the clinic was withdrawn at the request of the Regional Medical Society. It was alleged that he was unreliable regarding the management of the clinic and that he lacked the diligence and knowledge to run a clinic. On 9 November 1967 König appealed against the decision of the authorities to reject his objection. The Frankfurt Administrative Court dismissed the appeal 10 years later on 22 June 1977. At the date of the judgement of the European Court of Human Rights in 1978 the Hessen Administrative Court of Appeal had not yet ruled on the appeal from the Frankfurt Administrative Court. In addition König's authorisation to practise was withdrawn on 12 May 1971 because König was held to be unfit to practise medicine. In 1978 the Hessen Administrative Court of Appeal dismissed the appeal, which had been lodged against the judgement of the Frankfurt Administrative Court in 1971 (seven years later). In his application lodged with the Commission on 3 July 1973 Dr König claimed that the length of the proceedings before the Frankfurt Court had exceeded the "reasonable time" referred to in Article 6 I of the Convention. The European Court of Human Rights found that the length of the proceedings was due to the conduct of the court and not a result of Dr König's behaviour. As a result it held that in both cases the "reasonable time" had been exceeded and that this violated Article 6 I of the Convention.¹¹⁹

This groundbreaking decision extended the procedural protection of Article 6(1) accordingly everyone is entitled to a fair hearing "in the determination of his civil rights and obligations" to the jurisdiction of Administrative courts in Germany. Not least as a

¹¹⁸ Ossenbühl, *Staatshaftungsrecht*, 1998, 529

¹¹⁹ Vincent Berger, Case law of the ECHR 1991, 96

result of this judgment, the reforms regarding the acceleration of the Administrative court proceedings were initiated.

3. Evaluation

Judicial review of the administrative procedure in both jurisdictions is increasingly subjected to standards set by European jurisprudence. In England, the planning process has been subject to scrutiny under Human Rights jurisprudence. Even though no declaration of incompatibility was made, the more subtle outcome of *Alconbury* is the definition of judicial review principles in planning cases as including the principle of proportionality. However, the result of the case remains that the English planning system remains unchanged so far. In Germany, the new legislation concerning the curing of administrative defects within the court proceeding, is likely to be in conflict with the jurisprudence of the European Court of Justice in case of procedural errors which occur in the course of indirect administration of Community law. European case law concerning the application of the new rules in Germany can be expected. Ironically, though the reforms are partly due to earlier case law by the European Court of Human Rights regarding the overlength of German Administrative court proceedings which in the case of *Konig* were held to be in contravention to Article 6(1) of the Convention on Human Rights.

D. Limitations to convergence

In both legal systems the denial of a right to a hearing constitutes a ground for review. Both systems contain a variety of exceptions to the right to a hearing, in form of case law or as codified exceptions contained in Art 28 of the Administrative Procedure Act. Further, the notion that defective decisions can be cured in subsequent appeal procedures is equally an issue in English decision and it is a codified and recently modernised principle in German law. The National Reports have shown that English judges are increasingly “willing to accept that an appeal has “cured” a defective decision.¹²⁰ Further, the case of *Cheall v Association of professional, Executive,*

¹²⁰ De Smith, *Judicial Review of Administrative Action*, 1995, 490

*Clerical and Computer Staff*¹²¹ illustrates that in cases where the decision maker exercises no discretion the defect in the decision, i.e. the denial of a hearing may be irrelevant if it has made no difference to the result.

However, English courts are not as rigorous as German Courts in applying these principles. The German Code of Administrative Procedure, ironically, displays an increasing loss of status of the procedural safeguards within the Administrative procedure. For the purpose of procedural efficiency the right to a hearing and the duty to give reasons within the administrative process have lost some of their meaning. Since 1996 it is codified law that procedural flaws concerning both rights can be cured until the end of the Judicial review proceedings within the trial. Further, the courts apply a test according to which the lack of a hearing is irrelevant if it would not have influenced the administrative decision in its substance.¹²²

The reasons for the different approach are to be found in the history of the Administrative courts and the development of the *Rechtsstaat*. This leading principle automatically sets the limits to a reduction of judicial protection. The German judicial review process is marked by the attitude that only the courts can reach the correct answer. The German tradition of finding justice is unlike the English tradition not based on an adversary battle of two parties and procedural fairness but on the belief that there is only one correct answer to a legal question. As a consequence administrative procedure law does not enjoy the same status as in the common law system. It merely has an ancillary or facilitative function. This attitude has found legislative expression in the new reforms of the Administrative Court Procedure law which allows the extensive curing of procedural defects within the court proceedings. As shown in chapter two the strong position of the Administrative courts in reviewing decision by the administration has its roots in the nineteenth century when they emerged as a reaction to the parliamentary failure of the 1848 revolution. However, in the absence of a strong constitutional tradition and the protection of individual rights the courts were mainly concerned with the review of *ultra vires* acts and the administration enjoyed comparably wide discretionary powers.

¹²¹ [1983] Q.B. 126

The concept of the *Rechtsstaat* originally merely embraced the requirements “that the state must act within the framework of the law and that the law must be precise, calculable and enforceable.”¹²³ This formal concept of the *Rechtsstaat* did not contain the protection of higher values such as fundamental rights or basic principles of justice. The concept of the formal *Rechtsstaat* was based on the ideas of legal positivism, which believed in the approach that “law is law” and not concerned with value-oriented legal thinking. The extreme change that occurred in German legal thinking after the Second World War, i.e. the transformation from legal positivism to a more natural law approach is a clear answer to the abuses suffered by individuals under the Nazi regime. The emergence of the “substantive” *Rechtsstaat* after the Second World War transformed German jurisprudence fundamentally.

Clearly, an important tool in deciding whether the correct decision has been made is the power of the courts to fully investigate the facts of the case. Unlike the judicial review procedures in England, which are concerned with a supervisory role, the German courts carry out a full investigation into the underlying facts of the decision. The courts have been empowered by the legislature with the power to “advise” authorities within the court procedures to correct flawed decisions with the result that decisions which are flawed by the lack of a hearing or by insufficient reason giving may be cured and turned into legal acts.

The administrative courts which are bound by the constitution and by the empowering statute to enforce the substantive *Rechtsstaat* with its searching review for “the truth” and the protection of individual rights operate at the costs of an independent executive. As seen in the previous chapter public authorities enjoy little areas within their discretion or their margin of appreciation, the protection of individual rights justifies an intense review of discretionary decision. As seen by recent reforms of the Administrative Procedure Act the role of procedural safeguards has been further minimised to a “serving function.” Procedural safeguards such as the right to a hearing and the duty to give reason, which have been codified ironically, play such a minor role now within the pre-trial phase that the purpose of the so-called *Beschleunigungsgesetze*

¹²² Article 46 of the Administrative Procedure Act

(Laws to accelerate court procedures) has been questioned. The courts now act as advisors of the authorities and pre-trial procedural safeguards are exercised during the court proceedings. This shift towards overloading the courts with issues stemming from the decision making process has been widely criticised in academic writing. The speeding up of the court procedures are partly due to pressure from decisions such as *König* where it was held that the German Administrative court's seven year trial was in contravention to Article 6(1) of the European Convention on Human Rights.

By comparison, the developments in English law are less obvious. The judicial review remedies are granted within the discretion of the courts. In *Camelot*, for example, the court retained discretion to refuse relief if it would be satisfied that the unfairness made no difference. It takes no reform of empowering statutes to allow courts to "cure" procedural defects in decisions. Further, they can "create" wider concepts such as that of "fairness". The concept of fairness as used in the *Camelot* case appears to blur the difference between formal and substantive rights position of applicants. Accordingly, the Commission's decision to negotiate only with the competitor in the bidding process for the running of the National Lottery "constituted a lack of evenhandedness which required "the most compelling justification". The concept of fairness fills a gap left by the ground of review of procedural impropriety, as *Camelot* could not expect to be negotiated with if the bidding process resulted in no party winning. Fairness therefore contains an element of equality of the parties, which is more founded in a substantive rights position. The concept of fairness in its vagueness therefore acts as a smoke screen for the court's discretion to cure procedural defects as well as for the courts to protect more substantive rights positions. In that respect English courts act much more independently, they can exercise discretion whereas the German courts are bound by their commitment to respect the Basic Law and act on the basis of the Administrative Court Procedure Act.

Further, English Administrative Law, in its own way and with the new powers given under the Human Rights Act 1998 will develop a much more constitutionalised Judicial Review. *Jeffrey Jowell* expresses doubts as to whether courts will engage in a merit

¹²³ Nolte, *supra* n. 116, 200

review of cases.¹²⁴ It is difficult though, to imagine the protection of individual rights by courts who are unwilling to review cases more closely on its merits. It will have to remain a slow process, on a case-to-case basis. It is hard to predict whether the emphasis on the protection of individual rights under the Human Rights Act 1998 will be accompanied by an approach by the courts to “cure” errors of procedure within the trial stage and consider them as less relevant. The increasing importance courts ascribe to the duty to give reasons illustrates a development, which will enable courts to review cases more closely.

E. Conclusion

In conclusion, German courts are less likely to quash a decision for procedural flaws such as the lack of a hearing or insufficient reasons. German courts play an important role in advising authorities if the reasons for their decisions were insufficient. German courts are traditionally more concerned with the substantive correctness of the decision. Most procedural errors can be cured at trial. The leading argument for the reform of the law on Administrative court procedure was the duty of the courts under the inquisitorial procedure to take account of all kind of new submissions. However, this generous attitude might cause conflicts in the European law context. In England, procedural errors are more likely to lead to the quashing of a decision. Courts have traditionally not had the power to review substantive rights but were merely concerned with a legality review. However, a slow constitutionalisation and Europeanisation of the British style is leading to a more intensive review of administrative decisions. Whether this will lead to greater willingness of judges to cure procedural errors within the court procedures as experienced in Germany is doubtful. According to section 6 of the Human Rights Act 1998 it is “unlawful for a public authority to act in a way which is incompatible with a Convention right”. This will also include the protection under Article 6(1) of the Convention on Human Rights, which contains fundamental process rights.

¹²⁴ Jowell, J., “Beyond the Rule of Law: Towards Constitutional Judicial Review”, (2000) *Public Law*, 671 [683]

CHAPTER FIVE

TORTIOUS LIABILITY OF PUBLIC AUTHORITIES

A. Introduction

In the previous chapters we have seen how both systems have developed a system of judicial review of administrative action. Despite the differences that have been identified the review of administrative discretionary powers and administrative procedures controls the legality of administrative action and provides protection for the individuals. However, judicial review only cannot provide satisfactory redress where damage to the individual has already occurred. Therefore this final chapter is concerned with an immensely important area, that of the tortious liability of public authorities for unlawful action. The title already suggests that both in England and Germany, principles of tort law apply to the act of public bodies. This chapter therefore explores a highly complex area of law, which illustrates how private and public law remedies merge into another. We will see how this area of law due to its insufficiencies in both jurisdictions has been particularly exposed to European influences, which might support a desirable systematisation.

Both the English and German legal system provide for a legal basis for compensation for the unlawful action of public bodies. An interesting observation made in comparison with the position in English law is that despite a few legal foundations in German statute law or in Constitutional provisions both legal systems have to rely mainly on case law and the development of principles by the courts.¹ Therefore this area of law lends itself in particular to the comparison of cases. This chapter will identify to which extent common features in the concept of duty of care and causality amount to the formulation of common principles. Further, it will show to what extent external influences such as the post-*Francovich* rulings of the European Court of Justice and the rulings on Article 6(1) of the European Convention on Human Rights (ECHR)

¹ Ossenbühl, Fritz *Staatshaftungsrecht*, (München: C.H. Beck-Verlag, 1998) ,3

such as in *Osman v UK*² and *König*³ have had an effect on the development and approximation of both systems of tortious liability. Finally, the reasons for the different approaches will be discussed by analysing the underlying constitutional conditions and historical developments such as the concept of the state, the *Rechtsstaat* and the rule of law, parliamentary and constitutional supremacy. These constitutional differences set at the same time the limits to a further approximation of the law of liability of public bodies. However, particularly in English law constitutional changes such as the introduction of the Human Rights Act 1998 vitalise the discussion to which extent public bodies should be held liable.

B. National reports

I. England

1. Ordinary private law principles of tortious liability

The English law on liability of public bodies is not based on any codified provisions. However, this does not prevent actions to be brought against public authorities. A claimant in a damage action will have to show that the facts of his/her case fit into one of the existing private law heads of tort. Generally speaking the heads of tortious liability derived from civil law apply to public authorities in the same way as they apply to private citizens. The same remedies as liability of private persons generally speaking rule English law on governmental liability. The private law remedy in different heads of tort is equally applicable to public as to private bodies. In England the liability of public authorities is ruled by a constitutional principle which has best been described by Dicey in his *Introduction to the Study of the Constitution*: “When we speak of “the rule of law” as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. [...] With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal

² (1998) 5 B.H.R.C. 293.

justification as any other citizen.⁴ He was talking of personal liability. Dicey made no mention, however of the extensive immunities and privileges which the Crown enjoyed in his lifetime.⁵ The rule of law provides nonetheless an important foundation of governmental liability in that one can generally say “ that there is a basic principle in English law concerning the liability of public bodies that rules of private law liability apply to the activities of bodies and officials exercising public functions in the same way and to the same extent as they apply to the activities of private citizens, unless some good reason can be found why they should not.”⁶ No basic set of principles or codes on non-contractual liability therefore exists. “The basic premise is that an ultra vires act per se will not give rise to damages liability. For the plaintiff to succeed the claim must be capable of being fitted into one the recognised causes of action which exist.”⁷ The major ones are negligence, to some extent nuisance, breach of statutory duty and misfeasance in public office. However, to succeed in any of such claims the plaintiff has to overcome a variety of hurdles, which have been developed, by the courts in order to avoid a flood of cases trying to establish liability in damages.

a. Negligence

Probably the most pervasive head of tort is that of negligence, either in breaching a duty, which was directly imposed on the authorities or by way of vicarious liability. The focal point of attention when establishing a claim in negligence is the existence of a duty of care. The negligence action is “in terms of legal history, of comparatively recent birth and it remains in its adolescence. It lacks many of the characteristics of a mature system of law, most notably a settled conceptual apparatus and a set of reasonably clear boundaries.”⁸

³ *ibid.*

⁴ Dicey, *Introduction to the law of the Constitution*, 1927, 189

⁵ Hogg, P.W., *Liability of the Crown*, 2nd edition (Toronto: Carswell, 1989) 3

⁶ Cane, *An Introduction to Administrative Law*, 1996, 233

⁷ Craig, P., “The Domestic Liability of public Authorities in Damages”, in Tridimas, T., *New Directions in European Public Law*, (Oxford: Hart Publishing, 1998) 83

⁸ Mullis, A., Oliphant, K., *Torts*, 3rd edition, (Basingstoke: Macmillan, 1999) 11

The action in negligence is comparatively young and its modern basis was established in the famous case of *Donoghue v. Stevenson*⁹ In this case the claimant had gone to a cafe with a friend. This friend bought the applicant a tumbler with ice cream, over which the owner of the cafe poured some ginger beer. In the ginger beer were the remains of a decomposed snail. The question was whether, in the absence of any contractual relationship the manufacturer of the beer owed a duty of care to the final consumer. The case was decided in the claimant's favour and established the self-contained tort of negligence. Lord Atkin tried to find "some general conception of relation giving rise to a duty of care" and found it in the neighbour principle which has become "one of the most quoted passages in the law of tort":¹⁰ "The [Biblical rule that you are to love your neighbour becomes in law, you must not injure your neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions, which you can reasonably foresee, would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."¹¹ *Donoghue* clearly established the duty of manufacturers not to cause physical injury to the consumers of their products. However, the neighbour principle did not necessarily determine the way in which other duties in other areas of activity existed. Lord Macmillan, though, said in *Donoghue* that "the categories of negligence are never closed."¹²

Particularly the concept of duty of care caused problems and later cases further defined the scope of it. In the case of *Anns v. Merton LBC*¹³ the plaintiffs alleged that the council had been negligent in the inspection of foundations, causing cracks in their flats. The council argued that it had no duty to consider whether it should inspect or not. The House of Lords, however, held that the council owed a duty of care in respect of purely economic loss. In *Anns* a distinction was drawn between those actions, which in the exercise of a statutory power are of a policy nature and those actions which implement

⁹ [1932] AC 562

¹⁰ Hedley, S. *Tort* (London: Butterworths, 1998) 19

¹¹ *Donoghue v Stevenson* [1932] AC 562, 580, Lord Atkin)

¹² *ibid.*, 619

¹³ [1978] AC 728

settled policies and are therefore described as operational. In this case, the issue was considered to be of operational character, i.e. the implementation of a settled policy. The House of Lords held that “it can be safely said that the more “operational” a power or duty may be, the easier it is to superimpose upon it a common law duty of care”. Lord Wilberforce in *Anns* further laid down a two-stage test for the establishment of a duty of care. The first step was that of proximity: “[...] one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises”. Secondly issues of public policy are to be considered which might result in a denial of the award of damages.

Anns was criticised for being too lenient a test for the establishment of liability and the decision in *Caparo Industries v. Dickmann*¹⁴ added to the two-step test. The plaintiffs owned shares in Fidelity plc and bought further shares relying on incorrect accounts for the year 1984. The House of Lords held that the defendant auditors owed no duty to the plaintiffs. According to the decision in *Caparo* the defendant ought to have foreseen the injury (foreseeability), a proximity between the plaintiff and the defendant has to be shown (the authority’s function is to protect specific individuals) and the impositions of a duty of care has to be fair, just and reasonable.

*Murphy v Brentwood*¹⁵ the plaintiff also discovered cracks in the foundation of his semi-detached house and he found out that the foundations were defective and lead to the subsidence despite the fact that the local authority had inspected them. The owner of the house was forced to sell the house for £35,000 less than the value in a structurally sound condition. The decision in this case overruled aspects of the *Anns* case. Here, the House of Lords held that in such cases no general principle of liability should apply. It held that the law should develop incrementally by analogy with established situations of liability. It was held that if the likely damage were personal injury then it would be easy to establish a duty of care. However, economic losses such as the loss in this case are recoverable only if they flow from breach of a relevant contractual duty. No such

¹⁴ [1990] 2 AC 605

contractual relationship existed between the owner of the building and the authority. Lord Bridge of Harwich further held that there was no relationship of proximity, which in the absence of a contractual duty would lead to the imposition of a duty of care either.

Particularly difficult is the establishment of a duty of care in cases where damages are sought because a public body did not exercise its public power. Such a situation occurred in *Stovin v. Wise*¹⁶. The plaintiff suffered injuries when his motorcycle collided with a car, which was driven by the defendant. This accident occurred at a junction where the view was restricted because of an earth bank on railway land. The plaintiff sued the council in damages because it had omitted to remove the earth bank, which had impaired the plaintiff's vision. The council knew that the junction was dangerous and had tried to get the owner of the land to remove the bank of earth. However, the owner did not respond and the council did not follow up the issue further. The question that arose was whether there was a duty of care imposed on the public authority, which was founded on the existence of a statutory power to safeguard people against injury. In determining this question the court held that "the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation." The minimum pre-conditions that were set out in *Stovin* for the establishment of a duty of care were that it would have been irrational not to have exercised the power. It was held that the question of whether anything should be done about the junction was at all times firmly within the area of the council's discretion. Secondly, the applicant could not rely on the doctrine of general reliance. This doctrine was developed in a previous case and contains the thought that "a statutory power could never generate a common law duty of care unless the public authority had created an expectation that the power would be used and the plaintiff had suffered damage from reliance on that expectation."¹⁷ Here, however, there was no reliance by anyone that the junction would be improved. The court held that the requirements of the doctrine of general reliance because the applicant was treated exactly the same way as any other road user. Finally, the court held that in holding the

¹⁵ [1990] 2 All ER, 908

¹⁶ [1996] 3 All ER 801

¹⁷ *Sutherland Shire Council v. Heyman*, 157 C.L.R. 424, 483

authorities liable in a case like this would lead to the spending of scarce resources and that the insurances of the applicants provide for compensation.

Generally speaking it is difficult to establish liability of public authorities for omissions as seen in *Stovin v. Wise*. However, under certain circumstances authorities might be liable even for the act of third parties where there is an element of control involved in the relationship between the tortfeasor and the authorities as in *Home Office v Dorset Yacht Co Ltd*¹⁸. This case concerned a claim in negligence of a yacht owner who suffered damage after seven Borstal boys had escaped from a training exercise whilst the officer's in charge were asleep. The Home Office was held liable for the omissions of its officers because reasonable care should have been taken to avoid omissions, which could have been foreseen and were likely to injure neighbours. In *Dorset Yacht* Lord Reid said that the action of a third party "must have been something very likely to happen if it is not to be regarded as *novus actus interveniens* breaking the chain of causation." In this case it was extremely likely that the borstal boys would try to escape and as they were on an island it was foreseeable that they would use a boat. In addition to the condition of foreseeability it was held in *Dorset* that the officers were in charge of holding the borstal boys in custody and therefore were under a special duty to prevent harm from the general public which might be suffered in the course of the boys' escape from the officer's control.

Guidance concerning the content of the law of tortious liability was given by Lord Browne-Wilkinson's judgement in *X*¹⁹ which "contains a wealth of analysis and exposition of the rules governing the tort liability of public authorities".²⁰ In *X* five actions were brought, two of which were based on claims for damages alleging mistakes in the exercise of powers and duties in relation to the protection of children from abuse, three actions concerned powers and duties with regard to children with educational needs. All but two of the education cases were unsuccessful. The first of the "abuse" cases dealt with the complaint by children who were allegedly ill-treated and neglected by their parents and that the authority should have taken steps to take them into care

¹⁸ [1970] AC1004

¹⁹ *X (minors) v. Bedfordshire County Council* [1995] 2 AC 633

²⁰ Cane, P., "Suing Public Authorities in Tort" (1996) *LQR* 1996, 13

(*Bedfordshire* case). The second case (*Newham* case) was concerned with a complaint against the decision to take the child of applicant 1 into care, a decision based on the suspicion of child abuse by the mother's boyfriend. The decision was reached after inadequate inquiries by a child psychiatrist and a social worker and turned out to be wrong as it was based on the misinterpretation of the child's remarks concerning the name of the abuser.

In the *Bedfordshire* and *Newham* cases a duty of care was denied and the requirements for such a duty were laid out in detail: This minefield of conditions for the establishment of a *duty of care* appears to be complicated and is at the centre of most recent decisions. The applicants in the *Newham* case appealed to the European Court of Human Rights, which delivered a decision on 10 May 2001.²¹ This decision will be dealt with below under European influences.

The requirement of proximity, in particular has been used in the consequent case of *Phelps v. Hillingdon LBC*²² where it was argued that the educational psychologist was not directly responsible to the plaintiff because she had been primarily employed to advise the local Education authority: Here Stuart-Smith LJ. held that "the defendants' psychology service was set up and used by the LEA to advise it and its other employees on the discharge of its statutory functions in teaching the plaintiff. It is quite different from for example, a health authority setting up a clinic where people can come to see doctors and nurses for treatment. In such a case there would be a direct relationship of doctor and patient, and an assumption of responsibility to treat him or her."²³ The requirement of proximity stands for the authority's function to protect specific individuals but is also seen "as a cover for giving value-judgements about the desirable scope of tort liability."²⁴

Further barriers to a flood of cases have been set by the requirement that the imposition of duty of care must be just and reasonable. In *X*. the requirement of just and reasonable has been described as consisting of three elements: The compatibility of a duty of care

²¹ *TP and KM v United Kingdom* [2001] 2 FLR 549; [2001] 2 FCR 289; [2001] Fam Law 590, ECHR

²² *Phelps v. Hillingdon London Borough Council* [1999] 1 All ER, 421

²³ *ibid.*, 437

with the statute in question, in case of the exercise of a statutory discretion according to *X*, the questions of whether the exercise of that discretion was unreasonable and thirdly the question whether non-justiciable issues were raised. “The compatibility issue is relevant to deciding whether a statutory functionary can be held to owe a common law duty of care directly to a claimant in respect of the performance of a statutory function (which is not a duty actionable in tort) which involves no exercise of discretion.” The compatibility test is similar to the question whether a statutory duty is actionable in tort. In one of the abuse cases in *X*, it was held that the imposition of such a duty “would cut across the whole statutory system set up for the protection of children at risk” and “that civil litigation would be likely to have detrimental effect on the relationship between social worker and client.”²⁵ In *X*, Lord-Brown Wilkinson made clear that in the establishment of a tort liability it is essential to distinguish between decisions made at the policy level and those made at the operational level. This distinction had first been drawn in the case of *Anns v. Merton LBC*²⁶ as mentioned above. Therefore, the establishment of negligence in the course of exercising powers on the policy level has since been very difficult. In this case, as held in *X*, the applicant has to show that the decision on the policy level has been made ultra vires. Lord-Brown Wilkinson held that ultra vires had to be shown satisfying the conditions of *Wednesbury* unreasonableness. Further, a number of non-justiciable decisions were mentioned in *X* such as “matters of social policy”, “the determination of general policy”, “the weighing of policy factors”

The recent decision in *Phelps v. Hillingdon LBC*²⁷ appears to contradict the position taken by Lord Brown-Wilkinson in *X*. Ms Phelps brought an action in damages alleging the negligent failure of an educational psychologist employed by the local authority to diagnose her as suffering from dyslexia. The lower courts found the local authority to be vicariously liable for the psychologist’s negligence. Stuart-Smith LJ, however, came to a different conclusion by deciding that there was no such duty of care on the part of the educational psychologist towards the plaintiff. He held that the psychologist was primarily employed to advise the school and the local authority and that there was no personal responsibility for the plaintiff. A number of policy considerations were given

²⁴ Cane, *An Introduction to Administrative Law*, 1996, 242

²⁵ Cane, *supra* n. 20, 15-16

²⁶ [1978] AC 728

to refuse liability: “In this case, and no doubt in other such cases, decisions are taken after consideration of the views of many professionals; in this case the CGC, the educational psychologists and teachers both ordinary and remedial. It is likely to be invidious to single out one and make him or her a scapegoat. Yet if all the professionals who had some input to the decisions making and teaching are sued, that obviously circumvents the immunity of the LEA. The question of causation presents enormous difficulties.”²⁸ These two arguments have been criticised by Hedley asking, “Why is the fact that it is hard to establish duty, breach of duty and causation a reason for denying a claim to a plaintiff who has succeeded in doing so? The court’s concern that individual employees might be “scapegoated” is also strange, for it is only employees who are demonstrably at fault who have anything to fear?”²⁹

The case of *Barrett v. Enfield*³⁰ is an important development of the liability of public bodies in negligence. *Barrett* was concerned with the damage action of a plaintiff who had been in the care of the local authority during most of his childhood. He sued the authority in damages for the psychiatric injury caused by the negligence of the authority and its employees whilst he was in their care. The authority had allegedly failed to arrange his adoption and to organise appropriate placements with foster parents and to obtain psychiatric treatment for him. The House of Lords decided that a duty of care should not be ruled out. Lord Hutton supported previous rulings with regard to the issue of justiciability of a matter. Accordingly a negligence action was bound to fail if it touched upon issues which are non-justiciable. In his speech Lord Hutton said that ... “these judgements lead me to the provisional view that the fact that the decision which is challenged was made within the ambit of a statutory discretion and is capable of being described as a policy decision is not in itself a reason why it should be held that no claim for negligence can be brought in respect of it. [...] It is only where the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess that the courts will hold that the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory

²⁷ *supra* n. 22

²⁸ *supra* n. 22, 442

²⁹ Hedley, S., “Negligence - Vicarious liability of health Authorities - Diagnosis of Dyslexia” (1999) *The Cambridge Law Journal*, 270 [272]

³⁰ *Barrett v. Enfield*, [1999] 3 All ER 193, 197-198

discretion.”³¹ He further said “[...] I consider that where a plaintiff claims damages for personal injuries which he alleges have been caused by decisions negligently taken in the exercise of a statutory discretion, and provided that the decisions do not involve issues of policy which the courts are ill-equipped to adjudicate upon, it is preferable for the courts to decide the validity of the plaintiff’s claim by applying directly the common law concept of negligence than by applying as a preliminary test the public law concept of *Wednesbury* unreasonableness to determine if the decision fell outside the ambit of the statutory discretion.”³² *Barrett* has therefore made two important points. A negligence action is not deemed to be unsuccessful only because the authority has acted within the scope of their discretionary power. Secondly, the standard of reasonableness is no longer identical with the concept of reasonableness contained in the *Wednesbury* test. The decision in *Barrett* has therefore lowered the hurdle to overcome for applicants and as a result “it will be increasingly possible to succeed in a damages action even though it might not be possible to challenge the action successfully via judicial review.”³³

In *Gower*³⁴ another striking out action was decided on an educational malpractice issue. The plaintiff suffered from muscular dystrophy and complained that the school staff had not exercised its educational duty to him in form of providing him with a computer etc. The claim that the educational authority could be vicariously liable for its teacher’s breach of duty to take reasonable care in the provision of education to the plaintiff was not struck out. This is quite a revolutionary decision but it also shows clearly that a differentiation between educational psychologists and teachers who are in a direct relation to pupils seems to be unjustified.³⁵

³¹ *ibid.*, 220

³² *ibid.*, 225

³³ Craig P. and Fairgrieve, D. “Barrett, Negligence and Discretionary Powers”, (1999) *Public Law*, 626 [648]

³⁴ *Gower v. London Borough of Bromley*, *The Times* 28 October 1999

³⁵ Fairgrieve, D., and Andenaes, M., “A Tort Remedy for the Untaught? Liability for Educational Malpractice in English and Comparative Law” being a paper presented at a Senior Practitioner Seminar, Friday, 5 November 1999, Centre of European Law, King’s College London

b. Breach of statutory duty

In his often recited speech in which principles of tort liability against public bodies were clearly stated, Lord Browne-Wilkinson gave the unanimous judgement of the House of Lords and confirmed that “The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty.”³⁶ A further condition usually relied upon to establish a cause of action for breach of statutory duty is that the statute in question provides no remedy for its breach.³⁷ As in German law, as will be shown, the plaintiff has to establish the particular statute conferred rights and that the plaintiff was amongst this protected group of people (in German law: *Drittschutz*). The House of Lords did not establish such a right stemming from the Act in question by saying that the Act was not intended for the protection of the children but for the benefit of society as a whole. The establishment of a statutory duty causes the problem of “tracking down that elusive concept - the intention of Parliament.”³⁸ Despite many cases dealing with the issue of breach of statutory duty and academic discussion the courts don’t seem to have found a clear position and this area of law is in particular need for reform.³⁹ In the field of housing law for instance two cases illustrate that judges have become much more reluctant over the years to award damages for breach of statutory duty.

However, the reasoning in more recent cases leaves some questions to be answered. In *Thornton v. Kirklees D.C.*⁴⁰ the applicant was without a home and had to sleep in the streets. After his application to the local council for accommodation had failed he filed an action in the County Court for the award of damages and an injunction. The case went to the Court of Appeal and there it was held allowing the appeal that the Homeless Persons Act 1977, in the absence of any provision for the enforcement of the duties

³⁶ Bailey, Jones & Mowbray, *Cases and Materials on Administrative Law*, 1997, 714

³⁷ The Hon. Sir Robert Carnwath, (1998) *Public Law*, 407

³⁸ *ibid.*

³⁹ *ibid.*, [422]

⁴⁰ [1979] Q.B. 626

contained in it, gave rise to a civil action in damages if such duties were not performed properly. *Thornton* gave rise for further cases, which dealt with the damages claims resulting out of the Homeless Persons Act 1977, which were brought in the County Court. However, in the early eighties judges began to put a hold on the flood of cases by emphasising that issues relating to the question of whether a statutory duty existed or not such as dealt with in *Thornton* should be brought by judicial review. This new approach was clearly expressed in *O'Reilly v. Mackman*⁴¹ and *Cocks v. Thanet D.C.*⁴²

c. Vicarious liability

In *X* an important distinction was drawn between the direct liability of public authorities and vicarious liability. This differentiation appears to be difficult to understand. It is important to note that statutory social welfare and education authorities are juridical persons and that they therefore can only carry out their duties through human agents. As a consequence both the direct and the vicarious liability stems from the acts of others. Vicarious liability is the liability of an employer for the tortious act of his employee, whereas direct liability is the liability for the act of another, whether tortious or not.⁴³ Further, the decision in *X* did not out rule the possibility of vicarious liability of public authorities for the acts of its officers but made clear that if no direct duty of care was established on the side of the authority, no duty of care is to be imposed on the officers because this would circumvent the immunity of public authorities from liability. Unlike the reasoning in the abuse cases, in the education cases in *X* it was held that vicarious liability might be one route to hold the education authorities liable. In the Dorset case in which it was alleged that the educational authorities were liable vicariously for the negligent advice given by its psychology service in relation to the applicant's condition of dyslexia Lord Browne-Wilkinson held that "psychologists hold themselves out as having special skills and they are, in my judgement, like any other professional bound both to possess such skills and to exercise them carefully."⁴⁴ The decision in *X* therefore

⁴¹ [1983] 2 A.C. 237

⁴² [1983] 2 A.C. 286

⁴³ Cane, P., "Suing Public Authorities in Tort", (1996) *LQR* 1996

⁴⁴ *X (minors) v. Bedfordshire County Council* [1995] 2 AC 353, [393]

leaves way open for a successful claim in damages against educational psychologists resulting in their personal liability in tort and the vicarious liability of the authorities.⁴⁵

2. Misfeasance in public office

Misfeasance in public office is the only public law tort remedy. For this cause of action to be successful if it can be shown “that the official who is alleged to have inflicted the injury on the plaintiff knew that the action was ultra vires or acted for an improper purpose”.⁴⁶ This tort has been defined as a “deliberate abuse of power causing damage”.⁴⁷ Only few cases have been reported in which the tort of misfeasance in public office has been established. A very recent decision is the judgement by the House of Lords on May 18 2000 in *Three Rivers District Council and Others v. Governor and Company of the Bank of England*.⁴⁸ The plaintiffs deposited funds with a deposit-taker, the Bank of Credit and Commerce International S.A. (“B.C.C.I”), a Luxembourg corporation, which was licensed by the Bank of England. They lost all their money when BCCI went into liquidation. The plaintiffs alleged that named senior officials of the Banking Supervision Department of the Bank committed the tort of misfeasance in public office. They alleged that that the defendants acted in bad faith when licensing BCCI in 1979 knowingly that it was unlawful. They alleged that they were “shutting their eyes to what was happening at BCCI after the licence was granted, and that they were failing to take steps to close BCCI when the known facts cried out for action at least by the mid 80s.”⁴⁹

The judgment of the House of Lords spelt out clearly the conditions of the tort. The first requirement is that the defendant must be a public officer. The second requirement is the exercise of power as a public officer. The third requirement concerns the state of mind of the defendant, which contains two degrees: “The case law reveals two different

⁴⁵ Hedley, S., “Negligence - Vicarious liability of health Authorities - Diagnosis of Dyslexia” (1999) *The Cambridge Law Journal* 270

⁴⁶ Cane, *An Introduction to Administrative Law*, 1996, 255

⁴⁷ Wade and Forsyth, *Administrative Law*, 1994, p. 792

⁴⁸ Publication on the Internet, <http://www.parliament.the-stationery-offi...a/ld199900/judgment/jd000518/rivers-1.htm>

⁴⁹ Publication on the Internet, <http://www.parliament.the-stationery-offi...a/ld199900/judgment/jd000518/rivers-1.htm>

forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.”⁵⁰ *Three Rivers* was not concerned with targeted malice but with the second limb of the tort. The disputed issue in this case was whether “recklessness was a sufficient state of mind to ground the tort.” It was held that it is sufficient if a state of mind could be demonstrated that amounted to subjective recklessness. In its latest decision of 22 March 2001 the House of Lords held that the action should not be struck out but proceed further.

3.Crown immunity

A special feature of the liability of public authorities in England still is the position of the Crown. The immunity of the Crown has traditionally been summarised in the maxim: “The King can do no wrong.” This originally meant that the King was not privileged to commit illegal acts and in the Middle Ages the maxim had been used to impose liability on the King to give redress to an aggrieved subject.⁵¹ However, in the nineteenth century the courts were engaged into finding remedies against the Crown for contractual and non-contractual liability of the Crown. With regard to breaches of contract committed by the Crown liability was established reviving the so-called petition of right, an old form of procedure against the Crown.⁵² However, the courts interpreted the maxim that “The King can do no wrong” as an exclusion of tort claims from the available procedures against the crown. As a result the Crown was immune from any liability claims in tort until the reform introduced in 1947.

According to the Crown Proceedings Act 1947 the Crown can be held liable under the rules of tort law. The Crown today is being defined as the “executive branch of central

⁵⁰ Publication on the Internet, <http://www.parliament.the-stationery-offi...a/ld199900/judgment/jd000518/rivers-1.htm>

⁵¹ Hogg, *Liability of the Crown*, 1998, 6

government” which includes “Ministers of State and the departments for which they are constitutionally responsible.” Parliament and the Judiciary are not part of the Crown.⁵³ However, some privileges and immunities remain in connection with acts committed by the Crown. Amongst these privileges is section 25 of the Act according to which money judgements cannot be executed against the crown. A further privilege is contained in section 40(2) of the Act, which lays down the principle that the Crown may benefit from a statute even if the statute does not mention the Crown as a beneficiary. Further, according to section 2(2) the Crown is not liable for breach of statutory duty unless the duty is also imposed on persons other than the Crown and its officers. It is important to note that the Crown has to be understood as having a corporate nature, which still leaves room for claims against single Ministers or officers of the Crown.⁵⁴

4. Tortious Liability under the Human Rights Act 1998

Section 8 of the Human Rights Act 1998 provides for the award of damages for breaches of Convention Rights: “In relation to any act ... of a public authority which the court finds is ... unlawful, it may grant such relief or remedy ... within its powers as it considers just and appropriate.” The nature of this kind of damages in connection with breaches of rights under the Human Rights Act is still unclear. Breaches of Convention rights such as false imprisonment, trespass to land etc. are already actionable in tort. Dawn Oliver and Duncan Fairgrieve suggest that such rights should be protected by a “kind of constitutional tort”. Such a tort would be similar to the liability of member states for breaches of EC law.⁵⁵ The test of a “sufficiently serious breach” was established in the case of *Brasserie du Pêcheur* and *R v Secretary of State for Transport, ex p Factortame*⁵⁶. The test concerns the question whether the member state has “manifestly and gravely” disregarded the limits of its discretion. In answering this question a variety of factors has to be considered such as the clarity and the precision of the rule breached; the amount of discretion left to the national authorities, whether the

⁵² *Thomas v. The Queen*, 1874, L.r. 10, Q.B. 31

⁵³ Cane, *An Introduction to Administrative Law*, 1996, 236

⁵⁴ *ibid*

⁵⁵ Oliver D, “The Human Rights Act and Public/Private Law Divides”, (2000) *EHRLR*, 343, [348]; Fairgrieve D, “The Human Rights Act 1998, Damages and Tort Law”, (2001) *Public Law* 695 [698-699]

⁵⁶ Cases C-46/93 & C-48/93

error was excusable or not. As opposed to tortious liability in England (and Germany) no further fault on the part of the authority is a necessary precondition for liability. The adoption of a similar test would bring in line the already applied test of member state liability with the award of damages under the Human Rights Act. Nevertheless, Fairgrieve remarks that the element of fault, might not necessarily cause problems in the context of Human Rights as the award of damages requires the breach of a right, which in itself “involve an element of fault.”⁵⁷

Fairgrieve also recommends that the traditional use of policy arguments should be avoided in the context of Human Rights, similarly to the approach taken by English courts in awarding damages for breaches of Community law. In the *Factortame* litigation the House of Lords held that “Justice requires that the wrong should be made good.”⁵⁸ Lord Woolf on the other hand stated that “the Convention should not be used to promote a public law damages culture” and that the courts must avoid “creating dangers of preventive administration.”⁵⁹ For the purpose of more coherence in the award of damages in support of Fairgrieve it would be desirable, however, to find a more streamlined approach to the award of damages in the context of purely domestic case, cases with EC law context or the new head of damages under the Human Rights Act 1998.

Having said that the new tort will to an extent differ from the established common law principles on tort law. Section 8(2) provides that “damages may be awarded only by a court which has power to award damages. Further, section 8(3) states that “no award of damages is to be made unless ... the court is satisfied that the award is necessary to afford just satisfaction...” It will bear more resemblance with equitable wrongs or torts such as breach of confidence, which contains discretionary awards of damages. Further, the time limit of only 1 year will be shorter than that for ordinary torts. It is not clear yet which role alternative remedies provided for by judicial review will play.⁶⁰

⁵⁷ Fairgrieve, D., “The Human Rights Act 1998, Damages and Tort Law”, (2001) *Public Law* 695 [700]

⁵⁸ *R v Secretary of State for Transport, ex p. Factortame Ltd* (No.5) [2000] 1 A.C. 524 [548]

⁵⁹ Lord Woolf, “The Human Rights Act 1998 and Remedies” in Andenaes and Fairgrieve, *Judicial Review in International perspective: Volume II* (Kluwer Law International, 2000), 432

⁶⁰ Oliver D, “The Human Rights Act and Public/Private Law Divides”, (2000) *EHRLR*, 343 [349]

II. Germany

The German law on liability of public authorities to compensate an individual for any loss or injury caused is complicated and in need of reform. The different heads of state liability in modern Germany apply the Prussian General Land Law 1794 laying down the legal basis for the special sacrifice (*Sonderopfer*) and Art 14 Basic Law which deals with compensation for expropriation, tortious liability in the Civil Code (*BGB*) dated 1900 and provisions in the Basic Law, i.e. Art 34 laying down the vicarious liability of the state for its servants. There are two main strands of liability, which run parallel to each other. These are the tortious liability of public authorities and the principle unknown in English law to compensate pecuniary and non-pecuniary damages resulting from any lawful governmental action, which places an unequal burden on the individual.⁶¹ This chapter does not intend to cover all areas of liability of public authorities in great detail but will concentrate on the provision of tortious liability as laid down in the Civil Code (*BGB*).

1. Tortious Liability according to the Civil Code (*BGB*)⁶² in connection with Article 34 Basic Law

Similar to the position in English law the liability of public authorities in Germany is governed by the law of torts contained in Art 839 Civil Code, which is concerned with damages for the breach of an official duty. However, the legal construction of this tort, which is a hybrid between public and private law, has been criticised for a long time. Liability for the wrongdoing of an official is a combined liability between the official and the state. However, the personal liability of the official is transferred to the state according to Art 34 Basic Law (see below).⁶³

One similarity is the fact that the tortious liability of public authorities in Germany is equally difficult to grasp and has been described as “incomprehensible” and “badly

⁶¹ Bell, J., Bradley, A.W., *Governmental Liability: A comparative study*, 1991, 251

⁶² Abbreviation for *Bürgerliches Gesetzbuch*, came into force 1900

⁶³ Ossenbühl, F., *Staatshaftungsrecht*, 1998, 2

constructed".⁶⁴ This is due to its historical development from a purely private law liability in tort to a constellation in which the state accepts responsibility for the tortious acts of its civil servants. However, it is still not clear whether it can be regarded as a private or a public law remedy.⁶⁵ Due to its original private nature, the cause of action has to be filed in the civil courts and is outside the jurisdiction of the Administrative courts. Similar to the position in English law, liability for breach of an official duty is governed by the law of torts, which is laid down in the *BGB*, the Civil Code that was drafted in 1900. Originally the liability of a civil servant for the breach of an official duty was purely dealt with as a private law matter contained in Art 839 of the *BGB*. Accordingly the relationship between the state and its officials was considered as being of a purely private law nature. Therefore the official was liable personally for all unlawful acts. This reasoning is still clearly expressed in the *BGB*.

Art 839 Civil Code

(1) If an official intentionally or negligently violates the official duty, which falls upon him as against a third party, he must compensate the third party for the harm arising therefrom. If the official can only be charged with negligence, a claim can only be made against him if the person suffering harm cannot obtain compensation in another manner.⁶⁶

(2) If an official violates his official duty through a decision on a legal issue, he is only responsible for the harm arising therefrom if the violation of duty consists in a criminal act. This provision has no application to a refusal or delay in the exercise of the office, which is contrary to duty.⁶⁷

(3) The duty to compensate does not arise if the person suffering the harm has intentionally or negligently omitted to avert the harm by the use of legal remedy.⁶⁸

⁶⁴ *ibid.*, 6

⁶⁵ *ibid.*, 6

⁶⁶ This provision imposes liability for the breach of an official duty on the civil servant himself acting on behalf of the state. It is a personal liability of the official. If the requirements of Art 839 are met, the official has to compensate any damage including pure economic loss.

⁶⁷ This is the so-called judge's privilege clause. It limits the liability for judges. A judge is only liable if the breach of his official duty constitutes a criminal act. The purpose for the limitation is to maintain the independence of the judiciary.

⁶⁸ This means that the citizen has to seek judicial review first before claiming compensation.

However, the aggrieved citizen was often unable to gain compensation from the civil servants. In order to protect the citizen claims were gradually allowed to be made against the state. Therefore the law changed around the second third of the 19th century and later the Weimar constitution from 1919 contained the provision, which is now contained in Art 34 of the Basic Law:

Should anybody, in exercising a public office, neglect their duty towards a third party liability shall rest in principle with the state or the public body employing them. In the event of wilful intent or gross negligence remedy may be sought against the person concerned. In respect of claims for compensation or remedy recourse to the ordinary courts shall not be precluded.⁶⁹

Claims for tortious liability of the public authorities in Germany are dealt with by the ordinary courts unlike in France where the administrative courts determine these questions. German law on tortious liability remains uncodified and has to be deduced from judicial decisions and legal writings. Reform attempts starting in the fifties to draft a uniform liability law culminated in the enactment of a Law on State Liability 1981. However, its was invalidated by the Constitutional Court on the ground of incompetence of the Federal Parliament to enact a law in this area which would be applicable to federal as well as land authorities.

To make sure that the officials would not misuse the immunity granted to them from personal liability Art 34 reserves a right of the state to recover damages from the official in question in case the breach of duty was wilful or grossly negligent.

This tort in German law lends itself to a comparison to the breach of a statutory duty in English law. As will be discussed below particularly the issues concerned with the establishment of a statutory duty bears resemblance with the German model. However, some of the arguments brought forward in the English decisions such as *Stovin v. Wise* and *X v. Bedfordshire*, which are described as “policy” arguments, appear alien to modern German reasoning. The four policy arguments as identified by Markesinis,

⁶⁹ Ordinary courts means the private law courts as opposed to the Administrative courts

Auby, Coester-Waltjen & Deakin⁷⁰ are that imposing liability would make bad economic sense, that it would inhibit public authorities to carry out their duties, that the courts would be allowed to substitute the authorities decisions by having a “second guess” and that alternative remedies were available.⁷¹ However, a closer look into material stemming from the time when the German Civil Code was drafted early last century reveals that similar arguments were considered.

a. Persons exercising public office

Tortious liability of the state or public authorities for the wrongs of any person exercising a public office irrespective of the fact whether such person is in the employment or service of the state or a public authority. Even if section 839 of the Civil Code speaks of an “official”, the courts have always taken a very liberal approach on the matter. There has been a shift to “any person” who is entrusted with a public office.” The courts have held that the state cannot escape its liability by handing over a public law duty to a private person. Example: The city authorities, who were under an obligation to provide safety measures on the roads, have been held liable for the negligence of a private contractor who failed to install proper traffic signs on a road under construction due to which the plaintiff suffered an accident resulting injuries.

b. Breach of duty

Art 34 Basic Law and Art 839 Civil Code do not contain a catalogue of official duties. Official duties may stem from any legal source. In the courts the requirement of official duty has been interpreted very liberally. Examples are the duty to act lawfully as contained in Art 20 Basic Law and the duty to exercise discretionary powers. The review of discretionary powers was originally limited to extreme cases of arbitrary exercise of the discretion. “The *Reichsgericht* constantly held that the courts should not interfere with discretionary power. The courts could only decide in cases where the

⁷⁰ Markesinis, B.S., Auby, J.B., Coester-Waltjen, D. & Deakin, S.F., *Tortious Liability of Statutory Bodies, A Comparative and Economic Analysis of Five English Cases* (Oxford: Hart Publishing, 1999)

⁷¹ *ibid.*, 62

public body acted outside the ambit of its discretionary power.”⁷² However, the control of the exercise of discretionary powers has been extended by the Highest Court in Civil matters so that it now includes the failure to exercise discretionary powers, the excessive use of discretionary powers or the incorrect exercise of discretionary powers parallel to the grounds of review in the review of an administrative act. “A discretionary decision may thus be reviewed by a court in a public wrong case even if it is within the ambit of discretion. However, the court will not go into the question whether the decision taken by the public body was “right” (*Richtigkeitsprüfung*) but only whether the decision seems plausible (*vertretbar*). The test for plausibility allows far more control than was sanctioned in the past, but it still does not mean that the court is substituting its own judgement for that of the administrative authority.”⁷³ The courts review the erroneous use of discretion (*Ermessensfehlgebrauch*), the excess of the exercise of discretion (*Ermessensüberschreitung*), the omitted use of discretion (*Ermessensnichtgebrauch*).⁷⁴ The landmark case is the decision of the Highest Court in Civil matters (*Bundesgerichtshof*) in 1979 where it found a breach of an official duty in the course of the exercise of a discretionary power even though the breach did not amount to an obvious level of abuse.⁷⁵

d. Duty towards third party

Both section 839 BGB and Art 34 Basic Law require that the official duty must be owed to a *third party*. Whether a person is a third party in that sense depends on whether the object of the duty is to directly safeguard the interests of that person. If for instance a policeman remains inactive while a theft is being committed, he is in breach of his official duty towards the owner, because his power to interfere is conferred on him not merely in the interest of the general public, but at the same time in the interest of each single individual. In each case it has to be seen whether according to the object and the legal provisions of the official task the affected interests should have been protected. Three conditions have to be met in order to establish a duty towards a third party. Firstly, the official duty must be capable of protecting individuals, secondly the plaintiff

⁷² *ibid.*, 45

⁷³ *ibid.*, 63

⁷⁴ Ossenbühl, *Staatshaftungsrecht*, 1998, 46

has to belong to the protected group of people and thirdly the damage must be included in the protective effect of the duty.⁷⁶ The establishment of such a duty owed to a third party is extremely difficult. The determination which duties are capable of protecting third party effects is left to the courts. The decision on this issue is crucial for the success or failure of an action. The fact that Art 839 Civil Code does not enumerate official duties, which confer rights on individuals, illustrates that the courts are given some leeway as to how to interpret the concept of duty.

III. Evaluation

Both English and German law provide a legal basis for compensation for unlawful acts of public bodies. This is a principle, which is based on the rule of law and the *Rechtsstaatsprinzip* respectively. For A.V. Dicey the rule of law meant “equality before the law”⁷⁷ – by which he meant the equal subjection of all, including officials, to the ordinary law administered by the ordinary courts.⁷⁸ Accordingly, the same rules of tortious liability apply, in principle, against private citizens and public bodies. The German *Rechtsstaatsprinzip* as contained in Art 20 III Basic Law similarly subjects all acts of public bodies to the review by the courts. In that respect public bodies in Germany do not receive any other treatment than private citizens. However, in Germany there exists a much more distinct division between public and private law courts dating back to the 19th century. The protection of the citizen against unlawful acts of public bodies is at the centre of the *Rechtsstaatsprinzip*. A clear constitutional basis for that can be found in Art 19 IV Basic Law. Generally speaking all public law disputes fall within the jurisdiction of the Administrative courts. The liability of public bodies is governed in both legal systems by the law of torts. In Germany, however due to the historical development of the liability of public bodies, this cause of action has a hybrid nature. The transfer of the personal liability contained in the much older provision in Art 839 civil code unto the state as provided for by Article 34 Basic law is primarily designed for the protection of the aggrieved citizen. It is aimed to provide an

⁷⁵ BGHZ 74,156

⁷⁶ Ossenbühl, *supra* n. 74, 58

⁷⁷ Dicey, *The Law of the Constitution*, 1885, 202-203

⁷⁸ Turpin, *British government and the Constitution*, 1999, 68

efficient judicial protection for the individual and therefore an expression of one of the core principles of the *Rechtsstaat*.

In determining liability both systems apply the requirement of a duty for the official body. In English law the tort of negligence requires the establishment of a duty of care to be imposed on the public body. Within the tort of breach of statutory duty the statute in question has to be imposed for the “protection of a limited class of the public and that parliament intended to confer on members of that class a private right of action for breach of the duty.” German law requires equally that the duty imposed on the official be designed for the protection of a limited class of people. In determining the meaning of this concept of duty the legal systems apply rather vague tests such as the *Caparo* test or the test relating to the protective purpose of the official duty in German law. Both the concept of duty in English tort law and the concept of the protective purpose play a pivotal in each liability case. As a consequence in both legal systems the limitations imposed on the concept of duty operate as a means to reduce the amount of cases won. Despite the fact that German Tort law provides for a statutory provision dealing with the liability of public bodies this provision does not contain a catalogue of official duties. Therefore the interpretation of the meaning of official duty as contained in Article 839 Civil Code has to be established by the courts. Similar to English law, German law contains groups of established duties in certain areas of public administration such as the duty of school teachers, building authorities and the state prosecution office to name just a few. However, in contrast to English courts in negating the existence of a duty of care German courts tend not to resort to policy arguments of the kind used by English judges such as the floodgate arguments, the diversion of scarce resources and others. The following cases below will discuss this basic difference in legal reasoning in more detail.

C. Comparative cases

I. Duty of the prosecution service

1. England

*Elgouzouli-Daf v Commissioner of Police of the Metropolis*⁷⁹

In this case two plaintiffs brought actions in damages against the Crown Prosecution Office after they had been detained in custody for suspected crimes. In the first case forensic evidence showed that the first suspected criminal could not have been the offender but it took 22 days before he was released. In the second case, it took 85 days for the Crown Prosecution Office to come to the conclusion that there was no valid evidence against the plaintiff.

The plaintiffs were not successful and the claims were struck out. The Court of Appeal held that despite the fact that the plaintiffs had been deprived of their liberty it was not just, fair and reasonable to impose a duty of care on the Crown Prosecution Office. In particular it was held that there were alternative remedies such as a claim under the Criminal Injuries Compensation Scheme and that the imposition of a duty of care would result in a more defensive approach of the Crown Prosecution Office.

2. Germany

*Fraud case*⁸⁰

At the request of the prosecution service the lowest court in criminal matters (*Amtsgericht*) issued an arrest warrant for the plaintiff in February 1990 on suspicion of defrauding his former employer. The plaintiff was arrested in Italy in March 1990 and remained in custody - meanwhile having been extradited to Germany - for almost two months. The arrest warrant was later formally annulled and the preliminary proceedings against the plaintiff were discontinued. The warrant of arrest was primarily based on the accusation of a former business partner. This allegation was incorrect in the light of the evidence, which was available when the prosecution service requested the arrest warrant. At the time of his arrest the plaintiff was managing director of the V Company. He had also a consultancy contract with the P Company. The P Company dismissed the

⁷⁹ [1995] QB 335

plaintiff after the publication of his arrest in. The plaintiff also lost his position as managing director with the V Company. The Amtsgericht held in April 1991 that the plaintiff was entitled to damages for the time in custody according the Law on Compensation for Prosecution. The plaintiff claimed loss of income and his legal costs.

The District Court allowed the claim for the amount of DM 4,228.45 for the legal expenses incurred. The Court of Appeal awarded a further DM 160,990.78 for the breach of an official duty by the defendant for loss of income and the legal costs. The Highest Court in Civil matters upheld the judgement of the Court of Appeal that the investigating prosecutor had breached an official duty by assuming a compelling suspicion (*dringender Tatverdacht*) that the plaintiff had committed a crime. The court held that some measures of the prosecution service were immune from judicial review, in particular the request for an arrest warrant. However, the courts may review whether the grounds for requesting a warrant were reasonable. Accordingly it held that at the time of the request of the arrest warrant the accusation was implausible.

3. Evaluation

Both the German and English courts preserve an area of individual judgement and evaluation with regard to actions of the state prosecution office. In Germany the review of the actions and functions of the state prosecution service can only be subject to limited review. The courts only review these actions and functions as to their reasonableness and not whether they were correct.⁸⁰ However, in the German case the public prosecutor owed a duty of care to the persons charged. The German judgment illustrates the absence of policy arguments. The decision of the prosecution office has to be reasonable which in this case it was held not to be. Nevertheless it is interesting to note that with regard to the liability for failure to prosecute the German position is similar to the English approach. A decision by the Federal Court in Criminal matters in

⁸⁰ BGH *NJW* 1998, 751

⁸¹ Fluck, P., "Amtspflichtverletzung durch Staatsanwälte", (2001) *NJW* 202

1996⁸² confirms that the prosecution office owes no duty of care to third parties, its duty of care is restricted to the state (*staatlicher Strafanspruch*).⁸³

II. Duty of the Social Services

I. England

*W v Essex County Council*⁸⁴

The plaintiffs, a couple and their natural children, held the defendants, Essex County council and one of its social workers liable in damages for having given them a child into their foster care who sexually abused the children. They had especially asked for a child without a record of sexual abuse. However, a fifteen-year-old boy was placed with them who abused the children. All the children suffered physical abuse and were psychologically badly affected by this as a consequence. After the parents had found out about the abuse they also were psychologically badly affected. The plaintiffs sued the County Council in damages for failure to inform them and for positive misinformation, for misfeasance in public office and breach of contract.

The Court of Appeal supported the decision by the court of first instance to strike out the claims of the plaintiffs for misfeasance in public office, breach of contract and the claim of the parents in negligence. These claims failed because the psychological harm of the parents was caused by learning of the abuse and not by witnessing the abuse. However, the claims in negligence by the natural children were allowed to proceed to trial. The Court of Appeal held that it was arguable that a social worker who places a child into foster care is under a duty of care to provide the potential parents with such information that a reasonable social worker should provide. This led to the personal liability of the social worker and the vicarious liability of the county council. It was held that the duty of care owed to the children was dependent on the outcome of the fair, just and reasonable test. The Court of Appeal discussed the policy arguments brought

⁸² BGH NJW 1996, 2373

⁸³ For an excellent comparison see Markesinis, *supra* n. 70

⁸⁴ [1998] 3 WLR 534

forward in *X v Bedfordshire County Council*⁸⁵ to deny a duty of care in respect of a child whose placement I care was under consideration. The Court of Appeal was not unanimous on these issues. Two of the judges held that it was indeed fair, just and reasonable to impose a duty on the social worker because he was not exercising any statutory functions. LJ Stuart-Smith was of the opinion that the arguments brought forward in the *X v Bedfordshire* case were equally relevant. The policy arguments brought forward included the consideration that it would not be fair to scapegoat a single social worker as choosing a child for fostering included the decision of various people. Further he argued that the imposition of a duty of care was incompatible with the social worker's role as mediator between foster children and parents. He further argued that the imposition of liability would encourage the authorities to take a more defensive approach in cases like this and delay the decision making process. He added that the plaintiffs could have claimed compensation under the Criminal Injuries Compensation Scheme. Judge LJ held that a duty should only be imposed with regards to the actual knowledge of the authorities and not with regard to the knowledge the authorities should have had. Otherwise such a duty would interfere with the proper exercise of its function.

2. *Germany*

*OLG Hamm*⁸⁶

The plaintiffs sued the youth welfare department of the defendant city in damages because they had failed to inform them that the child that they had adopted suffered from early childhood damage. They had expressly wished a child without mental disabilities. However, the youth welfare department placed a little boy aged two with them who was going to have special needs. The youth welfare department possessed information in a medical report stating that the boy had progressed only slowly in his development and had only reached the mental age of an 8 months old baby when he was already two years old. However, they had failed to link these deficiencies to potential brain damage. The plaintiffs claimed damages for loss of earnings and the material damage incurred by a child with special needs.

⁸⁵ [1995] 2 AC 633

The *Landgericht* (District Court) granted the claim, the *Oberlandesgericht* (Court of Appeal) dismissed the defendant's appeal. It held that the youth welfare department was in breach of its official duty according to Art 839 Civil Code in connection with Art 34 Basic Law. It should have informed the parents that the child's development was unusually slow. No statutory duty exists regarding the duty to inform parents about the health of the child in an adoption process, however the youth welfare department is under an obligation to undertake all necessary inquiries whilst preparing the adoption. This includes the gathering of information regarding the state of health of the child. This official duty was owed to the parents.

3. Evaluation

From the cases it is noticeable that the German judgments are free from any policy arguments whereas the English judgments contain arguments based on policy considerations such as the following:

One common argument is the fear that an increase in liability would lead to a more defensive approach of public authorities in their work. Further, the argument is often raised that many decision-making processes involve more than one person and that it would amount to scapegoating to hold a single person responsible for a damage. Another policy argument is that of "floodgates", which refers to the fear of public bodies that an increase of claims in negligence could lead to a great reduction of available means of public bodies. Further it is argued that alternative forms of protection exist which make it unnecessary to file a claim in damages against the authorities.⁸⁷

Policy arguments of that kind are not mentioned in German judgments. However, they have played a role, in particular at the time when the German Civil Code was drafted which dates back to 1900.⁸⁸ The argument regarding the fear that claims in negligence could inhibit the exercise of public powers was of particular concern to the drafters of the Code. However, it was decided that the inhibitions of public servants were better

⁸⁶ *VersR* 1994, 677

⁸⁷ see *Stovin v Wise* [1963] 3 WLR 388

than any “careless or less diligent behaviour on the part of civil servants.”⁸⁹ The economic argument concerning the expenditure of scarce economic resources has also been mentioned in Germany but had little impact on the legislature and court decisions; it is noteworthy that German awards in damages are much lower than in England.⁹⁰

D. European influences

I. The impact of rulings of the European Court of Justice

Brasserie du Pêcheur v Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd [1996] ECR I-1029

1. England

The above ruling of the European Court of Justice on member state liability resulted in a controversial decision by the House of Lords. The ruling, which has received much public resonance, is the decision of the House of Lords in *Regina v. Secretary of State for Transport Ex Parte Factortame Limited and Others*⁹¹. The divisional Court and the Court of Appeal unanimously held that the breaches of Community law involved, i.e. by imposing and applying the condition of nationality, domicile and residence in and pursuant of the Merchant Shipping Act 1988 were sufficiently serious for the purpose of awarding damages to the plaintiffs.⁹² The ruling of the House of Lords upholding the judgment marks the potential influence of European law on British Public Law. The recent decision by the House of Lords in *Factortame* raises the issue of how European standards of governmental liability are to be accommodated within the national legal system of damages remedies. In *Factortame* and *Brasserie* the European Court of Justice redefined the conditions on member state liability, which had been established in its *Francovich* ruling in 1991. The result is a hybrid remedy whose conditions will in the future partly be determined by the European Court itself and partly by the domestic

⁸⁸ Markesinis, *supra* n. 70, 58

⁸⁹ *ibid.*

⁹⁰ *ibid.*, 61

⁹¹ HL, 28 October 1999

⁹² *Regina v. Secretary of State for Transport ex parte Factortame Limited and Others* (HL, 28 October 1999)

courts. The crucial question still is the identification of the appropriate cause of action in national law for the accommodation of such a claim.⁹³ Further, the test of sufficiently serious breach as introduced by the European Court of Justice might inspire the development of the English law of tortious liability of public bodies.

a. Potential Causes of Action

There appear to be four possible causes of action in English law for giving effect to state liability. These are negligence, breach of statutory duty, misfeasance in public office and the innominate tort.

aa. Negligence

Liability in negligence would not be suitable as a cause of action because the liability under Community law does not depend on fault.

bb. Breach of statutory duty

In its decision on 31 July 1997 in *R v. Secretary of State for Transport, ex parte Factortame* the Divisional Court indicated that the appropriate cause of action should be breach of statutory duty. The main issue in this well known case was the assessment of whether the United Kingdom Government had committed a sufficiently serious breach of law which resulted in liability to pay damages by enacting the Merchant Shipping Act 1988. The Divisional Court held that it had. This judgement has been confirmed by the House of Lords.⁹⁴ The Court also considered whether exemplary damages were available in the context of a claim against the State for breach of Community law and held that they were not.

Regarding the appropriate cause of action the Divisional Court held that:

“In Community law, the liability of a State for a breach of Community law is described as non-contractual. In English law there has been some debate as to the correct nature

⁹³ Hoskins, M. in Tridimas, T., Beatson, J., *New Directions in European Public Law*, 1998, 81

of the liability for a breach of Community law. In our judgement it is best understood as a breach of statutory duty...whilst it can be said that the cause of action is sui generis, it is of the character of a breach of statutory duty. The United Kingdom and its organs and agencies have not performed a duty which they were statutorily required to perform [by the European Communities Act 1972].”

However, the question, which cause of action should accommodate actions in governmental liability for the breach of Community law is not yet answered clearly. The House of Lords, in its decision of 28 October 1999 made no comments on the question which cause of action should accommodate the damages claim against the United Kingdom claim. Breach of statutory duty had been suggested long before the Factortame cases in *Garden Cottage Foods Ltd v. Milk Marketing Board*⁹⁵. Here the House of Lords held that a breach of Art 86 EC could give rise to damages and that breach of statutory duty was the correct cause of action in cases concerning private law rights. A breach of a directly effective provision of Community law was categorised as a breach of §2(1) of the European Communities Act. However, in *Bourgoin SA v Ministry of Agriculture*⁹⁶ the majority of the Court of Appeal held that a breach of Art 30 EC would not be sufficient in order to establish misfeasance in public office which was considered the only possible cause of action.

cc. Misfeasance in public office

To equate liability for breaches of EC law with the establishment of the conditions of misfeasance in public office as discussed earlier make it “impossible or excessively difficult” for applicants. Therefore the ruling in *Bourgoin*⁹⁷ can no longer be regarded as valid.

To limit applicants only to a misfeasance cause of action would not satisfy the ECJ since the restricted test for liability under this tort would make it “impossible or excessively difficult” for applicants to obtain compensation. There could be situations in which the

⁹⁴ *The Times*, 28 October 1999

⁹⁵ [1984] A.C. 130

⁹⁶ [1986] 1 CMLR 267 (CA)

State would be held to have committed a serious breach for the purposes of the *Brasserie du Pêcheur* test, and yet there would be no cause of action, since the breach may have been neither knowing nor maliciously in the sense demanded by the tort of misfeasance.⁹⁸

dd. Innominate Tort

The creation of an innominate tort has recently been suggested in *Three Rivers District Council v. Bank of England (No.3)*⁹⁹. This option would avoid any of the difficulties, which the other heads of tort create.

b. Applying the requirement of “sufficiently serious breach” to domestic cases.

It has been suggested that the requirement of a “sufficiently serious breach” as established by the European Court of Justice in *Brasserie du Pêcheur* and *R v Secretary of State for Transport, ex p Factortame*¹⁰⁰ might assist to find more satisfactory solutions to the development of the law of tortious liability of public bodies.¹⁰¹ The test is already applied by English courts in awarding damages under the principle of member state liability. As already discussed above, English courts in the past have made it extremely difficult to overcome the hurdles in negligence actions, in particular in overcoming of the condition that there must have been a duty of care. Many actions fail at this early stage, as the courts have applied a variety of policy reasons to deny a duty of care. Nevertheless cases such as *Barrett v. Enfield*¹⁰² indicate that there is a willingness to reconsider the requirements for the establishment of a negligence action.¹⁰³

The sufficiently serious test may assist in finding new answers in a purely domestic law context. The requirement has already been described above as containing the element

⁹⁷[1986] 1 CMLR 267 (CA)

⁹⁸ Craig in *supra* n. 93, 81

⁹⁹ [1996] 3 All ER, 558

¹⁰⁰ Cases C-46/93 & C-48/93

¹⁰¹ Andenaes, M., Fairgrieve, D., “Sufficiently Serious? Judicial restraint in tortious liability of public authorities and the European influence”, in Andenaes M, *English Public Law and the Common law of Europe* (London; Key Haven Publications plc, 1998); Craig, P., in Markesinis and others, *supra* n. 70)

¹⁰² *Barrett v. Enfield*, [1999] 3 All ER 193, [197-198]

that “ the member state must have “manifestly and gravely” disregarded the limits of its discretion. ¹⁰⁴ It is not a fault-based test. However, there are a number of questions which further define the meaning of the requirement:¹⁰⁵ Further considerations may include the clarity and the precision of the rule breached, the measure of discretion left by the rule to the national authorities, whether the infringement and the damage caused was intentional or involuntary and whether any error of law was excusable or inexcusable. Craig notes that the test is richer and better developed than the English test.¹⁰⁶ The sufficiently seriousness test would avoid the difficulties arising out of the application of the public law hurdle of *Wednesbury* unreasonableness, secondly in applying the same test to EC law cases as well as domestic cases decisions on liability would appear less arbitrary and vague than before.¹⁰⁷ The adoption of the European test in purely domestic cases as well as the development of a similar test for damages under the Human Rights Act 1998 as discussed above would lead to more coherence in the development of the law. It would move the focus from the duty to the breach stage. The test would still give judges enough room for manoeuvre at the breach stage but it would reduce the traditional difficulties that occurred at the duty stage where policy considerations were employed to deny a duty of care.

2. Germany

*Brasserie du Pêcheur SA v Germany*¹⁰⁸

The decision in *Brasserie* was criticised because of the Court’s activist approach in the creation of a new remedy. It sparked of a lively discussion as to how to accommodate the new remedy into existing law. Academic writers discussed whether the new European remedy of member state liability should be integrated into the existing rules of tort law or whether it should be regarded as new head of tort, separate from the liability for official wrongs under the rules of tort. It was argued that the European case law had

¹⁰³ see above National reports: England, 1. Negligence

¹⁰⁴ see the National reports: England, 6. Tortious Liability under the Human Rights Act 1998

¹⁰⁵ see the National reports: England, 6. Tortious Liability under the Human Rights Act 1998

¹⁰⁶ Craig in Markesinis and others, *supra* n. 70

¹⁰⁷ Andenas, M., Fairgrieve, D., “Sufficiently Serious? Judicial restraint in tortious liability of public authorities and the European influence”, in Andenaes, M., *English Public Law and the Common law of Europe*, 1998, London; Key Haven Publications plc at 324-325

¹⁰⁸ (1997) 1 *C.M.L.R.* 971

intended that national remedies would have to accommodate the new head of liability.

¹⁰⁹ However, the Highest Court in Civil matters (BGH) decided differently:

The court applied the principles of member state liability and reached the conclusion that the applicant was not entitled to compensation. It emphasises that the European Court of Justice's view on the legal basis for member state liability has to be followed and that is accordingly based on Community law. The questions concerning causality and damage would fall into the national jurisdiction. In this context national courts have to ensure that the application of the national rules does not make it practically impossible or extremely difficult to obtain compensation.¹¹⁰ In the German court's view the direct legal basis for the claim against member states has to stem from Community law because it is important that the requirements for claims against the Community institutions should not differ from claims against the member states. This principle has been applied in the European Court of Justice's decision in which it applied the requirements as laid down in Article 215 II EC Treaty to the case. The German Court held further that in applying the European requirements for liability no liability was established. Therefore it did not enter into a review of the German law on liability for legislative injustice. The interesting question of whether the German law of liability of public bodies had to be reviewed in light of European case law was not addressed. In particular the question of whether the German requirement of *Drittgerichtetheit* in section 839 BGB (protective purpose of the duty for a third party) had to be interpreted in way to accommodate the European principle of member state liability was not addressed in the court's decision. The court therefore opted for a dualistic model, which results in two separate set of rules, one for domestic official liability, the other for the European head of tort.

Nevertheless it has been suggested, however, that decisions might lead to an overdue reform and codification of one of the most disorganised fields in German Law.¹¹¹ In particular the requirement of fault has been the subject of debates on reform. Reforms had been discussed since 1968, however failed due to disagreement concerning the

¹⁰⁹ Ossenbühl, *Staatshaftungsrecht*, 1998, 525 with further references

¹¹⁰ EuGH, EuZW1996, 205 = NJW 1996, 1267 Tz. 67

¹¹¹ Schwarze, *Das Verwaltungsrecht unter Europäischem Einfluß*, 1996, 193

federal competence to legislate on the issue.¹¹² Whether the European model will inspire any new attempts for reform remains to be seen.

3. Evaluation

The decision of the European Court of Justice has added to both systems of tortious liability the previous unknown concept of liability for legislative wrongs. Both legal systems had to accommodate this new head of liability. This is an important amendment to the existing principles of tortious liability. However, the discussion concerning the accommodation of this new concept as a new head of tort or as part of an existing head of tort in an amended form has had different results in both jurisdictions. In Germany, to avoid confusion the new head of liability will be accommodated in an *actio sui generis*.¹¹³ In England, it will be regarded as breach of statutory duty. This may be due to the remedial tradition in England, which requires any claim to fit into an existing head of tort or other action. In both countries, the new remedy for member state liability has sparked off discussions concerning the reform of the existing system. In England, constructive suggestions have been made. The introduction of a similar concept such as “sufficiently serious breach” was suggested in order to give judges more manoeuvre as opposed to the breach of a statutory duty.¹¹⁴

II. The problem of causation in the member state liability

1. Damage would have occurred anyway (*rechtmäßiges Alternativverhalten*)

In both, English and German law of tort the plaintiff has to establish that the damage suffered was caused by the injurious action of the tortfeasor. This comparison of the question of causation in both jurisdictions is important with respect to the case law of the European Court of Justice on member state liability. In *Brasserie du Pêcheur and Factortame* the European Court of Justice held that "as for the third condition [i.e. causal link] it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the

¹¹² Ossenbühl, *Staatshaftungsrecht*, 1998, 438 pp

¹¹³ *ibid.*, 526

injured party".¹¹⁵ By leaving the establishment of a causal link to the member state's jurisdictions the Court ensured that this condition falls within the area of national procedural autonomy. However, whether the rules relating to the establishment of a causal link between the injurious action and the damage can be classified as a substantive or procedural matter is not clear. The Court gave no guidance to national courts as to how this condition is to be defined. The Court referred to its own case law on Article 288 (ex 215) only with regard to the conditions of breach of a rule and the sufficiently serious fault. Accordingly, the conditions have to be similar to the general common principles of the member states. "The result is that much room is left to the national courts to define the conditions further, which does not help to ensure the uniform application of Community law throughout the Member States, a principle which the Court has repeatedly said is a fundamental requirement of Community law."¹¹⁶ The lack of guidance by the European Court of Justice on the issue of causation may result in the loss of a remedy altogether as has been suggested to be the case in English law.¹¹⁷ It has also been stated that "it is not correct [...] to leave the definition of these essential conditions (damage and causation) entirely to the national legal orders because this would amount to a de facto "renationalisation" of the Community law principle of state liability."¹¹⁸ The decision of the English Court of Appeal in *R v Secretary of State for the Home Department, ex parte John Gallagher*¹¹⁹ illustrates this well as will be shown below. In that case the Court held that despite the fact that the Home Secretary had committed a sufficiently serious breach of Community law the breach was not causal for the harm suffered by Mr Gallagher. The issue of causation in the law of torts committed by public authorities in the different member states has so far hardly been compared.¹²⁰ This comparison will show that the differences between the

¹¹⁴ P. Craig, "Once more unto the breach: the Community state and Damages Liability", in Andenaes, M., *English Public Law and the Common Law of Europe*, 1998, 169

¹¹⁵ *Brasserie du Pêcheur and Factortame*, Joined Cases C-46/93 and 48/93 [1996] ECR I-1029 at para. 65

¹¹⁶ van Gerven in, Tridimas, T., Beatson, J., *New Directions in European Public Law*, 1997, 39

¹¹⁷ Smith F. and Woods, L., "Causation in Francovich: The neglected problem", (1997) *International and Comparative Law Quarterly*, 925

¹¹⁸ *supra* n. 116, 46

¹¹⁹ [1996] 2 CMLR 951

¹²⁰ see Markesinis, B.S., *Comparative introduction to the German law of Tort*, 1986; van Gerven, W., "Bridging the unbridgeable: Community and national tort laws after Francovich and Brasserie", *International and Comparative Law Quarterly*, 1996, 507; Hart and Honoré, *Causation in the Law*, 1959, 403

English and the German approach are of a subtle nature but that they might lead to different results in dealing with similar cases.

In both the English and the German law of torts the question of causation is analysed in two stages. The terminology used mirrors the traditional approaches in each legal system. In English law the first stage of the causal inquiry is referred to as 'factual causation', 'cause in fact' or 'but-for cause'. "This 'but for test' consists of posing the question: would the loss have been sustained *but for* the relevant act or omission on the defendant?"¹²¹ Similarly, the German law of torts has adopted the so-called *Äquivalenztheorie* or *conditio sine qua non*- formula, which is the equivalence to the 'but-for test'.¹²² The more theoretical approach of German legal thinking is illustrated by the "efforts to determine how the defendant's conduct (or the event complained of) will be deemed to be or not to be a *conditio sine qua non* of the plaintiff's harm. The so called elimination theory operates as follows: "If one attempts wholly to eliminate in thought the alleged author (of the act) from the sum of events in question and it then appears that nevertheless the sequence of intermediate causes remains the same, it is clear that the act and its consequences cannot be referred to him ... but if it appears that, once the person in question is eliminated in thought from the scene, the consequences cannot come about, or that they can come about only in a completely different way, then one is fully justified in attributing the consequences to him and explaining it as the effect of his activity."¹²³ The English approach might be less theoretical as Lord Reid remarked in *McGhee v National Coal Board*¹²⁴: "The legal concept of causation is not based on logic or philosophy" but on "the practical way in which the ordinary man's mind works in the every-day affairs of life." However, English judges reach similar conclusions. There seems to be some truth in the criticism by the French that "if causation did not exist as a subject it would have to be invented so that German lawyers would have something to exercise their minds".¹²⁵ Interestingly, in contrast to the theoretical approach of German scholars with the condition of causation, the German

¹²¹ Deakin & Markesinis, *The law of Torts*, 1998, 174

¹²² Markesinis in Deakin & Markesinis, *The law of Torts*, 1998, 176 also refers to the "conditio sine qua non of the loss, that is to say an event without which the harm would not have happened."

¹²³ Markesinis, *supra* n. 120, 64

¹²⁴ [1972] 3 All ER 1008

¹²⁵ Markesinis, *supra* n.120, 63

courts have shown that "the solution should, in the end, be one dictated by common sense and equity."¹²⁶

The second stage in the causal inquiry is the one that causes more difficulties in both jurisdictions. In English law this is often described as the test of foreseeability or remoteness. "At this second stage the courts make an assessment of whether the link between the conduct and the ensuing loss was sufficiently close. To put it differently, judges decide which of the conditions of the plaintiff's harm should also be regarded in a legal sense to be its causes."¹²⁷ Both English and German courts are faced with questions such as liability for a damage which would have occurred in any case whether or not a breach of duty could be established (*in German law: rechtmäßiges Alternativverhalten*). The following cases deal with that problem in particular.

In *Barnett v Chelsea & Kensington Hospital Management Committee*¹²⁸ the plaintiff's husband went to the casualty department of the defendant's hospital suffering from what subsequently proved to be arsenic poisoning. The casualty officer, without examining him, told the plaintiff's husband to consult his own GP. A few hours later the man died and his widow sued the hospital in negligence. Her claim was unsuccessful, because the casualty officer's negligence was not shown to have caused the man's death. In its judgment the Court applied the but-for-test which "demands, then, a hypothetical inquiry into what would have happened if the defendant had acted without fault. This entails consideration not only of how the defendant should have acted but also of how the plaintiff would have reacted to the defendant's hypothetical conduct; to be taken into account are both purely physical reactions, e.g. how the plaintiff would have responded to proper medical treatment, and reactions reflecting the plaintiff's deliberate choice."¹²⁹

The Court also addressed the question of the burden of proof. "It remains to consider whether it is shown that the deceased's death was caused by that negligence or whether, as the defendants have said, the deceased must have died in any event. In his concluding submission Mr Paine submitted that the casualty officer should have

¹²⁶ *ibid.*, 63; see BGHZ 3, 267; BGHZ 30, 154, 157

¹²⁷ Deakin & Markesinis, *The law of Torts*, 1998, 174

¹²⁸ [1968] 1 All ER 1068

examined the deceased and had he done so he would have caused tests to be made which would have indicated the treatment required and that, since the defendants were at fault in these respects, therefore the onus of proof passed to the defendants to show that the appropriate treatment would have failed, and authorities were cited to me. I find myself unable to accept that argument, and I am of the view that the onus of proof remains upon the plaintiff [...]."

England

*R v Secretary of State for the Home Department, ex parte Gallagher*¹³⁰

In the Court of Appeal's decision of 10 June 1996 in *R v Secretary of State for the Home Department, ex parte Gallagher*¹³¹ the issue of causation in member state liability led to the failure of the claim against the UK. Gallagher, an Irish national was arrested in the UK under the protection of the Prevention of Terrorism Act 1989 on the grounds that he had been involved in acts of terrorism. The Secretary of State made an expulsion order against Gallagher, which Gallagher then challenged in court. Gallagher was entitled under the 1989 Act to make representations and to be interviewed by a person nominated by the Secretary of State, and the Secretary of State was obliged to reconsider his decisions after receiving those representations and the report of the interview. (...) On a preliminary ruling, the European Court of Justice held that, in passing the 1989 Act, the UK had failed to give full effect to Art 9(1) of Directive 64/221, which required that the Secretary of State should have made any expulsion order until *after* receiving the report of the person appointed to interview Gallagher. The Directive gave effect to the fundamental freedom of movement of workers. Gallagher amended his claim to include an action for damages for breach of Community law.

"...turning to the issue of causation it appeared that the Secretary of State had approached the matter afresh after receiving the interviewer's report, and there was nothing to suggest that the Secretary of State would have reached a different decision if the correct procedure had been followed." "Causation [...] is an issue to be decided on

¹²⁹ Mullis, *Torts*, 1997, 108

¹³⁰ [1996] 2 CMLR 951

¹³¹ *ibid.*

the balance of probabilities. The plaintiff must show on the balance of probabilities that the injury for which he seeks compensation was caused by the unlawful conduct of which he complains. Mr Gallagher has established a breach of Community law, but he cannot show that the breach probably caused him to be excluded from the UK when he would not otherwise have been excluded."¹³²

In other words if the Secretary of State would have acted without being in breach of procedural rules would not have changed anything, the expulsion would have taken place anyway. Cane describes this question as "hypothetical" or "counterfactual": what would have happened if D (the defendant) had acted non-tortiously rather than tortiously?"¹³³ Gallagher argued further, "that while he may have been excluded anyway if the correct procedure had been followed, he would have had a better chance of securing a favourable result if he had been able to be interviewed before the Secretary of State had made a decision, and that he was entitled to be compensated for the chance which he had lost of securing a better result."¹³⁴

However, Gallagher failed to prove a causal connection between the breach of the Directive and the alleged damage.

2. Germany

*Breach of procedural provisions designed for the protection of Basic rights and the rules on causation*¹³⁵

In December 1982 the plaintiff was admitted to a psychiatric hospital on the basis of a compulsory admission on the basis of a court decision. Attached to the court decision was a medical report, which contained details concerning the mental health of the plaintiff. The plaintiff was diagnosed to suffer from paranoia and that he posed a threat to himself and others. The report was signed by the plaintiff's GP and the doctor officially assigned to him by the court. The official doctor had signed the report after

¹³² *ibid.*, 965

¹³³ Cane, *The Anatomy of Tort Law*, (Oxford: Hart Publishing, 1997) 173

¹³⁴ 1996 2 CMLR 951 at 963, 964

¹³⁵ OLG Oldenburg, VersR 91, 306

several telephone conversation with the GP, however he had not examined the plaintiff himself.

The Law on mental Health Patients (PsychKG ND) governs compulsory admission to Psychiatric Hospitals. According to Art 10 ff. of that law the official doctor is required to ensure that temporary compulsory admissions are legal. He was required to examine the plaintiff himself. The plaintiff admits the act violated his constitutional rights in Art 2 and 104 Basic Law which read: Art 2 Basic Law

(1) Everybody has the right to self-fulfilment in so far as they do not violate the rights of others or offend against the constitutional order or morality.

Everybody has the right to life and physical integrity. These rights may not be encroached upon save pursuant to a law.

Art 104 Basic Law reads:

(1) Individual liberty may be restricted only pursuant to a formal law and only in the manner it prescribes.

The defendants argued that even if the official physician had carried out an examination as required under the Law on Mental Health Patients the plaintiff would have been admitted to a Psychiatric Hospital under a compulsory admission. Therefore he was not entitled to damages according to Art 839 Civil Code in connection with Art 34 Basic Law.

The Higher Court in Civil matters held that the plaintiff was entitled to damages for having been submitted to the institution in the absence of a medical report by the official physician. It held that the defence was not successful because the violation of the Law on Mental Health Patients is of such gravity that this defence is not permitted. The court laid down that the protective purpose of the law is to allow the limitation of one's personal freedom only according to narrow requirements such as the omitted medical examination. This law is directly based on the constitutional protection guaranteed in Art 2 and 104 Basic Law and therefore of such importance that the violation of procedural rules like the ones in this case is sufficient in itself to lead to the liability of the authorities. The hypothetical consideration that the plaintiff would have been

submitted anyway even if the procedures had been followed correctly is therefore irrelevant and not sufficient as a defence for the defendant authority.

These cases illustrate well that English and German law of torts is concerned here with exactly the same question: what would have happened if the defendant had acted lawfully? The defendant can use the concept of the counterfactual situation (*rechtmäßiges Alternativverhalten*) as a defence but in contrast to the defendant in English courts clearly has to carry the burden of proof. Principally, the counterfactual situation is relevant in deciding whether the non-tortious action would have avoided the injury. Cases are straightforward if the defendant's action was negligent. Here, the defendant can successfully defend himself against the claim by showing that the injury would also have occurred had he acted non-tortiously.

There are, however restrictions to the defence of the defendant in arguing that the injury would also have occurred had he acted non-tortiously. It appears, however that restrictions of that kind cannot be found in English law. In some cases the defendant acted with full intention. In these cases it is controversial whether the defendant may later defend himself by saying the injury would have occurred anyway. On the one hand it is argued that the law of tort is not designed to punish the defendant for having breached a duty as such. This should be the domain of criminal law. On the other hand the argument is brought forward that someone who has wilfully chosen to act in a tortious way may not be permitted the defence of the counterfactual situation (*rechtmäßiges Alternativverhalten*). The *Bundesgerichtshof* (highest court in civil matters) applies a theory, which is described as the middle path between these views and which is generally followed by lower courts. This is the theory of the protective purpose of the norm (*Schutzzweck der Norm*). Accordingly, the question is asked whether the norm, which has been breached, was designed to prevent the tortious injury as such. The protective purpose of the norm, which was breached, may hold the defendant liable even if the injury had also occurred if the norm had not been breached. This may be the case if major procedural requirements are not fulfilled such as in the case of a psychiatric patient who was admitted to a psychiatric ward in violation of procedural requirements. The defendant could not successfully challenge the claim by arguing that the patient would have been admitted to a psychiatric ward anyway even if the

procedural requirements had been complied with.¹³⁶ Here the German court argued that the protective purpose of the procedural rules is of such importance that their breach leads to liability regardless of whether or not the compliance with the rules would have led to the same result. Similarly, it was held that the theory of the protective purpose of the norm is rather vague and it has been cynically remarked that the *Bundesgerichtshof* favours this formula in order to decide each case flexibly.¹³⁷

The other restriction applies to cases in which the counterfactual situation involves the exercise of discretion. In the case decided by the *Bundesgerichtshof* a public body was sued for having made a decision despite the fact that it was not the competent authority to make that decision. The authority defended its position by claiming that the competent authority in exercising its discretionary powers possibly would have reached the same decision. The *Bundesgerichtshof* held that the plaintiff was entitled to damages because the defendant could not show that the competent authority would certainly have decided identically.¹³⁸ Accordingly a plaintiff was held to be unsuccessful with his claim against a public body after it was shown that in the absence of discretionary powers the competent authority would have reached exactly the same decision.¹³⁹

When assessing the decision of the Court of Appeal in *Gallagher*¹⁴⁰ in the light of the principles under German law three main differences can be observed.

The first point concerns the burden of proof, which under the provisions in English law is laid upon the plaintiff. *Gallagher* failed because he could not show that he would not have been expelled from the UK had the procedural requirements according to Directive 64/221 had been complied with. In German law it would have been the defendant's defence to show that the same result would have been reached had the procedural requirements been met. In the German case above the authorities argued that the

¹³⁶ Oldenburg VersR 91, 306

¹³⁷ Prof. Dr. Helmut Rusman, <http://ruessmann.jura.uni-sb.de/bvr99/Vorlesung/kausalityaet-der-pflichtwidrigkeit.htm>

¹³⁸ BGH *NJW* 59, 1316

¹³⁹ BGH *NJW* 71, 239

¹⁴⁰ [1996] 2 *CMLR* 951

plaintiff would have been submitted even if the doctor had examined him himself. In this case it might have been easy for the Home Secretary to show that he would have reached the same decision but there might be cases in which it is harder for the defendant to discharge of the burden of proof and therefore German law in comparison to English law facilitates the position of the plaintiff.

The second point concerns the restrictions to the defence with regard to the exercise of discretionary powers. In *Gallagher* the court had to decide whether the Secretary of State would have reached the same decision if he had considered the report and the representation before issuing the expulsion order. This involved the exercise of discretionary powers. Both English and German courts, should however avoid second-guessing as to how a discretionary power is or would have been exercised: "It is trite law that judicial review (in English courts) is not concerned with the merits of administrative decisions and the court should ordinarily avoid substituting its own opinion for that of the public body as to how precisely a discretion should be exercised. Probability (in establishing causation) will be defined by, among other facts, by the degree of discretion possessed by the decision maker."¹⁴¹ The European Court of Justice held that the case of *Gallagher* was comparable to the situation in *British Telecom* where the UK had discretionary powers in transposing the directive. Therefore the stricter conditions established in *Brasserie*, i.e. the demonstration that the UK violation of Community law was sufficiently serious, applied.¹⁴²

Finally the theory of the protective purpose of the law, which has been breached, which is applied by the *Bundesgerichtshof* might lead to a different decision from that of the Court of Appeal. Accordingly it has to be assessed whether the norm, which was breached, was specifically designed to avoid the damage.¹⁴³ The norm breached was Council Directive 64/221 which "sets out to co-ordinate all measures relating to entry and deportation from their territory and issue or renewal of residence permits which Member States can adopt on grounds of public policy, security, and health, in relation to

¹⁴¹ De Smith, *Judicial review of Administrative action*, 1995, 19-033

¹⁴² [1996] 2 CMLR 951, 952

¹⁴³ von Caemmerer, *Das Problem der überholenden Kausalität* (1962) 30ff.

the employed, the self-employed, recipients of services, and the families of each."¹⁴⁴ In Gallagher Art 9 was at stake, which contains "procedural rights which must be provided for a person against whom one of the grounds is being invoked."¹⁴⁵ Art 9 (1) reads: "Where there is no right of appeal to a court of law, or where such appeal may be only in respect the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision [...] ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of the defence and of assistance or representation as the domestic law of that country provides for." The procedural rights contained in Art 9 are very important as they safeguard that the derogations from the fundamental freedoms contained in the Treaty such as the free movement of workers, freedom of establishment, and free movement of services are given a narrow scope.¹⁴⁶ Gallagher's damage consisted in the lost chance of securing a better result which he lost by not being interviewed before the issue of the expulsion order. When defining the purpose of Art 9(1) of the Directive the European Court held in its previous decision in *R v Secretary of State for the Home Department, ex parte Gallagher*¹⁴⁷ "that the competent authority [...] must follow a procedure enabling the person concerned effectively to present his defence. As the Court has already held, the purpose of the intervention of the competent authority referred to in Art 9(1) is to enable an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure, to be carried out *before* the decision is finally taken. The Court has also ruled that save in cases of urgency, the administrative authority may not take its decision until an opinion has been obtained from the competent authority."¹⁴⁸ This provision is designed to prevent cases being decided hastily, save in cases of urgency, without taking all facts and circumstances into account. Therefore the damage Gallagher suffered which consists in the lost chance of obtaining a better result was to be prevented by the provision itself. Therefore one could argue that the breach of the directive caused the damage the plaintiff suffered regardless of the fact that the Home Secretary would have

¹⁴⁴ Craig and de Burca, *EU Law*, 1998, 786

¹⁴⁵ *ibid.*, 796

¹⁴⁶ *ibid.*, *EU Law*, 1998, 786

¹⁴⁷ [1996] 2 *CMLR* 951

¹⁴⁸ [1995] *ECR* I-4253, [1996] 1 *CMLR* 557, 573

reached the same decision anyway. The Home Secretary's defence that the expulsion would have taken place anyway might have been unsuccessful in the German court.

The case of *Gallagher* is also problematic because it contains a "three-party" situation and despite the fact that the United Kingdom was at fault by incorrectly transposing Directive 64/221 into domestic law the state was not held liable. The *Bundesgerichtshof* decided differently in a state liability case containing a three party-situation¹⁴⁹. A State Secretary in Germany required subordinate administrative departments to implement measures for which no legal basis existed. A legal basis could have been enacted only in conjunction with Parliament. The plaintiff was successful with his claim in damages against the State Secretary even though a legal basis could have been enacted easily as all legal requirements for the enactment were fulfilled and the measures would then have been lawful. The State Secretary, however could not use this as a defence because the legal basis could only have been enacted in conjunction with Parliament. In these cases the rule of law outweighs the hypothetical argument that the measures would have been implemented in the same way because all requirements for the enactment of the legal basis existed at the time. In *Gallagher* the legal basis, the Prevention of Terrorism Act 1989 was held to be in breach of Community law and required the alteration by the UK Parliament. According to the principles in German law it could therefore be argued that it was not within the State Secretary's power to change the legislation and therefore he could not bring the defence of the counterfactual situation.

Applying the principles of causality developed in the German law of state liability to the case of *Gallagher* has shown that the *Bundesgerichtshof* might have decided the case differently. The rules on the burden of proof under German law for situations like the one in *Gallagher* are more in the plaintiff's favour. However, as mentioned earlier, the theory of the protective purpose of the norm (*Schutzzwecklehre*) is vague and was deliberately chosen by the *Bundesgerichtshof* to maintain room for policy decisions.

¹⁴⁹ BGHZ 63, 319

3.Evaluation

These cases have shown some parallels in how English and German courts deal with the issue of causation. In both the English and the German law of torts the question of causation is analysed in two stages. This "bifurcation" of analysis is a striking similarity. The "but for test" in English law is equivalent to the German *Äquivalenztheorie* or *conditio sine qua non*- formula. However, the second stage in the inquiry into the causality of the tortious action shows that both systems face similar issues such as the question of alternative lawful conduct or in other words the question whether a damage would have occurred regardless of the breach of duty. Both systems recognise this concept, which results in the negation of a sufficient causal link between the breach and the damage. However, the strong Human Rights culture in modern Germany has led to a limitation of that concept in cases where the rule that was breached, i.e. a procedural rule was designed to protect Human Rights such as the right to personal liberty as shown above in the law on Mental Health Patients. The decision in *Gallagher* illustrates that no such limitations to this concept are known, not even when important procedural rules are clearly breached.

These potential differences in reaching decisions in state liability cases by applying purely domestic principles of causation do not support the idea of a uniform legal protection of individuals within the European Union. This lack of uniformity in the enforcement procedures for Community law rights through the member state's legal systems is a major problem.¹⁵⁰ In the absence of Community legislation which lays down rules for the protection of Community rights in the national courts the European Court of Justice might continue to define a "set of uniform principles which the national rules on remedies must satisfy where Community rights are in issue."¹⁵¹

Some more guidance by the European Court of Justice for the establishment of principles common to all member states is desirable. However, it is not clear to which extent is the European Court of Justice is prepared to take further steps forward in the elaboration of the remedy of member state liability. There appears to be "a retreat from

¹⁵⁰ Arnall, A., *The European Union and its Court of Justice* (Oxford: University Press, 1999) 151

the more interventionist stance the European Court of Justice took in some cases in the 1980s and 1990s.” One reason is seen in the “more detailed enumeration of the Community’s powers in the TEU, at least in the immediate aftermath of Maastricht, have made the Court less willing than previously to compensate for the shortcomings of the legislature.”¹⁵² However, it remains the European Court of Justice’s task to ensure that national procedural rules do not make the enforcement of Community law rights impossible or excessively difficult. Therefore the further development of the remedy of member state liability through the European Court of Justice also depends on the questions, which are referred to it via national courts.

III. The impact of the rulings of the European Court of Human Rights (Art 6 I of the European Convention on Human Rights) on the tortious liability of statutory bodies

1. England

The impact of the decision in Z v UK¹⁵³ on the development of the liability of public bodies in the UK

The law of liability in tort of public authorities is a notoriously difficult and developing area of law. It is an area of law, which has come increasingly under the influence of an emerging Human Rights culture in the United Kingdom and which, currently, occupies practitioners and academics alike.¹⁵⁴ Since the widely criticised ruling of the European Court of Human Rights in the *Osman*¹⁵⁵ case in 1999, two judgments have been handed down by that Court in the cases of *Z v UK* and *TP and KM v UK*¹⁵⁶ in May 2001 which

¹⁵¹ *ibid.*, 151

¹⁵² *ibid.*, 188

¹⁵³ *Z v. United Kingdom* [2001] 2 FLR 612; [2001] 2 FCR 246; 10 BHRC 384; [2001] Fam Law 583, ECHR

¹⁵⁴ Bowen, A.J., “A Terrible Misunderstanding? *Osman v UK* and the Law of Negligence” (2001) *Scots Law Times* 59; Carnwath, R., “Welfare Services-liabilities in tort after the Human Rights Act” (2001) *Public Law* 210; Craig, P. and Fairgrieve, D., “Barrett, Negligence and Discretionary Powers” (1999) *Public Law* 626; English, R., “The decline and fall of *Osman*” (2001) *New Law Journal* 973; Gearty, C.A. “Unravelling *Osman*” (2001) *Modern Law Review* 159; Giliker, P. “*Osman* and police immunity in the English law of torts” (2000) *Legal Studies* 372; G. Monti, G., “*Osman v UK*-Transforming English Negligence Law into French Administrative Law?” (1999) *International and Comparative Law Quarterly* 757; Markesinis, B.S., *Tortious Liability of Statutory Bodies, A Comparative and Economic Analysis of Five English Cases*, Hart Publishing, 1999

¹⁵⁵ *Osman v United Kingdom* (1998) 29 EHRR 245.

¹⁵⁶ *TP and KM v United Kingdom* [2001] 2 FLR 549; [2001] 2 FCR 289; [2001] Fam Law 590, ECHR.

distance themselves from parts of the *Osman*-ruling. These decisions have already been held to admit to a “misunderstanding” of the English law of negligence as displayed in the *Osman*-case.¹⁵⁷ As a consequence, *Osman* has been “bid farewell” and “consigned to the bin of judicial mistakes”.¹⁵⁸ This section assesses the case law of the European court of Human Rights and its impact on the future development of the liability of statutory bodies in the UK. It argues that the recent decisions of the European Court of Human Rights are mainly in line with its previous reasoning with the exception of its attitude towards striking-out procedures. They reinforce a narrow reading of *Osman* and indicate a willingness of the European Court of Human Rights to review its understanding of English procedural law. The ruling in *Z v UK* was mainly concerned with the compliance of the rules of negligence with Article 6(1) of the European Convention on Human Rights than in the decision in *TP and KM v UK*. However, the latter decision gives important guidance to the way in which the Human Rights Act will give applicants a right to claim for the violation of their rights.

A focal point of this section is the decision by the House of Lords in *Barrett v Enfield*¹⁵⁹ in 1999 which under the influence of the Court’s ruling in *Osman* set a trend towards a more careful consideration of policy arguments on the basis of facts established at full trial rather than on the basis of hypothetical facts.

a. The ruling of the European Court of Human Rights in *Osman v United Kingdom*¹⁶⁰

The case of *Osman v United Kingdom*¹⁶¹ concerned a teacher who was obsessed with one of his pupils, Osman. This obsession eventually ended in the death of the pupil’s father and the wounding of Osman. The police had failed to prevent this disastrous outcome and the family brought an action in negligence against the police force. The Court of Appeal decided that the claim should be struck out finding that it was not fair, just and reasonable to impose a duty of care on the police in respect of their handling of

¹⁵⁷ Bowen, “A Terrible Misunderstanding? *Osman v UK* and the Law of Negligence” (2001) *Scots Law Times* 59.

¹⁵⁸ English, “The decline and fall of *Osman*” (2001) *New Law Journal* 973 at 974.

¹⁵⁹ [1999] 3 All ER 193.

¹⁶⁰ (1998) 5 B.H.R.C. 293.

¹⁶¹ (1998) 5 B.H.R.C. 293.

criminal investigations. The Court of Appeal based its decision on the case of *Hill*,¹⁶² which had established a public policy exclusion of negligence actions against the police for the investigation and suppression of crime. The policy arguments in *Hill* were set out as follows: a negligence action would lead to the diversion of scarce resources, the police would exercise its functions in a defensive frame of mind and the conduct of such an investigation involves the exercise of discretion which “would not be regarded by the courts as appropriate to be called into question.”¹⁶³

The European Court of Human Rights saw in the application of this rule an infringement of Art 6(1) of the European Convention on Human Rights which provides that:

“In the determination of his civil rights and obligations..., everyone is entitled to a hearing...by [a]...tribunal...”

The European Court of Human Rights held that Article 6(1) was applicable because the Osmans “must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the *Hill* case.”¹⁶⁴

The European Court of Human Rights held that the denial of the Court of Appeal to award damages to the Osmans by way of striking out their claim on the basis of the *Hill*-rule did not comply with Art 6(1) for two connected reasons.

Firstly, it submitted that the right under Article 6 is not absolute and may be subject to restrictions. However, “a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”¹⁶⁵

The European Court of Human Rights therefore required that any limitation on the right

¹⁶² *Hill v. Chief Constable of West Yorkshire* [1989] AC 53.

¹⁶³ *ibid.*, p. 63.

¹⁶⁴ *Osman v. UK*, (1998) 29 EHRR, 245 at para 139.

to damages should be decided in each case afresh, in other words by weighing the counter arguments of the applicant against the policy arguments of the defendant. Otherwise, as in this case the lack of weighing up of competing interests amounted to a blanket immunity. Secondly, the European Court of Human Rights was of the opinion that the striking out action deprived the applicant of the right of access to a court because they could not argue their case on its merits.

The main criticism against *Osman* as expressed extra judicially by Lord Hoffman and others was that the ECHR was using Article 6(1) to decide on the content of a person's civil rights and obligations, rather than upholding the right of access to a court.¹⁶⁶ This apparent judicial activism and over-interpretation of Article 6 is rooted in the fundamental difference between the continental law approach and the common law. *Osman* is "difficult to understand" as Lord Browne-Wilkinson admitted in *Barrett* because the European Court of Human Rights applied an approach to the English law of negligence which is alien to the common law. The Strasbourg court's reasoning appears less strange from a continental law perspective.

In German law, for instance, the right to damages against public authorities is codified in provisions contained in the Civil Code (Article 839 BGB)¹⁶⁷ and the Constitution (Article 34 Basic Law).¹⁶⁸ This provision on the liability of public authorities is part of the so-called substantive law of rights rather than purely remedial law. It belongs "rather to the rights and not to the remedies side of the matter."¹⁶⁹ English law still displays a much more remedial conception of law as expressed by *Maitland's* quote that

¹⁶⁵ *ibid.*, p 245. at para 147.

¹⁶⁶ Lord Hoffmann, "Human Rights and the House of Lords" (1999) *Modern Law Review* 159; Bowen, "A Terrible Misunderstanding? *Osman v UK* and the Law of Negligence" (2001) *Scots Law Times* 59.

¹⁶⁷ Article 839 paragraph 1 Civil Code:

"If an official intentionally or negligently violates the official duty, which falls upon him as against a third party, he must compensate the third party for the harm arising therefrom. If the official can only be charged with negligence, a claim can only be made against him if the person suffering harm cannot obtain compensation in another manner."

¹⁶⁸ Article 34 (first sentence) Basic Law

"Should anybody, in exercising a public office, neglect their duty towards a third party liability shall rest in principle with the state or the public body employing them."

¹⁶⁹ Ruffert, M., "Rights and Remedies in European Community Law: A Comparative View", (1997) *Common Market Law Review* 307 at 332.

“The forms of action we have buried, but they still rule us from their graves”.¹⁷⁰ The English remedial conception is characterised by a fact-oriented approach¹⁷¹, which as, for instance, in the *Hill* case led to the setting of a precedent which denies under specific factual constellations the availability of a remedy. In English law “it is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence.”¹⁷² The defendant in *Osman* submitted in the Court of Appeal that the facts in the present case were indistinguishable from those in *Hill* so far as public policy was concerned.¹⁷³ In German law however, the action would automatically be connected to the potential violation of a civil servant’s duty arising out of a protective norm or other relationship. In the absence of the principle of precedent which could rule out the existence of an action, a case would proceed to a full trial and the court will examine whether a civil servant was subject to a duty of care in the particular case. The difficulties which were experienced by English judges in understanding the ruling in *Osman* were partly due to this conceptual difference. As will be shown below, the case of *Osman* marks the beginning of a dialogue between the European Court of Human Rights and the House of Lords on the understanding of the law of negligence of public bodies in the United Kingdom and its compatibility with Article 6(1) of the European Convention of Human Rights.

b. Impact of the ruling in *Osman* on subsequent decisions

The decision of the House of Lords in the case of *Barrett v. Enfield*¹⁷⁴ is an important development of the liability of public bodies in negligence. *Barrett* was concerned with an action in damages of a plaintiff who had been in the care of the local authority during most of his childhood. He sued the authority in damages for the psychiatric injury caused by the negligence of the authority and its employees whilst he was in their care. The authority had allegedly failed to arrange his adoption and to organise appropriate placements with foster parents and to obtain psychiatric treatment for him. The House

¹⁷⁰ Maitland, F.W., *The Forms of Action at Common Law: A course of lectures*, (Cambridge:University Press, 1948) 2.

¹⁷¹ Allison, *A Continental Distinction in the Common Law*, 2000, 127.

¹⁷² *Barrett v. Enfield* [1999] 3 All ER 193.

¹⁷³ Court of Appeal, *Osman v Ferguson* [1993] 4 All ER 344.

¹⁷⁴ *Barrett v. Enfield* [1999] 3 All ER 193.

of Lords decided that a duty of care should not be ruled out. With regard to the effects of the decision in *Osman* Lord Browne-Wilkinson's speech is highly important: He admitted that he found "the decision of the Strasbourg court extremely difficult to understand".¹⁷⁵ His following summary of the reasoning of the European Court of Human Rights and its application to the English law of negligence is an enlightening illustration of the difficult task of doing justice to the rights and to the remedies approach.

Firstly, unlike the understanding of the European Court of Human Rights in *Osman* in English law "it is a prerequisite to there being any liability in negligence at all that as a matter of policy it is fair, just and reasonable in those circumstances to impose liability in negligence."¹⁷⁶

Secondly, "the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss they have individually suffered."¹⁷⁷

Thirdly, this question whether the imposition of such a duty is just, fair and reasonable is a question of law and once a decision had been taken for a particular case "that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case."¹⁷⁸

Despite his criticism of the ruling in *Osman*, the decision in *Barrett* has set a new trend in negligence cases against public bodies.¹⁷⁹ *Osman's* influence on the decision in *Barrett* was clearly expressed by Lord Browne-Wilkinson's statement that "in the

¹⁷⁵ *ibid.*, at 198d.

¹⁷⁶ *ibid.*, at 199e.

¹⁷⁷ *ibid.*, at 199f-g

¹⁷⁸ *ibid.*, at 199h-j.

¹⁷⁹ Craig and Fairgrieve, "Barrett, Negligence and Discretionary Powers" (1999) *Public Law* 626 at 631.

present very unsatisfactory state of affairs, and bearing in mind that under the Human Rights Act 1998 Article 6 will shortly become part of English law, in such cases as these it is difficult to say that it is a clear and obvious case calling for striking out".¹⁸⁰ Further, the House of Lords refused some of the often-raised policy considerations such as "the existence of other avenues of complaint"¹⁸¹ ruling out a right of action and the argument that the imposition of a duty of care would lead to a defensive attitude of statutory bodies: "If the conduct in question is of a kind which can be measured against the standards of the reasonable man, placed as the defendant was, then I do not see why the law in the public interest should not require those standards to be observed."¹⁸² The case was allowed to proceed to trial. This trend was followed in subsequent decisions such as *W. and Others v. Essex County Council*¹⁸³ and *Phelps and Others v Hillingdon Borough Council*.¹⁸⁴ The facts of the former case have been dealt with before. *Phelps* was concerned, *inter alia*, with the common law claims in negligence of four applicants against the local authorities concerning the misdiagnosis of dyslexia or the failure to provide educational support for children with learning difficulties or special needs. The House of Lords allowed all but one appeal. In the second case, where the authorities failed to provide educational support for the severely dyslexic applicant, Lord Clyde referred to the decision in *Osman*, which required the proportionate weighing of competing policy consideration. He was not convinced that there were any policy considerations strong enough to exclude the liability of the Local authority.¹⁸⁵

In conclusion *Osman* has set a trend towards a more cautious use of striking out actions. The requirement in *Osman* that policy considerations should be weighed carefully with competing interests of the applicants has led to a slow erosion of the public policy immunities previously enjoyed by welfare services.

¹⁸⁰ *Barrett v. Enfield* [1999] 3 All ER 193 at 200a.

¹⁸¹ *ibid.*, at 228h.

¹⁸² *ibid.*, at 228f.

¹⁸³ [2000] 2 W.L.R. 601.

¹⁸⁴ [2000] 3 W.L.R. 776.

c. The ruling of the European Court of Human Rights in *Z and others v The United Kingdom*

The case of *Z* concerned the claim of four siblings in damages for personal injury arising out of breach of statutory duty and negligence by Bedfordshire County Council in failing to protect them from parental abuse.¹⁸⁶ The children were so hungry that they had to steal food, they were locked in their bedrooms and had to sleep in soiled bedding. The mother could not cope and stated that she would batter them if they were not taken into care. However, it took the authority's social services unit several years before care orders were made.

Z is of particular interest because the European Court of Human Rights' surprising admission that with regard to a violation of Article 6(1) "its reasoning in the *Osman* judgment was based on an understanding of the law of negligence which has to be reviewed in the light of the clarifications subsequently made by the domestic court and notably the House of Lords..."¹⁸⁷ Unlike the European Commission of Human Rights, the European Court of Human Rights found that Article 6 was not violated.¹⁸⁸

When looking at this decision in some more detail it becomes evident that the Strasbourg Court is only partly willing to review its previous reasoning in *Osman*. The decision in *Z* contains three main points.

Firstly, the European Court of Human Rights has shown that it still regards Article 6 as applicable in cases in which applicants assert that English courts deprive them of their right to a court in holding that it was not just, fair and reasonable to impose a duty of care on a statutory body. The European Court of Human Rights is still convinced that Article 6(1) is applicable because the applicants whose actions were struck on the basis that no cause of action existed were denied access to court. In that respect the question of whether Article 6 (1) is applicable at all in these type of cases is still not clearly answered. The European Court of Human Rights held that "The Government's

¹⁸⁵ [2000] 3 W.L.R. 776 at 809. Breaches of a statutory duty under the Education Acts 1944 and 1981 were not actionable.

¹⁸⁶ The House of Lords decision was cited as *X v. Bedfordshire County Council* [1995] 2 A.C. 633.

¹⁸⁷ *Z v United Kingdom* Application no. 29392/95 (May 10, 2001 (ECHR)) para 100.

¹⁸⁸ see the Report of the European Commission of Human Rights dated 10 September 1999.

submission that there was no arguable (civil) “right” for the purpose of Article 6 once the House of Lords had ruled that no duty of care arose has relevance rather to any claims which were lodged or pursued subsequently by other plaintiffs”.¹⁸⁹ This is a circular argument because such subsequent plaintiffs would according to the European Court of Human Rights be faced with an immunity, which again would be in violation of Article 6(1). The European Court of Human Rights is not willing to accept that under the English law of negligence there is no cause of action in negligence if it is not fair, just and reasonable to impose a duty of care on the defendant. As a result English law after *Z* will still have to comply with the original findings in *Osman* regarding the applicability of Article 6.

Secondly, the European Court of Human Rights still requires a balancing of competing policy considerations in each case to determine whether it was just, fair and reasonable to impose a duty of care. In *Z* it was satisfied that such a balancing of interests had taken place. In that respect the Court upheld its ruling in *Osman* according to which a “proportionate immunity”¹⁹⁰ of the defendant, i.e. one which resulted from the proper balancing of competing policy considerations would be in compliance with Article 6. The Court is not generally criticising the use of policy consideration but it is opposed to a practice as displayed in *Osman* where the Court of Appeal failed to take competing considerations into account and applied the *Hill*-rule in a way which amounted to a blanket immunity for the police.

Finally, the European Court of Human Rights has clearly reviewed its reasoning in *Osman* by acknowledging that the striking out procedure complied with the requirements under Article 6: the applicants’ claims “were properly and fairly examined in light of the applicable domestic legal principles concerning the tort of negligence. Once the House of Lords had ruled on the arguable legal issues, the applicants could no longer claim any entitlement under Article 6(1) to obtain any hearing concerning the facts. As pointed out above, such a hearing would have served no purpose, unless a duty of care in negligence had been held to exist in their case.”¹⁹¹

¹⁸⁹ *Z v United Kingdom* Application no. 29392/95 (May 10, 2001 (ECHR)) para 89.

¹⁹⁰ Giliker, “Osman and police immunity in the English law of torts” (2000) *Legal Studies* 372 at 378.

¹⁹¹ *Z v United Kingdom* Application no. 29392/95 (May 10, 2001) ECHR para 100.

d. Impact of the decision in *Z v UK* on future cases in negligence

The question now remains: what likely effect is the decision in *Z v UK* going to have on the future direction of the courts in negligence cases against public bodies?

As shown above, the decision in *Z v UK* regarding the applicability and compliance with Article 6 in negligence cases is not deviating from *Osman* as much as some might have hoped. The ruling in *Z* is in line with *Osman* regarding the requirement of a balanced decision, which takes into full account the competing policy considerations of both parties. In *Z* the Strasbourg Court was satisfied that such a balancing had taken place. However, it remains clear that the application of a blanket immunity such as the constraint under the *Hill-rule* would amount to a violation of Article 6. Therefore *Z* does not place courts in a pre-*Osman* situation and even if it did it has been doubted whether the “trend set by *Barrett* would be reversed, i.e. less resistance by English courts to allowing action to proceed in negligence.”¹⁹²

The Strasbourg Court’s main revision of its understanding of the “law of negligence” concerns the practice of striking out actions. It is now satisfied that competing interests can be properly and fairly discussed in interlocutory hearings. However, it is interesting to note that in *Barrett*, Lord Browne-Wilkinson expressed unease with the practice of striking out actions even before he proceeded to discuss Article 6. He referred to his speech in *X and others v. Bedfordshire County Council* and explained that it was important that the development of the law of negligence of public bodies “should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.”¹⁹³ The decision in *Z* is therefore unlikely to reverse the more recent approach by the House of Lords to allow cases to proceed to a full trial.

Having said that, the Court of Appeal has delivered a judgment in April 2000 in the case of *S v Gloucestershire County Council; L v Tower Hamlets London Borough Council*

¹⁹² English, “The decline and fall of *Osman*” (2001) *New Law Journal* 973 at 974.

¹⁹³ *Barrett v Enfield* [1999] 3 All ER 193 at 197f.

*and another*¹⁹⁴ which might have an influence on the approach taken by other courts in cases of this kind. This case concerned the claim against the local authority in negligence resulting from sexual abuse suffered in foster care. The case is of some importance as it deals with the new Civil Procedure Rules, which were referred to in previous chapters. They now govern civil procedure, in rule 24.2 (a)(i)¹⁹⁵ which contains powers of “summary disposal” to be distinguished from rule 3.4(2)(a), derived from former RSC Order 18, rule 19 concerning striking out¹⁹⁶. The main difference between these rules is of technical nature in as much there is “no longer an embargo on the court receiving evidence”¹⁹⁷ under rule 24.2 (a)(i). In *S v Gloucestershire County Council; L v Tower Hamlets London Borough Council and another* the Court of Appeal dealt with the question of compatibility with Article 6 in some detail. It explained that under the old rules according to which *Barrett* was decided, no evidence was admissible on an application and that the decision to strike out was made under the assumption of hypothetical facts. Accordingly the House of Lords felt that it was safer to allow a full trial in order to avoid the applicant’s complaint in Strasbourg. The new rule 24.2 (a)(i) now allows for cases to be disposed of on the whole or in part “if the court considers that the claimant has no real prospect of succeeding on the claim or issue and there is no other reason why the case or issue should be disposed of at a trial.”¹⁹⁸ In applying the new rule and thereby deciding the cases in the light of *Barrett* “by reference to the actual facts, and not to hypothetical facts”¹⁹⁹ the Court allowed the first appeal because the Court was not persuaded that it had no real prospect of success and dismissed the second case as it showed no real prospect of success.

¹⁹⁴ [2000] 3 All ER 346.

¹⁹⁵ Rule 24.2 “The court may give summary judgement against a claimant ... on the whole of a claim or on a particular issue if – (a) it considers that – (1) that claimant has no real prospect of succeeding on the claim or issue ... (b) there is no other reason why the case or issue should be disposed of at a trial.”

¹⁹⁶ Rule 3.4 “... (2) The court may strike out a statement of case if it appears to the court – (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim ...”

¹⁹⁷ “The right to a fair hearing and summary disposal” (2000) *Civil Justice Quarterly* 341.

¹⁹⁸ *S v Gloucestershire County Council; L v Tower Hamlets London Borough Council and another* [2000] 3 All ER, 346 at 372.

¹⁹⁹ *S v Gloucestershire County Council L v Tower Hamlets London Borough Council and another* [2000] 3 All ER 346 at 373.

e. *TP and KM v United Kingdom*²⁰⁰

The applicants, mother and daughter, allege that the daughter had been wrongly taken into care and separated from the mother. They further allege that they were refused access to court or an effective remedy for the violation of their rights in the United Kingdom. The case is based on the facts of the “Newham case” which was decided by the House of Lords in 1995 and reported as *M.v. Newham County Council* as described above.

In 1983 the first applicant was 17 years old and gave birth to a daughter. In the time between 1984 and 1987 the London Borough of Newham suspected that the first applicant’s boyfriend sexually abused the second applicant. In an interview, which was recorded on videotape, the daughter told the child psychiatrist and a social worker that a man called X had abused her. The first applicant’s then boyfriend was called X. The first applicant was also interviewed and told that X had abused the daughter. After the interview however, the video containing the daughter’s interview was not disclosed to the first applicant. The first applicant then asked her daughter whether X had abused her. The daughter denied this. However, the psychiatrist and the social worker interpreted this as an attempt by the first applicant to influence the daughter. They decided to take the child into care immediately. About a year later the first applicant and her solicitor were shown the video and it was clarified that the daughter had not identified the applicant’s boyfriend but someone else who had been made to leave the household at an earlier stage. The House of Lords held that there was no breach of a statutory duty, because the Child Care Act 1980 was not designed “to establish and administrative system designed to promote the social welfare of the community.” Further, the Court held that the Local authority and the health authority were not vicariously liable for the psychiatrist and the social worker because they owed no duty of care to the applicants. There was no proximity between the applicants, the psychiatrist and the social worker because they are employed in order to advise the council and it would not be just and reasonable to impose such a duty. The European Court of Human Rights found a violation of Art 8 and 13 and no violation of Art 6 of the European Convention on Human Rights. The Court found a failure to respect the

²⁰⁰ *TP and KM v United Kingdom* [2001] 2 FLR 549; [2001] 2 FCR 289; [2001] Fam Law 590, ECHR

family life of the applicants in the fact that the local authority failed to provide access to the information, which it held in form of the video recording of the daughter's interview. Knowledge of the content of that tape would have enabled the applicant to get involved into the decision-making process concerning the care of her daughter. The Court held that this was a failure of the authority to respect the applicants' family life protected under Art 8 of the Convention. Further, the Court held that there was no violation of Article 6 of the Convention.

f. Conclusion

In conclusion, the decisions in *Osman* has undoubtedly influenced the reasoning of English courts with regard to allowing cases to proceed to full trial and to give a more thorough consideration to policy arguments. The case of *Barrett*, in particular, has set a trend towards a more critical analysis of policy considerations. *Z* is unlikely to reverse that trend. *Z* has clarified that in clear cases, striking out actions in which policy considerations are balanced against each other (proportional immunity) are not in violation of Article 6 of the European Convention on Human Rights. After *Z* a more rigorous balancing of policy considerations is necessary to comply with Convention rights.

However, the novelty in *Z* is that cases might not have to proceed to full trial incurring the full costs of a trial as illustrated in *Barrett*. *Z* does not require factual evidence to be heard at a full trial. However, as stated by Lord Browne-Wilkinson in *X (Minors) v. Bedfordshire County Council* and *Barrett*, there are good reasons for allowing a case to proceed to examine factual evidence rather than simply striking out. He made it clear that the law of liability of public bodies, which is a developing area of law, should be based on actual facts found at trial. In his view it might even reduce misunderstandings and a "proliferation of claims" if the facts are clearly proven.²⁰¹ This trend towards a more careful weighing of policy considerations on the basis of the actual facts rather than hypothetical ones seems unlikely to change in the light of the new Civil Procedure Rules. Rule 24.2 provides a good compromise between the interests of the defendants

²⁰¹ *Barrett v Enfield* [1999] 3 All ER 193 at 198.

in keeping the costs of proceedings low and the new approach of a more thorough balancing of policy considerations on the basis of the actual facts. The subject of liability of public bodies, has, in the author's view, benefited from the lively exchange of jurisprudence from judges in the common law and judges applying the Convention. Finally, it is worth noting that in *Z*, the plaintiffs succeeded in their claim under Article 3, and in the absence of a remedy provided by the domestic law there was a further breach of Article 13. The plaintiffs in *TP and KM* were successful in establishing breaches of Articles 8 and 13. As well as suing local authorities in negligence, applicants in these type of cases (occurred after 2 October 2000)²⁰² will in future be able to claim breaches of Convention Articles such as 3 and 8 under sections 7 and 8 of the Human Rights Act 1998.

2. Evaluation

Striking out actions are not unknown as such in Germany. The equivalent is the *Prozeßurteil*, a judgment being given if the claim is unsubstantiated (*unschlüssig*). This is the case if the alleged (hypothetical) facts do not sufficiently substantiate a claim or cause of action. However, in *Osman*, the hypothetical facts would have been sufficient to say that under German law there is a possibility that the Osmans win the case if the proportionality test is decided in their favour. At the heart of the problem is the difficulty of conciliating the principle of precedence with the European model of proportionality. Lord Browne-Wilkinson in the case of *Barrett v. Enfield* has identified the problem with the application of the *Osman* judgement to English law²⁰³. "In English law, questions of public policy and the question whether it is fair, just and reasonable to impose liability in negligence are decided as questions of law. Once the decision is taken that, say, company auditors though liable to shareholders for negligent auditing are not liable to those proposing to invest in the company, that decision will apply to all future cases of the same kind. The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case." Striking out actions in Germany would not apply blanket immunities in the way it was done in *Osman* referring to a previous judgement (*Hill*). The courts

²⁰² Section 22(4) Human Rights Act 1998

examine whether hypothetically a cause of action is given (*Schlüssigkeitsprüfung*) review the case in more detail if this is the case. They might then still come to the conclusion that the plaintiff 's action is unsuccessful (*Begündetheitsprüfung*). Each case is decided afresh. The different approach by the German courts clearly illustrates the gap between the legal cultures. German courts apply the facts in each case to the given rule, here the rules on tortious liability of civil servants as set out in the Civil Code and the Basic Law. In contrast the English system of precedence does not require the courts to decide each case on its merits if a precedent exists which determines the outcome of a case. Therefore no such list of cases to be struck out as can be found in the "Supreme Court Practice"²⁰⁴ can be found in any German commentary. A further result of these different approaches is that groups of cases such as the "Abuse" or "Education" cases cannot easily be identified in German law. However, in determining the duty of an official the German statute contains no specific catalogue of such duties. In that respect a considerable amount of groups of cases can be found in German commentaries.

The decision in *Osman* will have profound impact on the way decisions in English courts will have to be taken in the future. A new approach taking the decision in *Osman* into account, can already leads into a different direction as expressed by Lord Browne-Wilkinson in *Barret v. Enfield*: "In view of the decision in *Osman*'s case it is now difficult to foretell what would be the result in the present case if we were to uphold the striking out order. It seems to me that it is at least probable that the matter would then be taken to Strasbourg. That court, applying its decision in *Osman*'s case if it considers to be correct, would say that we had deprived the plaintiff of his right to have the balance struck between the hardship suffered by him and the damage to be done to the public interest in the present case if an order were to be made against the defendant council. In the present very unsatisfactory state of affairs, and bearing in mind that under the Human Rights Act 1998 art 6 will shortly become part of English law, in such cases as these it is difficult to say that it is a clear and obvious case calling for striking out."²⁰⁵

²⁰³ *Barrett v. Enfield London* BC [1999] 3 All ER, 193 [199]

²⁰⁴ *The Supreme Court Practice*, 1991 Vol 1, part 1, Sweet & Maxwell

²⁰⁵ *Barrett v. Enfield London* BC [1999] 3 All ER, 193 [200]

English courts in their extensive use of policy arguments reveal that the functioning of public bodies and economic considerations are still more important than the protection of individual's rights. However, English Public Law is developing rapidly now and is an exciting area of law because of the changes it undergoes. These changes are mainly due to the influences of external sources of decision making such as the European Court of Human Rights and the European Court of Justice. The rule of law in its traditional interpretation by Dicey clearly states that English law does not contain a positive catalogue of Human Rights. However, with the introduction of the Human Rights Act 1998 this statement has lost its relevance. The Act confers new grounds of review on individuals and introduces a new form of compensation for Human Rights violations. The decision in *Osman* has already had an impact on the development of tortious liability of public bodies to the extent that courts will in future be more careful in striking out actions. The rulings of the European Court of Justice on member state liability have clearly added a new dimension to both systems of liability by imposing liability for legislative wrongs. This was previously not possible under English or German law. The European Court of Justices development of the new remedy of state liable might spark off changes in both systems, which have long been discussed in reform proposals. In English law the requirements for a cause of action in damages in English law, such as the general statement that an ultra vires act by itself will not give rise to a cause of action. One of the main question in England, unlike the response in Germany was concerned with the accommodation of the European head of liability into existing categories of heads of torts. This is a clear indication that English law is still concerned with remedies rather than rights. Secondly, the introduction of a requirement similar to the "sufficiently serious" test has been discussed in the context of purely domestic cases as well as in the context of the new head of tort under the Human Rights Act 1998. This could solve some of the problems encountered by English judges in denying a duty of care in negligence. The European requirement would still leave enough room for manoeuvre.

In Germany, interestingly most of the response to the member state liability was centred on the criticism that the activist role of the European Court of Justice amounted to the

exercise of legislative functions, which it clearly did not have.²⁰⁶ However, the issue of accommodating the new right to compensation into existing domestic procedures was not so much an issue. The right to compensation for infringements of Community law by the Government in Germany is accommodated in an *actio sui generis*. In German law the Court's ruling might accelerate long-standing reforms²⁰⁷. Since the 1980s reforms to this rather confusing part of the Law have been made, including the abolition of the requirement of fault in the tortious liability of the state in order to correct the awkward construction of transferred personal liability under the current legal provisions in Art 839 Civil Code and Art 34 Basic Law. The European Convention on Human Rights might influence in particular how striking out actions are going to be used in English courts in the future. First signs can be noted which indicate a more careful use of striking out actions which amounted to a blanket immunity for certain classes of defendants in damages cases.

E. Limitations to convergence

A comparison of the tortious liability of public bodies has to be seen in the light of the historical developments and the constitutional backgrounds in which the liability has developed in both countries. The historical and constitutional background in both systems provides an explanation for the differences in the approaches. Both systems vary in their deeper philosophical approach to awarding damages in liability cases against public bodies. The English justification process is marked by a very policy oriented reasoning containing elements such as economic considerations, floodgate arguments and the concern that liability might inhibit the performance of public functions. The German concept of state liability is characterised by three main considerations: "The need to control statutory bodies, their willingness to do this by using all possible means at their disposal including the courts, a complete contempt for the argument that such control would make the civil servant in question reluctant to act."²⁰⁸

²⁰⁶ see the position of the German government in *Brasserie du Pêcheur*, C-46/93 and C-48/93

²⁰⁷ Schwarze, *Das Verwaltungsrecht unter Europäischem Einfluß*, 1996, 193

At the bottom of these differences lies a different attitude in each country with regard to the definition of the state and the relationship between state and citizen. Further, the concepts of parliamentary and constitutional sovereignty in England and Germany respectively serve to explain the differing roles of the courts in reviewing unlawful action of public bodies and awarding damages. English law does not recognise the concept of the state, which might explain the absence of a clearly defined position for applicants in damages claims who are faced with judgements based on policy considerations. Rather, “the tendency to identify the notion of sovereignty with a particular institution or organ has persisted in Britain.”²⁰⁹ The term state [...] “denotes a form of political order that emerged in Europe between the thirteenth and the late eighteenth or early nineteenth century as a result of specific conditions and impulses in European history.”²¹⁰ It is not possible to give one precise definition of *lo stato*, *l'État*, *der Staat*, or *the state* as it meant different things in different countries, at different times subject to a variety of theories.²¹¹ Thomas Starkey has used the word state in England as early as 1538 and is still a term attached to positions such as “Secretary of State”. The idea of the state as “territorial phenomenon” is fully recognised in Britain.²¹² However, Britain does not attach a much greater meaning to the concept state than that. This is due to the fact that historically in England chose a quite a distinct path compared to its European neighbour “states” in the development of the concept state. In brief this is due to the impressive “continuity of its political development from its medieval roots.” Unlike Germany, which once was divided into more than 150 splinter states, Britain had not to struggle for unity. On the contrary, as early as the tenth century unity had been achieved and the Crown had a strong position. Secondly, the well-organised legal profession had developed into a close-knit society of legal experts centred in the Inns of Court in London and “an evolutionary judge-made common law served as an instrument of unification.”²¹³ Comparably the German legal profession was not centralised and the law was a rather confused combination of German customary law, which differed from state to state. As a result the principles and

²⁰⁸ Markesinis and others, *Tortious Liability of Statutory Bodies, A Comparative and Economic Analysis of Five English Cases*, 1999, 114

²⁰⁹ Dyson, K.H.F., *The State Tradition in Western Europe* (Oxford University Press: 1980) 115

²¹⁰ Böckenförde, E.W. *State, Society and Liberty* (New York: Oxford University Press, 1991) 26

²¹¹ see *supra* n. 214 and 215

²¹² Dyson, *supra* n. 214, 38

concepts of Roman law, which were studied with enthusiasm by German medieval scholars in search of a unified body of law for Germany, did not find the same reception in England. On the continent therefore the concept of state was developed mainly through the scholarship of academic lawyers who traditionally had a more leading role in the development of the law. “Legal scholars sought to provide a doctrine, a body of concepts that were based on elaborate technical distinctions and would enable lawyers and judges to act with promptness and precision, clarify the deliberations of the law-maker, and bring unity, coherence and order into the legal system. In particular the German Civil Code, drafted in 1896 is a good example of how much influence academic lawyers had in the making *Rechtsstaat* of the law.²¹⁴ The development of the concept of the state preceded the development of the *Rechtsstaat* as it is contained in today’s Basic Law. The first roots of the *Rechtsstaat* can be found in the liberal movement in the nineteenth century. The *Rechtsstaatsprinzip* in its modern version is contained in the German Basic Law and embraces the principle of the separation of powers, the protection of the individual in the courts, in particular the protection of the individual against governmental action as laid down in Art 20 (3) and 19 (4) Basic Law This constitutional background provides the setting in which the tortious liability of public bodies is embedded.

The *Rechtsstaats* principle is not equivalent to the rule of law. In summary, the rule of law is traditionally concerned with three elements, which are the equality before the law in the sense that there is no room in English law for a separate system of administrative courts, the absence of wide discretionary powers and the absence of a written catalogue of rights in a single document. Dicey’s original conception of the rule of law however is outdated with respect to the element of equality considering the developments of a body of English Public Law.

*Allison*²¹⁵ argues that the public private law distinction as known in France is a clear example that the establishment of a system of Public Law containing rules on governmental liability is facilitated by the clear institutional distinction between public

²¹³ *ibid.*, 42

²¹⁴ *ibid.*, 112

²¹⁵ Allison, *A Continental Distinction in the Common Law*, 2000

and private law courts. This might be a reasonable conclusion following a comparison of English and French law. However, I argue that it is not necessarily the institutional distinction between private and public law in terms of a system of separate courts, which strengthens the development of the law of governmental liability. The comparison with the German system has shown that it is the principle of the *Rechtsstaat*, which defines the relationship between citizen and state. The *Rechtsstaat* has no equivalent expression in the English legal system because the concept of the state did not develop as such in Britain.

The differences between the English and German system of tortious liability for unlawful governmental action are not as evident as compared to the French system. In contrast to the French System, both the English and German rules on tortious liability have developed the concept of duty of care in a restrictive way. Both in England and Germany the tortious liability of public bodies is to be enforced in private law courts. Even the German reforms on state liability do not intend to transfer the jurisdiction over state liability cases to the administrative courts. Rather, it is suggested to combine the proceedings of review of unlawful action and damages in the same court, be it a finance court, a social court or a private law court. The comparisons of English and German law in this field have revealed different attitudes of the court with regards to the position of the individual and the position of the public body. In Germany this is clearly marked by a philosophy of protection against the state and facilitating the access to damages as a clear expression of the *Rechtsstaat*. The modern German *Rechtsstaat*, however, which is the result of a development over the last 200 years contains a number of elements such as the guarantee of Human rights, the division of power, judicial independence, the protection against executive acts “and a system of compensation with justly acquired rights in the event of state interference or misconduct, the result being a state based on the principles of proportionality, justice and legal certainty.”²¹⁶ The protection of Human Rights as a main part of the *Rechtsstaats* principle clearly indicates that in Germany the constitution is supreme. This has led to the development of a “rights based culture” which also reflects upon the approach that is taken when holding public bodies liable for unlawful action. The policy arguments applied by English courts in liability

²¹⁶ Kirchhof, P., Kommers, D.P., *Germany and its Basic Law: past, present, and future: a German-American symposium* (Baden-Baden: Nomos, 1993) 23

cases on the contrary reflects an attitude which is not so much concerned with individual positions but rather the public interest.

Despite these conceptual differences in constitutional history and concepts current developments in English law might bring the German and English positions taken by judges in damages cases closer to each other. English courts have begun to develop a judicial culture of rights protection even before the introduction of the Human Rights Act 1998. The Act empowers judges to issue declarations of incompatibility with Convention rights. They will not be able to strike down legislation but the new position of judges under the Act will have an impact on their willingness to uphold individual's rights against state action. Only time will tell to which extent these legislative changes will alter the course taken in awarding damages against public bodies.

E. Conclusion

The comparison of the Tortious Liability of public bodies has shown that both legal systems recognise the general principle that public bodies should be held liable for unlawful action. Both legal systems apply rules of tortious liability enforceable in civil court actions. The German Civil Code (*Bürgerliches Gesetzbuch*) provides for a special provision of public liability of civil servants, which is in force since 1901²¹⁷. The Weimar Constitution and the Basic Law have added a constitutional provision in order to transfer the personal liability onto the state. Therefore the German rules on state liability are now based on a combination of private and public law. The fact that for historical reasons state liability is still adjudicated under the jurisdiction of the civil courts has been heavily criticised and the quest for a transfer of state liability to the Administrative courts is becoming stronger. English law on state liability provides for heads of tort based in private law. The history of the public law liability in England equally shows that it is closely connected with the development of the private law liability. It appears, however, not clear whether the liability of public bodies is the result of an extension of the principles of private law liability or vice versa. "On the one hand, section 2(1) of the Crown Proceedings Act 1947 introduced the liability of the

²¹⁷ Art 839 Civil Code

Crown in tort by providing that “the Crown shall be subject to all the liabilities in tort to which, *if it were a private person of full age and capacity*, it would be subject (emphasis added). On the other hand, the English law of tort and contract developed earlier from the writ of trespass in which the plaintiff originally had to allege that wrongs had been committed *vi et armis and contra pacem regis*.²¹⁸

However, the English law on state liability is similar to the German system a hybrid of private and public law. However, with the introduction of the Crown Proceedings Act 1947 which abolished most of the Crown immunities and the developments of the head of tort of negligence in the English case law, the head of tort in misfeasance in public office and the liabilities under the Human Rights Act 1998 a system of public law liability is emerging. Unlike the French law on liability of public bodies neither the English nor the German law on tortious liability of public bodies recognises a liability for unlawful action per se. In that respect English and German law takes a similar approach. In German law the civil servant is held liable if he was at fault (*Verschulden*), i.e. if he had intentionally or negligently breached his duty of care. German law distinguishes further between light, ordinary and gross negligence (Art 267 Civil Code). However, in the determination of the standard of care is an objective one. Equally, the English requirement of breach of duty determines that the defendant was negligent if the appropriate level of care was not applied. Both the English and German system apply the concept of statutory duty, which has to be designed for the protection of a limited class of people. In both countries this enables the courts to restrict the number of applicants. Great similarities can be detected in the rules of causality. As discussed above, both systems recognise a bifurcation in the concept of causation. The first stage is concerned with a but for test or *conditio sine qua non* formula. The second stage is in both legal systems concerned with more legal issues such as remoteness. This part of the requirement of causality, however, allows principles of Human Rights protection in Germany to determine the outcome of a case as shown above in the German case on *Breach of procedural rules and causation*²¹⁹

²¹⁸ Allison, *A Continental Distinction in the Common Law*, 2000, 5

²¹⁹ OLG Oldenburg, *VersR* 91, 306

CHAPTER SIX

OVERALL SUMMARY AND CONCLUSION

This comparison has shown that the traditionally divergent positions, which are taken in the control of administrative action in England and Germany, display some common ground in very general terms on which decisions are being taken. The formulation of these general observations is valuable in the preparation of a transnational approximation of judicial review mechanism for the establishment of comparable levels of judicial protection in Europe. These results may be useful for future developments of a common system of judicial review across Europe, even though these results may only represent two pieces in the jigsaw. The comparison has also identified major differences and assessed the reasons for the diverging developments in a historical perspective. The identification of these differences is equally important because of the need to find compromises between divergent systems.

Secondly, the thesis was concerned with an analysis of the degree of Europeanisation of the national judicial review systems and the concept of public liability as it is currently emerging. Here, some changes can be noted in both legal systems, which have led to a slow convergence of the systems. The changes in England are marked by an increasing openness for more transparency in the decision-making and the development of a more rights based culture. The substantive review of administrative decision through the application of sharper tools such as proportionality and substantive legitimate expectation mark a new era. Germany, on the other hand displays very high standards of review. The changes in Germany which were provoked mainly by case law of the European Court of Justice indicate the need to reduce the standard of review in some areas, such as the protection of substantive legitimate expectation in the context of the recovery of state aid. The neglect of procedural protection which is illustrated by generous provisions which allow the in-trial curing of procedural effects displays an approach in Germany which is very focused on the substantive correctness of decisions. This attitude might, in the future lead to controversies in the context of European laws.

Nevertheless, limitations to a convergence are inherently set by each national systems constitutional framework. The reasons for the different developments of both legal systems in the nineteenth and early twentieth century can not be ignored and will remain to an extent to preserve the national character of both systems.

The variety of results, which have been identified in the four main chapters of this thesis were concerned with issues dealing with the institutional aspects as well as systematic aspects of judicial review and public liability in England and Germany. However, the nature of this comparison required the analysis of institutional contexts as well of the substantive and procedural judicial review mechanisms. The conclusion will summarise the main results. The questions asked were concerned with identification of common principles and differences in a historical context, the degree of Europeanisation, which has led to an approximation of nationally divergent positions and the limitations, which are provided by each system's constitutional framework in which judicial review operates. The comparison focused on the development of a system of judicial review of administrative action in a historical perspective, the judicial control of the exercise of discretionary powers, fair procedures and their judicial review and the liability of public authorities in tort.

A Common principles

The comparison has identified some common principles applied in both jurisdictions. Most importantly to note is that both systems have opted for courts rather than administrative agencies to review the lawfulness of administrative action. In that respect Dicey and Rudolf von Gneist took similar positions in the nineteenth century. The judges in both systems are specialised to deal with administrative law matters even though neither of them has received any special administrative training. The Bowman report has introduced changes not only of a cosmetic nature but also concerning the naming of the Queen's Bench Division into Administrative Court but has also introduced an increase in specialisation of the judges sitting on Administrative law cases.

Both systems provide a development of a system of writs, in England the application for judicial review and in Germany the different types of action (*Klagearten*), which are designed for the pursuance of public law actions. The English system is even easier to use, as only one application is necessary.

With regard to the control of the exercise of discretionary powers some general common principles can be observed. Both systems accept the existence and necessity of an area of administrative activity, which is free from any judicial interference. In both countries the exact meaning of the concept of discretion is equally difficult to determine. There is no legal definition for it, not even in Germany. In both systems the concept of discretion can be described as the product of the conflict between modern administration and the rule of law or the *Rechtsstaat*, respectively. It is highly dependent on the constitutional background, i.e. the separation of powers and the constitutional weight that is given to the protection of Human Rights. In both systems the question of the constitutional legitimacy has been discussed widely and both the rule of law as well as the guarantees under the *Rechtsstaats* principle form similar legal limitations for the exercise of discretionary powers. Cases such as *Pierson* illustrate the powerful use of the concept of the rule of law in holding the exercise of the Home Secretary's powers unlawful.

The exercise of discretion is subject to a limited judicial control. Both systems recognise that a review can take place only for errors of law and that the courts may not interfere with considerations of expediency of discretion or the merits of the decision. The grounds of review bear some resemblance. Some commentators have even described them as being identical. However, differences can be observed with regard to the intensity with which the grounds of review are being applied. Differences exist in particular with regard to the substantive review of decision under the headings of *Wednesbury* unreasonableness and proportionality (*Verhältnismäßigkeit*).

Both systems recognise the right to a fair hearing and that the refusal of the opportunity to be heard constitutes a ground of review. The right to a fair hearing in the decision making process is in both systems modelled on the court procedures. The right is subject to certain limitations such as in urgent situations. The denial of the opportunity

to be heard can be cured at a later stage. Having said that as has been shown English courts are less likely to cure a procedural error. Finally, the duty to give reasons is an important part in the decision making process. Again, the absence of reasons is in both countries a ground of review. The duty to give reasons is increasingly applied by English courts so that it has been said that the duty has become the rule and the denial of giving reasons the exception.

Chapter Four has shown that the liability of public authorities is a highly complex area of law, which in both countries is in need for reform. It displays the difficulties courts have faced in dealing with the liability of public officials in the exercise of official functions. For historical reasons, in Germany state liability is within the competence of the ordinary civil courts. The difficulties both systems experience is based on the complex situation public officials find themselves in the exercise of public functions. In Germany, the Civil Code had introduced the liability of public officials in its Article 839 I since its first draft in 1900. However, the public law dimension in form of a transfer of the individual liability of the official to the state was added at a later stage and is now contained in Article 34 of the Basic Law. This hybrid construction is still considered as unsatisfactory because it results in a transfer of liability on to the state. This construction can be understood as an indirect liability of the state. It is not clear whether this construction can be categorised as a private or public law claim. Due to the fact that the liability is originated in the claim against the public official personally, it is dependant on the fault on his side. Despite the fact that the liability in tort is based on these two provisions in the BGB and the Basic Law, similar to the development of the law of official liability in English courts, the main elements of the tort have been developed in the case law of the civil courts.

Equally complex is the situation in England where as a rule the ordinary heads of tort are applied for claims in damages based on the unlawful exercise of public functions. The ordinary tort rules such as negligence or breach of statutory duty have been modified in a way to fulfil the needs to take account the special function public officials fulfil. In other words, the duty of care has become the most difficult requirement to a successful damages claim and the courts have developed legal tools such as the use of

policy arguments to limit the amount of cases. Further, English law has a special public law tort of misfeasance in public office.

In both systems liability is not applied per se for unlawful action but is limited by the necessity to establish a duty of care and an element of fault. The most striking similarity can be found within the tort of breach of statutory duty. Here, the duty must be intended for the protection of a limited class of people. Similarly, the German tort contains the requirement of a breach of a protective norm, which is designed for the protection of a limited class of people. The requirement of causality shows similarities as well. Both systems contain a bifurcation of the causal link, which is a basic requirement in the establishment of the claim. In both systems the law on the tortious liability is in need for reform. In particular the requirement of fault in both systems is under scrutiny. Whether European influences such as the requirement of “sufficiently serious breach” will lead to a reform remains to be seen.

B Differences

The main difference between the two judicial review systems is rooted in its constitutional setting and this is illustrated by the justification of judicial control. In England the basis of judicial review has been discussed widely and there are three competing models of justification of judicial review. The traditional approach was seen in the principle of *ultra vires*, which justifies judicial review as a means of ensuring that the intention of Parliament has been carried out. Traditionally, the competing model has been the common law theory, whose representatives argue that the theory of *ultra vires* is too limited in scope and unable to explaining the content of the grounds of review and the provide a justification for the control of non-statutory powers. Further, the *ultra vires* theory is unable to allow a further development of the grounds of review toward a more substantive control. On the other hand, the German judicial review system is clearly based on the principle of full judicial protection against administrative action as laid down in Article 19 IV of the Basic Law¹ which forms one of the limbs of the

¹ Article 19 IV

“Where rights are violated by public authority the person affected shall have recourse to law. In so far as no other jurisdiction has been established such recourse shall be to the ordinary courts. [...]”

principle of the *Rechtsstaat*. Critical discussions within court decisions concerning the constitutional role of the courts as one can find in English decisions are less likely to be found in German court decisions.

The jurisdiction of the Administrative Courts is laid down in Article 40 of the Law on Administrative Courts (*VwGO*). Accordingly, all public law disputes are under the jurisdiction of the Administrative Courts, except for matters of a constitutional nature. Unlike in England therefore, the granting of a remedy is not within the discretion of the courts but based on a statutory duty subject to the fulfilment of the standing requirements. This statutory duty as laid down by the Law on Administrative Courts has put the German courts into legislative fetters, which are not experienced in that way by the English courts.

The historical development of the German Administrative Courts illustrates how the emergence of a separate body of Administrative law and distinct public law principles such as the principle of proportionality in the nineteenth century contributed to the establishment of separate Administrative courts. The general principles of Administrative law such as the concept of the Administrative Act (*Verwaltungsakt*) were drafted in 1895/6 by Otto Mayer, which is the classic collection of the Administrative law of the liberal *Rechtsstaat*. Its clear description of concepts and coherent structure has influenced modern German Administrative law.² The need for a separate system of public law courts was widely debated. However, Germany's development was much more encouraged by the need to deal with the increasing body of Administrative law principles in courts separate from the ordinary jurisdiction. On the contrary, in England, no body of systematised Administrative law was developed. The English development was rather more characterised by a remedial approach. The old prerogative writs of certiorari, mandamus and declaration were reformed. As opposed to the remedies provided in the German Administrative courts (which are only directed against administrative authorities) the prerogative writs were originally directed against lower courts. No categorisation of the public law took place in England; there was no such need to create separate courts dealing with a separate system of rules.

² Maurer, *Allgemeines Verwaltungsrecht*, 1999; 18

Dicey's conception of the rule of law, which was partly based on a misconception of the French *Droit Administratif* also played a major part in the neglect of a set of separate courts.

The development of what has been described as the substantive *Rechtsstaat* in the second half of the twentieth century has led to the increasing intensity of judicial control in Germany. The constitutional guarantees in Article 19 IV and Article 1 III³ ensure the protection of the Basic Rights in the Administrative courts. This has led to an intensive control of the exercise of discretionary powers through the frequent application of the principle of proportionality, the protection of legitimate expectation and the principle of equality. Further, the Federal Constitutional Court as the guardian of German constitutional rights has supported the protection of individual rights.

Due to the requirement to uphold individual's rights the German model of Judicial review of the exercise of administrative powers is marked by a high degree of substantive review. Even though the courts may not interfere with the expediency of a discretionary decision as laid down in Article 114 of the Law on Administrative courts, in practice they carry out a more searching review than the English courts. The application of the principle of proportionality follows a three-step test, which analyses the suitability, the necessity and the overall proportionality of the administrative decision. In carrying out this precise test courts are being criticised for touching upon the merits of a decision, which may lead to a replacement of the original decision.⁴ Another concept, which leads to an increase of the intensity of judicial review, is that of reduction of the discretion to zero (*Ermessensreduzierung auf null*). Accordingly, the courts may replace the exercise of discretionary powers if only one particular decision could have been lawful.

In contrast to the English uniform concept of discretion the German system applies three different grounds of review, depending on whether so called undefined legal concepts, real discretion or discretion in planning decisions are the subject of review. This

³ [...] the following Basic Rights shall bind the legislature, the executive and the judiciary as directly enforceable law.

conceptual differentiation narrows the scope for the exercise of discretion in a way, which finds no parallel in England. This distinction, which is not only complicated but also questionable, is unknown in English law and illustrates well the German affinity to categorisation and systematisation. Having said that, a tendency in Germany can be observed in the field of planning decisions where the Federal Administrative Court has held that in cases with a high content of technical detail a less intensive standard of review should be applied.⁵

The comparison has also shown that English courts are more prepared to review the decision-making process rather than the result of the decision itself. The exception is the application of the *Wednesbury* test, which under its second limb is concerned with the reasonableness of the result. German courts, on the other hand are required to protect the Basic rights, which are now the subject of the majority of administrative disputes. This has led to a frequent application of the principle of proportionality, which leads to an intensive review of the result of the decision. In a climate in which the Basic rights are heavily at stake in administrative cases, courts are increasingly less prepared to accept areas of discretionary powers, which are to be free of judicial control. This constitutionalisation of judicial review in Germany appears to override the (statutory) limitations to the judicial review of discretionary powers. The detailed requirements as contained in the German proportionality test, i.e. the necessity, the suitability and the proportionality allow a transformation of all policy and technical questions, which are at the merit of a discretionary decision into legal questions. This tendency has been criticised but no legal limitation to the application of the proportionality principle exists.⁶

However, the increased use of the principle of proportionality in English judicial review cases illustrates a change towards a more substantive review. Nevertheless the application of the principle of proportionality in England still differs from the thorough test applied in German courts. The traditional differences are also clearly illustrated by

⁴ Schwerdtfeger, *Öffentliches Recht in der Fallbearbeitung* 1993, Rn 99; Kopp in Götz/Klein/Starck, *Öffentliche Verwaltung*, 146 (151 and 153)

⁵ *DVBl* 1998, 339

⁶ Oeter, S., "Die Kontrolldichte hinsichtlich unbestimmter Begriffe und des Ermessens", Frohwein, J.A., *Die Kontrolldichte bei der Überprüfung von Handlungen der Verwaltung*, 1993, 266-277 [276]

the greater weight given to procedural errors in the English decision-making process. This emphasis on the procedural soundness of decisions has had a compensatory function for the lack of substantive control. In Germany the greater weight put upon the correctness of a decision in the substantive decision has reduced the relevance of purely procedural errors. The German rules of procedure enjoy a mere serving function, which means that their misapplication can be cured easily even in the court procedures. This attitude has been illustrated by the controversial changes made to the provision on the law of the Administrative procedures in 1996. This has even led to the neglect of procedural errors in the context of discretionary decisions.

This fundamental difference is based on the different conception of the role of the courts in administrative matters. The German approach is based on the ideal that the courts will find the “right” or correct decision. Due to their neutrality and distance the courts are regarded to be more able to achieve this correct decision.⁷ The inquisitorial procedure as applied by the German courts complements this attitude. The burden of proof rests upon that party which has more access to the relevant facts and information. Accordingly, the German courts have to ensure that the authorities disclose all facts and produce evidence, which is accessible to them. On the other hand, the English adversary procedure puts the judge into a less active position; he does not initiate the taking of evidence but relies on the parties’ motions. Cross-examination and discovery are only available to a limited extent and the new part 54 of the Civil Procedure Rules has not improved that situation.⁸ The onus of proof lies on the applicant and it might be hard in the absence of a duty to give reasons to establish his claim.

Finally, differences could be found in the law on liability of public officials. Even though both systems apply the rules of tort in some modified version, great differences can be observed between the reasoning of English and German judges. The most striking difference can be observed in the use of policy arguments in English courts as a means to restrict the availability of a remedy. The use of policy arguments is not alien to German legal reasoning and as chapter four has shown policy arguments served the

⁷ Classen, “Strukturunterschiede zwischen deutschem und europäischem Verwaltungsrecht” (1995) *NJW* 1995, 2457 [2461]

⁸ However, recent case law indicates that judges will order cross-examination

drafters of the BGB in their work at the end of the nineteenth century.⁹ Similarly, the case of *Ermacov* illustrated the use of policy arguments which led to the denial of allowing the in-trial curing of a procedural effect. Similar arguments are currently being brought forward against the new legislation in Germany which provide for the opportunity to cure a procedural error in trial.

C. European influences and convergence

The comparison has shown that both systems are affected by the influences they are exposed to by the European Courts. Both, the jurisprudence of the European Court of Justice and that from the European Court of Human Rights affect the national judicial review systems and the availability of tortious liability of public bodies. The thesis has shown two main differences in how these influences operate. Firstly, in the case of England, the influence of the dimension of the European Convention on Human Rights is far greater than in the case of Germany. This is due to the protection of the Basic Rights in the German constitution and the institutionalised protection of these rights in the Federal German Constitutional Court. Further, the Convention in Germany only ranks as an ordinary statute. Secondly, the effects of the European influence clearly mirror the state of the legal systems, respectively. The most important influence on the English judicial review system and the field of official liability is the development of a more rights based culture with an increased application of principles for substantive review. In Germany, on the other hand the nature of the European influences can be described as having the effect of attempting to reduce standards of review which are too intensive.

The case of *Upjohn*¹⁰, for example is an interesting example for the different approaches to the concept of discretion as taken equally in England and by the European Court of Justice and in Germany on the other hand. The European Court of Justice confirmed the position taken by the English court and confirmed that concepts such as safety, therapeutic efficacy and quality are of discretionary nature and are subject to a limited

⁹ Markesinis and others, *Tortious Liability of Statutory Bodies, A Comparative And Economic Analysis of Five English Cases*, 1999, 58

¹⁰ Judgment of 21.1. 1999, I-223

judicial control. For the development of the English standard of review this confirmed the position taken in English law, i.e. the limited intensity of review of the discretionary concept was sufficient. For the German standard of review which would have applied a full review of the concept the decision does not point to a general change in the conception of discretionary powers but in the particular case it has implications of how the national legislation that has implemented the directive will have to be treated as conferring discretionary powers.¹¹ This is the consequence of the indirect effect of the Directive. However, the case shows that the European Court of Justice applied a less intensive standard of review. The German courts are under no duty to follow that approach because they comply with the minimum requirements as set out in *Upjohn*.¹² Nevertheless, it has been argued that the German standards of review should be reduced in order to be equalised with the European approach. Whether this is achievable is dependant on the limitations set by the German constitutional background.

This thesis has illustrated the most remarkable change in English Administrative judicial review by the increasing recognition of Human Rights standards. English courts have illustrated a developing tendency to accommodate the protection of individual rights and to integrate new grounds of review such as the principle of proportionality and substantive legitimate expectation. Due to the absence of a catalogue of Human Rights in the British constitution and the increasingly active role of the courts in ensuring the protection of Human Rights, English law has shown enormous flexibility for the adaption of European standards. Due to the incorporation of the Human Rights Act 1998 the principle of proportionality will have to be taken into account in cases brought under the Act. The courts are not bound to apply it in exactly the same way as applied by the European Court of Human Rights. Rather, it will take a British shape. The effect of this is not so much a transplantation of a foreign concept but the “cross-fertilisation” of the English approach with standards of European origin. Nevertheless, the courts have discussed or applied the principle in numerous decisions even before the enactment of the Human Rights Act 1998. The cases of *Simms*, *Daly* and *Pro Life* have illustrated an increasing acceptance of the principle in English law. In *Simms* Lord Hobhouse stated that “In my judgment, this extreme policy is both unreasonable and

¹¹ Götz, V., “Europarechtliche Vorgaben für das Verwaltungsprozeßrecht”, (2002) *DVBl* 1 [5]

disproportionate and cannot be justified as a permissible restraint upon the rights of the prisoner.” Nevertheless, sometimes the application of the principle is still tied in with the *Wednesbury* test and closer to a negative test of proportionality, i.e. a test of disproportionality. The comparison has shown that English courts do not apply the test with the same rigour as German courts and that the anxiety of engaging in a merits based approach will accompany the further development of the principle in English law.

In Germany, the principles of proportionality, equality and substantive legitimate expectation are well established. They are based on the constitution and the concept and concerning the revocation of lawful and unlawful decision detailed provisions are laid down in the Law on Administrative Procedure. European influences in Germany are characterised by a request to lower the standard of review, in the case of *Alcan* the European Court of Justice required the German provisions on the protection of substantive legitimate expectation to be modified so that the provision in Article 93 EC Treaty which aim to avoid inequality in the granting of state aid could be upheld. The modifications led to a misapplication of those provisions which were in favour of the company who had received the grant.

Further, procedural safeguards such as the duty to give reasons in England have undergone changes which may partly be due to the influence of European principles. Traditionally, there was no general duty to give reasons in English common law. The Tribunals and Inquiries Act 1992, however required reasons for decisions by tribunals and ministers. However, this general rule appears to have been replaced by a greater willingness to accept the benefits of reason giving. The case of *Doody v Secretary of State for the Home Department*¹³ indicates a move towards reason giving. Further impulses to an increased procedural protection of individuals have come from the application of Convention rights to the law of planning in England. In Germany the new reforms to the Law on the Administrative Court Procedure Law might give rise to case law by the European Court of Justice which has indicated in previous decisions that it is not as generous as the German courts in allowing in trial curing of procedural errors.

¹² Schwarze, (2000) *NVwZ* 241 [249]

Strong evidence of European influences has been found in the area of liability of public bodies in tort. The cases of *Osman v UK* and *Z v UK* have illustrated the divergent positions between the standard of liability of public bodies in England and the protection of Human Rights under the European Convention on Human Rights. The European decisions have led to changes in the approach taken by English courts. Particularly after the decision in *Osman* English courts have taken a more cautious attitude towards striking out actions due to the lack of a duty of care on policy grounds. The decision in *Z v UK* illustrated well, though, that the development of similar levels of judicial protection is dependant on a dialogue between the European courts (here the European Court of Human Rights) and domestic courts who act together in the development of a common law for Europe. Further, the introduction of the “sufficiently serious breach test” as established by the European Court of Justice in *Brasserie* into the domestic law of negligence and the liability for breaches of Convention rights under the Human Rights Act 1998 could lead to more coherence and help to systematise this complex area of law. Similarly, the effects of accommodating member state liability into German law might contribute to an overdue reform of the law of official liability.

In conclusion, a degree of convergence between both judicial review systems can be observed, however it appears to be mainly due to the flexibility and openness of the English legal systems to embrace new standards of review in Judicial review and in the law of official liability.

D. Limitations to convergence

It appears desirable that a level playing field in judicial review in Europe is to be aimed for to avoid inequality and make it more attractive for foreign companies, for instance to seek review or damages in one country rather than another. However, despite trends which indicate a slow convergence between the two systems the thesis has shown that there are limits set to such a development.

¹³ [1993] 3 All ER 92

The comparison has shown that Judicial review of administrative action in both jurisdictions is heavily influenced by its constitutional backgrounds. In Germany, explicit mandates such as Article 19IV Basic Law require a full judicial control of administrative action save in the exercise of discretionary powers. However, as has been shown even the review of discretionary powers applies tools such as the principle of proportionality, which require the intensive control of administrative decision-making. The constitutional legacy of Germany's Nazi Dictatorship is the move towards the substantive *Rechtsstaat*, which requires the protection of the Basic rights in the Administrative courts. This has led to a constitutionalisation of the judicial review process, which has not been without criticism¹⁴. However, the protection of substantive rights positions reaches further than just to the end of the Second World War. It is unlikely that the German law of administrative procedure will ever move towards greater emphasis on procedural protection in the decision-making process because of the German tradition which seeks justice in the substantive correctness of the decision. The political costs of the *Rechtsstaat* with its emphasis on the judiciary as the guardian of the correct decision results in the loss of control in the hand of administrative decision-makers. A reduction in the intensity of judicial control would require a change of the constitution and this is unlikely to happen.

Equally, in England the constitutionalisation of judicial review as witnessed recently will be marked by limitations set by traditional constitutional principles, in particular the principle of parliamentary sovereignty. Any move towards a more substantive review will have to comply with the merely supervisory function of the courts in the control of administrative action. It was pointed out recently that the new constitutional review "should not, however permit judges to usurp the making of policy or to meddle with the merits of official decisions. Their role will be to engage with and elucidate the necessary qualities of our changing constitutional democracy."¹⁵ However, as the German example illustrates the application of the principle of proportionality as it is increasingly applied in English courts inevitably transforms questions of policy into legal questions. Therefore the rigour with which courts will pose the question of

¹⁴ Scharpf, *Die politischen Kosten des Rechtsstaats*

¹⁵ Jeffrey Jowell, (2001) "Beyond the Rule of Law, Towards Constitutional Judicial Review", *Public Law*, 2000, 671 [682]

proportionality and answer it will be less strong than in Germany. Nevertheless, the courts have already found ways of applying varying standards of review under headings other than the German three-step test. Any further development of the grounds of review beyond this careful and pragmatic point might trespass upon the limits of parliamentary sovereignty. In the absence of a written constitution (on the basis of which the German concept can be justified) the development of further principles would be unconstitutional in the UK. Finally, it can be carefully suggested that a trend toward comparable levels of judicial review protection in administrative law matters is emerging. This is mainly due to the flexibility of the English legal system and the accommodation of a more rights based approach, which can be witnessed by the application of new legal control mechanisms. The German system on the other hand is a lot less prepared to change due to the strict constitutional mandates of full judicial protection. Therefore despite a trend towards more similar levels of judicial protection against administrative action differences in the approaches taken by these two major legal systems will remain.

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