

Principles of Public Law

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FREEDOM OF MOVEMENT

27.1 Introduction

Freedom of movement within the territory of a Nation State is a fundamental right in a democracy; without such a freedom, we cannot be said to be truly free to make independent choices. Restrictions on individuals' movement across international boundaries are more generally accepted, partly due to historical circumstance, partly due to the need for controls to deal with advances in global travel. This chapter deals with the ability of people to move within and across State frontiers.

The law on freedom of movement has developed in three main areas: immigration; the rights of asylum seekers; and the rights of citizens of the European Union to move across inter-State boundaries.

There is no right to be free of border controls when moving into and out of the UK. This level of restriction on the freedom of movement of non-nationals and, to a certain extent, of nationals as well is due in part to the geography of the UK. In March 1992, the then Home Secretary suggested that this could have the effect of liberating residents of the UK from other controls common in landlocked countries:

Our island geography enables us to place the main weight of our immigration control at ports of entry. For us, that is by far the most effective way of doing it. It also means that we can avoid the need for intrusive in-country controls such as sanctions on employers who employ illegal immigrants or identity cards or random police checks, which other countries without effective means of controlling their borders find necessary [(1992) HC Deb Vol 73 col 31].

The Secretary of State's speech does not give the whole picture; in fact, employers who disregard the visa status of their employees may be subject to sanctions if it comes to light that the employee in question has overstayed or did not have right of entry in the first place.

Immigration control is one of the most controversial areas of government policy. Feldman suggests that if we take as the litmus test of a democracy the mood of the general public, it may be that, in the field of immigration control, 'rights' (of free movement) tend in one direction, 'democracy' in another (Feldman, D, *Civil Liberties and Human Rights in England and Wales*, 1993, Oxford: OUP, p 349). On the other hand, a generous spirited approach towards the admission of foreigners has allowed into the country people such as Marx, Engels, Garibaldi and Lenin. As Robertson has observed, some of their modern counterparts would today be deported as undesirable aliens

(Robertson, G, *Freedom, the Individual and the Law*, 7th edn, 1993, London: Penguin, p 387).

As far as asylum seekers are concerned, the UK is bound in international law by the provisions of the United Nations Convention relating to the Status of Refugees 1951. It has been said that they enjoy a right 'to humanity', 'anterior to all law'. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention on Human Rights (ECHR) to take note of their violation (*R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants* (1997)). International law on the rights of asylum seekers falls outside the scope of this book, though the recognition of these basic rights in the procedures governing asylum decisions are discussed in this chapter (see below, 27.5).

Freedom of movement has been given a much more significant role to play in the hierarchy of rights in the UK by accession to the EU. Free movement of persons is one of the fundamental freedoms protected by EC law (see above, Chapter 7). The UK's obligation under these provisions of Community law has not yet had a significant impact on rights of entry to non-EC nationals to the UK. In fact, it has been argued that British immigration law and practice have signally failed to reflect Community law since joining the Community (see Vincenzi, C, 'European citizenship and free movement rights in the UK' [1995] PL 259). The European Court of Justice has found the UK to be in breach of its obligations on several occasions, particularly where the Home Office purports to deport someone on grounds of public policy. Advocate General Jacobs said in an opinion in 1992 that a Community national who goes to another State is entitled:

... to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular, those laid down in the ECHR. In other words, he is entitled to say *civis europus sum*, and to invoke that status in order to oppose any violation of his fundamental rights [Case C-168/91 *Konstantinidis v Stadt Altensteig* (1993)].

It is, therefore, to Community law that we will have to turn to find a developed jurisprudence regarding the right to free movement and it may be that Community law in the future will prove the source of that right in respect of the movement of people who do not qualify for EU citizenship now. As Vincenzi says:

In a State without a written constitution, and without a constitutional court, the burden of giving effect to the rights of an estimated eight million EU citizens who annually visit this country falls entirely on those individuals in the ordinary courts and tribunals, usually without the assistance of legal aid. The fact that other Member States have a similarly undistinguished record in this field cannot justify this country's failure [p 274].

27.1.1 The scope of freedom of movement

Although there is no absolute right of non-nationals to enter the country, the laws on immigration and citizenship do not draw a clear line between nationals and aliens. At any given time, there are large numbers of people in this country with limited rights of entry and abode who fall between these two categories. It is the manner in which these limited rights are granted which gives rise to most litigation in this area, challenging the Home Office's standards of fairness and observation of procedural rights. Several other rights are often taken into consideration in this litigation, such as the right to life or privacy. Although the ECHR does not impose obligations on signatory States to allow entry to non-nationals (*Abdulaziz, Cabalas and Balkandali v UK* (1985)), the rights set out in the ECHR may be enjoyed by nationals and non-nationals alike. This provides certain important safeguards to aliens who face deportation or whose asylum applications are turned down. There is a Protocol to the ECHR – not yet ratified by the UK – which guarantees freedom of movement of lawful residents and the rights of entry of nationals into their own country (Protocol 4 to the ECHR). This Protocol also prohibits expulsion of nationals and the collective expulsion of aliens.

The government also has a limited power to curb the movement of its own nationals by restricting them to one part or other of the UK. The following sections will explore the extent to which the power to make exclusion orders under prevention of terrorism legislation infringes basic rights of movement. In addition, the movement of nationals and lawful residents alike are restricted by a range of restrictions imposed by the civil and criminal law, in particular, trespass.

27.2 Movement out of the UK

British people think of their freedom of movement in and out of the UK as dependent on having a valid passport. In fact, the grant of a passport is an exercise of prerogative power (see above, 2.4.3) which was based originally on the need to protect British subjects abroad; far from being a condition of travel out of the country, it was a document issued to those who wished to leave the country (freely) to ensure their safety. In fact, the right to leave the country is one of the rare breed of rights that were protected in statutory form in English law long before the Human Rights Act 1998; the Magna Carta guaranteed the right of individuals to travel abroad as early as 1215. The only measure that prevented movement out of the country was the writ of *ne exeat regno*, under which the Crown could prevent someone from leaving the realm when the interests of the State demanded it. Although the writ (a formal order of the court) still exists, its significance has been reduced by modern practicalities of travel. Since all countries require possession of a valid passport before allowing entry to a traveller, it is not in the carriers' interests to allow a

passenger to embark without a passport. Indeed, one commentator has observed that the most effective method of limiting asylum applications is through imposing heavy fines (£2,000 per passenger) on the airlines and shipping companies which carry fugitives whose entry documents are not correct:

The government has in effect 'contracted out' immigration control of refugees to the airlines, which have avoided financial penalties by refusing to fly refugees and in several cases by removing them from passenger planes by tricks or force [Robertson, G, *Freedom, the Individual and the Law*, 7th edn, 1993, London: Penguin, p 412].

Although carriers are legally obliged to ensure that they bring into the UK only passengers with valid identity and entry clearance documents, there is still no legal requirement for a passenger to possess a passport before leaving the country. In the light of this it is ironic that national law obliges people to be in possession of a British passport in order to prove British citizenship *within* the UK. There is no statutory appeal against a decision by the Home Office to refuse or revoke a passport but, in judicial review proceedings, an applicant may challenge a decision on the basis that no reasons have been given (*R v Foreign Secretary ex p Everett* (1989)). There is, on the other hand, no legal entitlement to a passport (see Finlay CJ in *Attorney General v X* (1992)).

27.3 Movement into the UK

As was noted above, the majority of cases in this area are taken by non-nationals who wish to challenge immigration officers' decisions to refuse entry, or the Home Office's decision to deport. Before considering the case law, it is first necessary to set out in a very basic form the complex distinctions laid down by UK law between different types of nationals and non-nationals, or aliens.

27.3.1 Nationals

Under the British Nationality Act 1981, the right of abode in the UK is primarily enjoyed by British citizens and their offspring, grandchildren or parents. Entry and residence are also allowed to some Commonwealth citizens. There are other complex categories of British citizenship in the Act which do not entail an automatic right of abode, including the following:

- British protected persons;
- citizens of the Republic of Ireland;
- British dependent territories citizens: these are people who were citizens of the UK and colonies before the British Nationality Act came into force but only had a connection with a British dependent territory, such as Gibraltar;

- British overseas citizens;
- residents of Hong Kong who became British nationals (overseas) citizens at the end of British rule in 1997;
- those born in an independent Commonwealth country before 1949: these are British subjects without citizenship.

The rules and procedures governing the entry of citizens of EC Member States are dealt with below, 27.4.

27.3.2 Non-nationals

The category of the British Nationality Act 1981 which most clearly excludes citizenship and with it the right of entry and abode is the residual provision referring to 'aliens'. Even without any prospect of achieving British citizenship by naturalisation or other means, some non-nationals may qualify for limited entry under the Immigration Rules 1994 which allow in students, patients seeking private medical treatment, people with work permits and people wishing to establish themselves as investors (the present minimum is £1 m).

However they seek entry into this country, non-nationals have to comply with procedures and qualifications laid down by the immigration legislation, not all of which is subject to judicial control. Short term visitors and students, for example, may find that they have no redress from a refusal of an immigration officer to grant entry on the basis of misinformation. Some decisions made by immigration authorities to refuse entry, impose conditions or curtail leave to enter have to be accepted without further hearing. Those decisions that are appealable fall broadly into the following four categories:

- (a) refusal of entry;
- (b) decisions on deportation and removal (see below, 27.5);
- (c) refusals to extend leave, the imposition of conditions and admission and the curtailment of leave;
- (d) asylum decisions (these are appealable to a Special Adjudicator (see below, 27.9)).

Appeals against these are heard in the first instance by a board of Home Office 'Adjudicators'. It is possible to appeal with leave from the Adjudicator to the Immigration Appeal Tribunal and, from there, on a point of law, to the High Court. In most instances, applicants can only pursue their appeals from abroad, and even asylum seekers may be removed from the country to pursue their claims if they can be sent to a safe third country (see below, 27.8). Judicial review is available of the Home Secretary's decisions in these cases but permission will be refused if the applicant has not exhausted all their avenues of appeal (*R v Secretary of State for the Home Office ex p Swati* (1986)). As with all judicial review challenges, applicants complaining about deportation or

removal decisions have to base their challenge on the three grounds for judicial review: legality; rationality; and procedural fairness (see above, Chapter 11). The courts have, however, reserved their power to apply a stricter level of scrutiny to judicial review applications in asylum decisions where the applicant's life is at stake (*R v Secretary of State for the Home Department ex p Bugdaycay* (1987), see above, 15.5.1).

Clearly, there is a range of decisions on residence permits and citizenship that remains outside these categories. This does not mean to say that the court's supervisory jurisdiction is excluded altogether. Under the British Nationality Act 1981, the Home Secretary used to refuse the issue of a naturalisation certificate without giving reasons. The Act also states that his decision should not be reviewable in any court of law. However, in *R v Secretary of State for the Home Department ex p Fayed* (1997), the Court of Appeal held that the Home Secretary had a duty to act fairly by affording applicants who have been refused citizenship an opportunity to make representations on any matters of concern relating to their application. The Government has indicated in its White Paper (*Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum*, Cm 4018, 1998) that applicants for British citizenship will now always be told why their application was rejected. The existence of statutory rights of access to some forms of personal data (see above, 23.2.7), coupled with increased computerisation of immigration and nationality casework will also increase the availability of information to applicants.

27.4 Involuntary removal from the UK

The government has wide discretion under the Immigration Act 1971 to deport individuals with no or limited rights of residence. Grounds for deportation are:

- (a) breach of residence conditions;
- (b) entry obtained by deception;
- (c) family member subject to a deportation order;
- (d) commission of a criminal offence;
- (e) if the Home Secretary deems that a deportation order would be conducive to the public good.

Such decisions have been made in relation to persons threatening national security, or where the individuals concerned are members of cults or religious groups which are generally disapproved of in this country (there is a long line of decisions either refusing entry to or deporting members of the Church of Scientology on 'public good' grounds, see, for example, *Van Duyn v Home Office* (1974)). It was mentioned above that appeals against deportation orders on national security grounds are now heard by a special Immigration Appeals

Commission and there is a right of appeal on a point of law to the Court of Appeal.

On occasion, deportation has been challenged on the basis that the authorities have used it as a form of disguised extradition. If, for example, the person in question has committed an offence which could be described as 'political', he or she may not be extradited. In *R v Brixton Prison Governor ex p Soblen* (1963), the decision of the Home Secretary to deport S for public good reasons was challenged on the basis that the deportation order was issued for another purpose – to comply with the US's request for the applicant's return. The Court of Appeal rejected this argument on the basis that this purpose did not undermine the validity of the Home Secretary's order. The Court held that the Home Secretary could act for a plurality of purposes.

There is no specific provision in the main body of the ECHR dealing with the right to freedom of movement. However, the right not to be subject to inhuman or degrading treatment under Art 3 has often been relied upon either to prevent deportation or to seek compensation for the deportation, without a proper hearing, of refugees to their State of origin where they face persecution. As early as 1978, the European Commission of Human Rights ruled that the refusal of entry to Asians fleeing persecution in Uganda amounted to inhuman and degrading treatment. In the Commission's view, the immigration rules in operation at that time were racially motivated, since they targeted, in particular, people in the applicants' position, despite the fact that they held British passports:

... differential treatment of a group of persons on the basis of race might be capable of constituting degrading treatment in circumstances where differential treatment on some other ground, such as language, would raise no such question [*East African Asians* case (1973)].

The *Chahal* judgment (discussed further below, 27.8) limits the ability of States to rely on national security considerations when deporting an asylum applicant who faces a well founded risk of persecution in the State of destination. Chahal was a prominent Indian Sikh who had been arrested for suspected involvement in Sikh terrorism in the UK. The Home Secretary decided that there were sufficient grounds to justify a deportation order. Chahal argued that there was a strong probability that he would be exposed to persecution in India due to his high profile position in the Sikh separatist movement; nevertheless, his application for asylum was turned down since the Secretary of State held that that the question whether he qualified for refugee status became irrelevant once the decision to deport him had been made. The European Court of Human Rights ruled that, in view of the potential risk he faced in the destination State, any deportation order issued against him would breach his rights under Art 3 not to be subject to torture or inhuman treatment.

Deportation of someone suffering from a terminal illness to a country where there is insufficient medical care may also amount to inhuman and degrading treatment in breach of Art 3 (*D v UK* (1997)). The applicant, a convicted drugs smuggler who was in the final stages of AIDS, was to be deported to St Kitts where there was no adequate medical treatment, shelter or family support. The court held that the duty to secure to the applicant the guarantees contained in Art 3 engaged the liability of the State in this case. Application of Art 3 is, therefore, no longer confined to situations where the individual to be expelled faces a real risk of being exposed to forms of treatment which are intentionally inflicted by the receiving State (see, also, the Commission's admissibility decision in *BB v France* (1998)).

The threshold for inhuman and degrading treatment is high. Breaking up a family will not breach Art 3, but it may amount to an infringement of the right to family life under Art 8. In order to rely on Art 8, non-nationals must satisfy the court that they have established family connections over a long period of time in the deporting State (*Beldjoudi v France* (1992)). Even before incorporation of the ECHR the rights of entry in this country were altered to include unmarried partners in a relationship akin to marriage.

27.5 Movement within the UK

The most important restriction on this freedom of movement is the ability of the Home Secretary to issue exclusion orders under the Prevention of Terrorism (Temporary Provisions) Act 1989 against anyone suspected of being involved in terrorist activities. This means that a person may be prevented from entering Great Britain (see above, 2.4) and vice versa if it appears expedient to the Home Secretary for the prevention of acts of terrorism connected with Northern Ireland. These orders are not subject to any form of independent review by a judicial body and the very situation which gave rise to this legislation is fraught with sensitive security issues. This allows the Home Secretary to impose exclusion orders without giving reasons (for fear that important sources of information might be betrayed). It is possible to seek judicial review of a decision to impose an order, but national courts tend to accept the government's defence that it is necessary on grounds of national security. In *R v Secretary of State for the Home Department ex p McQuillan* (1995), the applicant challenged an exclusion order against him because the Home Secretary had failed to provide reasons justifying the order. The application for judicial review was based on breach of the principle of procedural fairness. The court, although sympathetic to this argument, had to accept as conclusive the Home Secretary's statement that national security prevented the disclosure of reasons. The exclusion order could not, therefore, be ruled to be unlawful on that basis.

27.6 Freedom of movement in the European Union

One of the original purposes of the EC Treaty was to ensure that all obstacles to the free movement of economic actors, such as employees and service providers and their goods and capital, were removed. The purposes have now broadened beyond these economic aims and citizenship of the European Union has been created:

Article 17 [formerly Art 8]

- 1 Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
- 2 Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Article 18 [formerly Art 8a]

- 1 Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.
- 2 The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act in accordance with the procedure referred to in Art 251. The Council shall act unanimously throughout this procedure.

As we have noted before, rights and freedoms under Community law only apply to EC nationals and those third country nationals with recognised links to citizens of EU Member States, such as spouses. Even these applicants have to satisfy certain conditions before they can claim the protection of Community law; individuals who are not engaged in some economic activity and who do not qualify under one of the limited directives on residence discussed below are not able to bring claims under Community law. In addition, it is necessary for applicants to establish a 'jurisdictional link' between their case and Community law. The Court of Justice will not make preliminary rulings on questions which are internal to Member States (Case C-175/78 *R v Saunders* (1979)). For this reason, claims have been made to the recently adopted right to citizenship in the EC Treaty in matters relating to restrictions on movement within the borders of a Member State (see below, 27.7).

EC nationals and their spouses are not the only ones to be affected by developments at a Community level. One of the consequences of the Schengen Agreement, signed in 1985, was that, once a non-EC national is lawfully resident within one Member State, he or she may travel unobstructed by border controls within the EU (with the exception of the UK and Ireland,

which have reserved the right to operate their own border checks). However, a side effect of this arrangement is that asylum seekers are passed from one country to the other with no evenhanded determination of their claims. The hardships caused by what has come to be known as 'fortress Europe' were illustrated vividly in the case of Kenyan asylum seekers who arrived in the UK in early 1998 having been given 'notices to quit' by the Belgian authorities, where they had arrived ((1998) *The Times*, 26 March). They were the latest apparent victims of 'dumping' which the Home Office claimed had happened to more than 900 asylum seekers from Kenya and the former Yugoslavia since the beginning of 1998. The proposals for harmonisation of Member States' rules on asylum under the Amsterdam Treaty will be discussed below.

27.6.1 Economic actors

Community law protects free movement in a number of ways. Article 12 of the EC Treaty (formerly 6) prohibits discrimination on the basis of nationality. Articles 39 (formerly 48) protects the freedom of movement of workers. This includes the right to travel to find work. Article 43 (formerly 52) protects the right of EC nationals to establish their business in other Member States. This right applies to self-employed persons and to companies, and Art 49 (formerly 59) applies to services; individuals and companies are free to provide services across EC borders and EC nationals have the right under this Article to travel to receive services.

Articles 43 and 49 have been followed by various forms of secondary legislation (Directives 89/48 and 92/51) requiring Member States to recognise the qualifications of other EC nationals and restricting the imposition of re-qualification rules.

EC nationals claiming lawful entry and abode under Arts 39, 43 and 49 may avail themselves of the provisions of Directive 68/1612 which entitles them to 'family reunion'; in other words, they may be joined by their spouse, dependent children, parents, grandparents and, in certain circumstances, anyone who was living under the same roof as them in their State of origin. This is an important accessory to the right to freedom of movement because there must be no major disincentives that would prevent, say, a German national from taking a job in France because members of his family would lose out on valuable benefits in their new place of residence.

27.6.2 Other European Community nationals

Family members of EC workers may avail themselves of the same benefits and educational facilities available to nationals of the host State (Regulation 68/1612, Art 12: rights of workers' dependants to education on the same terms of children of host State nationals).

Article 18 (formerly 8a) of the EC Treaty enshrines the concept of European citizenship (see above). Since this Article refers to 'citizens', rather than workers, the freedom of movement it bestows is no longer restricted to economic actors. The implications of this provision are considered below, 17.7.

In addition to the Treaty provisions and Regulation 68/1612, the Council has passed three directives which guarantee the freedom of movement (that is, granting of residence permits) of non-workers and their families. Directive 90/366 grants rights to students undergoing vocational training; Directive 90/365 entitles self-employed people who have ceased to work certain rights of residence; and Directive 90/364, a catch-all piece of legislation governing all those persons who do not already enjoy a right in EC law, guarantees a right of residence for EC nationals who are of independent means and have private medical insurance. This Directive is designed to ensure free movement of individuals within the Community who will not present a financial burden to the host State.

The freedom of EC nationals under Art 50 to move in order to provide services also covers the freedom to receive services. This has the consequence of extending the application of Community law to many areas which would not appear to be within the commercial framework of the original Treaty objectives. In Case C-286/82 *Luisi and Carbone v Ministero del Tesoro* (1984), L and C were fined for exporting excessive amounts of capital out of Italy. They invoked Art 60 (now 50), claiming that they would have been protected by EC law if they had wanted this money to pay for services. The Court of Justice held that that the freedom to go to the State where the service provider is established is a corollary of the express freedom in Art 60 (now 50) of the service provider to move to the recipient's State. This freedom to receive services, therefore, applies to a wide range of people, such as tourists, persons receiving medical treatment and persons travelling for the purposes of education or business, although even these wide categories have been further extended by the recent ruling on this issue in *Bickel v Italy* (1998). Here, the court ruled that the scope of the provisions on freedom of services could cover situations where the applicants 'intend or are likely to receive services', a definition which arguably applies to such a wide variety of situations that the original link with the Treaty freedoms has been eroded away.

The broad principle of non-discrimination has also been responsible for the extension of Community law into areas unrelated to employment or services. France used to have compensation laws which limited payments for criminal injury to victims who were resident in France or who held French nationality. In Case C-186/87 *Cowan v French Treasury* (1989), C, a visitor to France, was denied State compensation for injuries incurred in a criminal assault. The Court of Justice, referring to Art 6 (now 12), observed:

When EC law guarantees a natural person the freedom to go to another Member State, the protection of that person from harm in the Member State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement.

Thus, it is not only lawful residence as a citizen of a Member State, but lawful presence as a visitor which furnishes the basis for a claim under the non-discrimination provisions of Community law. In *Bickel*, the court allowed a claim under Art 6 of the EC Treaty by two EC nationals who faced criminal proceedings in northern Italy. There was a local regulation which permitted German speaking residents to be tried in German, but they did not qualify since they were not lawfully resident in the area. They complained that this violated the principle of non-discrimination on the basis of nationality. The Court upheld their claim. It considered that their presence in the host State indicated that they were intending or likely to receive services; this then brought them within the personal scope of the EC Treaty and entitled them to rely on Art 6 to challenge the discriminatory measure in question. A similar position was taken by the Court in Case C-85/96 *Martinez Sala v Germany* (1998).

27.6.3 Derogations from rights of free movement

The rights outlined above are, as always, not absolute. They are subject to the ability of Member States to refuse entry or restrict the issue of residence permits on the basis of public policy and health grounds. States may also refuse permits to those wishing to seek work in sensitive areas of the public sector which it is permissible to reserve to nationals. However, these limitations are very strictly policed by the Court of Justice. There is also a Council Directive (64/221) which specifies the grounds upon which entry and residence for workers may be restricted. These grounds are similar to those referred to in the EC Treaty, but they are much more detailed and, therefore, it is difficult for a Member State to rely on them if the case in question does not fit into the provision.

In Case 36/95 *Rutili v Minister for the Interior* (1975), R, an Italian married to a French national, had his temporary residence permit in France endorsed so that he was only able to travel to certain parts of the country. He suspected that this was because of his role as a trades union activist and he applied to the Court of Justice, claiming this was a violation of his right under Art 48 (now 43) of the EC Treaty to travel freely in the Community as a worker. The Court upheld the claim. They refused to accept the defendant State's argument that the order was justified on the basis of public policy. Such a derogation from a fundamental EC Treaty right, they said, would only be permissible if it was necessary in a democratic society, applying the same reasoning to State derogations under the EC Treaty as the Court of Human Rights applies to the permitted derogations under Arts 8–11 of the ECHR.

Since the Court of Human Rights has taken the position that the provisions of the ECHR are relevant considerations in assessing the legitimacy of a Member State's derogation from a particular right in Community law, this means that the Member State's courts must consider whether a restriction on an individual's movement, such as the imposition of a deportation order, would be in breach of any of the rights listed in the ECHR, such as the right of free association under Art 11, or the right to privacy under Art 8, or the right not to be subject to degrading treatment under Art 3. If there is a risk of such a breach, the derogation may not be permissible, even if it is based on one of the grounds for derogation listed in the EC Treaty or in a directive.

In addition to this strict scrutiny of derogations from the right of freedom of movement, Community law requires that the power to restrict movement of EC nationals may only be justified on the basis of personal unacceptability; past membership to a proscribed organisation or a spent offence will not justify any derogation on public policy grounds (Case C-41/74 *Van Duyn v Home Office* (1974)). It was established in Case C-30/77 *R v Pierre Bouchereau* (1977) that a national authority may only rely on the public policy exception if the applicant presents a genuine and sufficiently serious threat affecting one of the fundamental interests of society.

This reasoning applies, of course, only if the case involves a point of Community law; the individual concerned must be an EC national, or the spouse of an EC national, who is a member of one of the protected classes outlined above. Neither the Treaty nor the Convention would be relevant if the case concerns a non-EC citizen (an illegal entrant of Indian nationality could not rely on Art 8, via Community law, to prevent the Home Office from refusing him leave to stay in the UK (*R v Secretary of State for the Home Department ex p Tejinder Singh* (1993))).

27.7 'An ever closer union': rights of movement for European Union citizens

The extent and scope of the rights under Art 18 (formerly 8a) of the EC Treaty – set out above – have been considered by national courts and the Court of Justice. The question is whether this EC Treaty provision confers any new rights in addition to those available under pre-existing EC Treaty provisions and directives. The issue is central to any discussion on free movement because, if Art 18 is a freestanding right, the applicant who wishes to claim the protection of EC law need no longer qualify as an economic actor or bring himself within the scope of one of the limited directives on residence rights discussed above, 27.6. Nor would it be necessary to establish a jurisdictional link with Community law; in other words, the claim to citizenship under Art 18 could exist irrespective of any inter-State element in the State action complained of.

The question first arose in the national courts in relation to exclusion orders, since they involve restrictions on the movement of EC citizens within the borders of a Member State, the UK. When EU citizenship was first created after the Maastricht treaty revisions, the leader of Sinn Fein, a political party in Northern Ireland with an association with the IRA, challenged an exclusion order preventing him from coming to Great Britain to attend a political meeting at the House of Commons (*Secretary of State for the Home Department ex p Adams* (1995)). However, the reference to the Court of Justice for a preliminary ruling was withdrawn after the Home Secretary revoked the exclusion order, so the court did not consider the applicability of Art 18 to wholly internal situations. In *R v Secretary of State for the Home Department ex p Vitale* (1996), the national court took the position that this Article does not create any new rights of free movement, but simply takes the existing rights created by the EC Treaty in its original form, together with all the implementing legislation and related qualifications, as the basis for the new citizenship. This has been borne out to an extent by comments of the Court of Justice to the effect that citizenship of the Union, established by Art 18, was not intended to extend the scope of the EC Treaty to internal situations which have no link with Community law (Case C-64/96 *Ücker v Germany* (1997); and see Vincenzi, C, 'European citizenship and free movement rights' [1995] PL 261).

Another application has been made under Art 7a of the EC Treaty (now Art 14), to the effect that the expressed aim of the Treaty, the abolition of internal frontiers, had been disregarded by the UK who had maintained border controls. The provision states:

Article 14 [formerly Art 7a]

- 1 The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Arts 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty.
- 2 The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.
- 3 The Council, acting by a qualified majority on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

The national court ruled that the Article was insufficiently clear and unconditional to produce direct effects between Member States and their subjects (*R v Secretary of State for the Home Department ex p Flynn* (1995)).

Earlier in this chapter, the byzantine provisions of domestic law for the determination of British citizenship were considered. Because of the

implications of Community law for immigration, the UK, on entry into the Community in 1972, took the precaution of limiting the definition of a UK national for the purpose of Community law to two categories within the British Nationality Act 1981: British citizens (who have the right of abode in the UK) and Gibraltarians (who come within the category of British dependent territories citizens, who do not necessarily have the right of abode in the UK).

However, if the right of EU citizenship is set to expand, such unilateral action by Member States may soon become a thing of the past. Exclusive competence of Member States in this area is bound to come under pressure, since Member State citizenship is determinative of EU citizenship. The Court of Justice has observed recently that this determination must be carried out with respect for and in accordance with Community law (*Ücker v Germany*), and the question of the competence of Member States to determine citizenship is presently under consideration by the Court after a referral was made in relation to the status of British overseas citizens in *R v Secretary of State for the Home Department ex p Kaur* (1998).

27.8 Asylum

The final part of our inquiry into the right to freedom of movement concerns the assertion of that right by those *in extremis*. The 1999 NATO bombing raids on Yugoslavia following Serbia's attempt to 'clear' the province of Kosovo of ethnic Albanians was only the most recent crisis precipitating the mass movement of people from their homes, seeking safety and protection elsewhere. Not all such disasters are so cataclysmic; asylum seekers may constitute only small groups or individuals, fleeing persecution from countries which have not made it to the front pages of the Western press. The urgent nature of the refugee problem after the end of the Second World War brought about the ratification of the International Convention Relating to the Status of Refugees 1951 (the Refugee Convention). This Convention defines a refugee as one who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion', is outside his or her country of nationality and because of such fear is unwilling to return to it.

The Refugee Convention has been adopted into national law by the Asylum and Immigration Appeals Act 1993 and the Asylum and Immigration Act 1996. There is no right to asylum, even by genuine refugees; however, the Refugee Convention obliges signatory States not to subject genuine refugees to refoulement, in other words exposing them to the danger of persecution by returning them to their State of embarkation. In order to qualify for refugee status under the Refugee Convention, an applicant for asylum must satisfy the immigration authorities that there is objective justification for their fear of persecution in their country of nationality.

Even if they are able to cross this threshold by supplying objective evidence to satisfy the authorities that their fear of prosecution is well-founded, applications for asylum often fail to meet the legal criterion for 'membership of a particular social group'. The unifying characteristics of gender, for example, do not, on the whole, go to constitute a 'particular social group' and, therefore, persecution on grounds of sex does not qualify applicants for refugee status, although, if there is some specific consequence of being of a particular gender – women, for example, threatened with flogging on suspicion of adultery – it might be possible to qualify as belonging to a 'particular social group' (*R v Immigration Appeal Tribunal ex p Shah* (1999)).

The Home Office decides upon the merits of asylum applications and the decision of the Home Secretary is appealable to Special Adjudicators whose decision in turn may be reviewed by the Immigration Appeal Tribunal on a point of law. The lawfulness of the detention of immigrants depends, to an extent, on the opportunity of the detainee to have the legality of his detention assessed by an independent tribunal (see above, 21.4.1). The Special Adjudicator, who usually sits in a panel of three ('three wise men') has been said by the European Court of Human Rights to be insufficiently independent of the executive to afford asylum applicants properly independent scrutiny of their claims as required by Art 5(4) of the ECHR (*Chahal v UK* (1997)). The European Court of Human Rights decided in this case that Chahal, a deportee claiming asylum, had not been afforded this opportunity, even though he could have challenged the decision of the Special Adjudicator by way of judicial review. Such a challenge did not, in the view of the Court, provide proper consideration of the merits of the decision. In response to this ruling, the UK has passed legislation under which an independent Commission, including a judge and at least one lawyer, has been appointed to hear appeals in cases of deportation on the grounds of national security (Special Immigration Appeals Commission Act 1997).

Obstacles for asylum seekers

The applicant for asylum faces severe practical as well as legal difficulties. In 1996, a pressure group acting on behalf of asylum seekers challenged social security regulations which deprived such applicants of income support while waiting for their claims and appeals to be decided (*R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants* (1996)). This, said the court, was a breach of their (common law) right to a fair hearing, since it made it impossible for them to stay in the country until their claims were determined and so it was, in practice, unrealistic that they would be able to appeal at all. In response to this judgment, the Government introduced the Asylum and Immigration Act 1996, which effectively deprives asylum seekers of the right to receive various social benefits if they claim asylum after entering the country and not at the port of entry. The courts' reaction to this manoeuvre was to move the burden onto local authorities and ratepayers

when, in October 1996, they ruled that s 21 of the National Assistance Act 1948 meant that local authorities had a duty to provide the resources for care and accommodation to asylum seekers who were without other means of support (*R v Hammersmith and Fulham LBC ex p M* (1997)). In its White Paper, *Asylum and Immigration* (Cm 4018, 1998), the Government signalled its intention to resolve this problem by removing cash benefits for asylum seekers and replacing them with benefits in kind – such as food and accommodation – the idea being to remove the main incentives for economic refugees.

The 'third country' rule

The 1996 Act also expedites asylum claims by introducing a procedure whereby an asylum seeker may be returned to a safe third country without the authorities in this country having to investigate the merits of his claim. In *R v Secretary of State for the Home Department ex p Canbolat* (1997), C, an asylum seeker from Turkey, applied for judicial review of the immigration officer's refusal to grant her entry and the decision of the Home Secretary to remove her to France, arguing that the Home Secretary did not properly evaluate the material that suggested there might be a risk that this third country would send her back to Turkey. This material was the finding of Special Adjudicators in a number of other cases that France was not a third country from which asylum applicants could continue their appeal. The Court of Appeal rejected the challenge, holding that the Secretary of State could grant a removal certificate if he was satisfied that the third country's system for dealing with asylum applications would, in general, provide the required standard of protection. This case demonstrates the difference between the function of the judicial review court and that of the Special Adjudicators. The former was unable to interfere with an administrative decision that was not *Wednesbury* unreasonable; whereas the Special Adjudicators, who could have examined her argument on its merits, may have come to a different conclusion (as, indeed, they had done in other cases).

The 'safe third country' rule in the Refugee Convention has particular significance for the handling of refugee claims across the EU. The Dublin Convention, which came into force in 1997, governs arrangements for safe third country cases in Europe. The basic rule is that asylum claims should be examined just once in the EU and that the Member State 'responsible' for the presence of the asylum seeker in the EU should be responsible for examining their claim. Whilst the aim of this Convention was to prevent asylum seekers from being passed between Member States without anybody taking responsibility for examining their claim, the effect has been rather the opposite, with a certain amount of buck-passing on who had responsibility in the first place. Where an asylum seeker has no documentation and is unwilling or unable to provide information as to where he or she has just been, it is practically impossible to establish which Member State was 'responsible' for their arrival.

Future proposals for asylum law

At the intergovernmental conference leading up to the Amsterdam revisions to the EC Treaty and Treaty of EU (see above, Chapter 7), Member States expressed concern that differing asylum rules across the EU afforded an opportunity for terrorist suspects to escape extradition by taking advantage of asylum procedures in other Member States. So a Protocol to the Amsterdam Treaty was drawn up which provides that Member States should regard each other as safe countries of origin for all legal and practical purposes relating to asylum applications from EC nationals. It will be remembered that the 'third country rule' is a relevant consideration in the Refugee Convention. This Protocol, in effect, provides an opportunity for Member States to reject asylum applications on the basis of a presumption that other Member States are safe, which suggests that Member States will not apply the level of scrutiny required by the 1951 Refugee Convention.

Decisions on asylum and immigration have now been brought within the 'European Community pillar' (see above, 7.2.1). Thus, they are subject for the first time to interpretation and review by the Court of Justice. Article 63 of the EC Treaty now provides for measures to be taken by the Council harmonising asylum policy, laying down minimum standards on the reception of asylum seekers and uniform procedures in Member States for granting or withdrawing refugee status. The aim of this is less to promote the rights of asylum as to ensure that the burden of dealing with refugees is equally shared between Member States ('balance of effort'); however, it is to be hoped that, once consistent asylum procedures are adopted under the EC Treaty, the tendency of Member States to 'pass the buck' in this area will come to an end.

27.9 Assessment

The main shortcoming in the UK's system of immigration controls is in relation to the guarantee of due process. The fact that most immigration controls are carried out via non-justiciable rules, internal regulations, guidance notes to immigration officers and circulars gives rise to a number of variable criteria that are difficult to anticipate, comply with or challenge in appeal proceedings. The operation of this system also depends on very wide discretionary powers which, again, have proved in the past very difficult to challenge in judicial review proceedings.

Asylum seekers fare slightly better, because of the strict scrutiny approach adopted by UK courts to cases involving a possible threat to the applicant's safety. The decision by the House of Lords holding the Home Secretary in contempt for deporting a Zairean citizen in breach of a court order in *M v Home Office* (1994) illustrates this approach. As Robertson has observed:

... although the court exonerated Baker of personal liability, the prospect of a criminal conviction will henceforth concentrate the minds of ministers who

may be tempted to ignore inconvenient court orders made to protect asylum seekers [*Freedom, the Individual and the Law*, 7th edn, 1993, London: Penguin].

This spirited approach by the courts to what they perceive to be genuine asylum seekers (see *ex p Shah*, above) will be bolstered by the provisions available to them under Arts 3, 6 and 8 of the ECHR, incorporated into national law by the Human Rights Act 1998, without the necessity to observe the margin of appreciation doctrine that has hampered the development of freedom of movement case law under these Articles in the Court of Human Rights. However, the tough approach to illegal immigration and bogus asylum seeking signalled in the Government's 1998 White Paper will bring with it a range of measures that may interfere with these rights. It remains to be seen how robust the judiciary is prepared to be in the face of primary legislation designed to combat immigration crime that overrides the rights of some genuine refugees and applicants for entry and residence.

EU citizenship, which got off to a slow start, is developing into a promising basis for claims to free movement, not only across EC boundaries, but within Member States. This will, no doubt, improve the situation for EC nationals and their families, but there may be a price to be paid by third country nationals as Member States draw in their entry requirements and clamp down on immigration criteria to compensate for the greater pressure imposed on their social welfare systems, by Community citizens within their borders.

FREEDOM OF MOVEMENT

The law on freedom of movement has developed in three main areas: immigration; the rights of asylum seekers; and the rights of EC nationals to move across inter-State boundaries. Community law has the most sophisticated case law regarding the right to free movement, although rights under Community law are only enjoyed by EC nationals and their spouses. The ECHR does not guarantee a right to non-nationals to enter and reside in the territory of signatory States, although there are Protocols annexed to the Convention (as yet unratified by the UK) which guarantee free movement for anyone lawfully within a Member State, prohibiting signatory States from refusing entry to or expelling their own nationals and prohibiting the mass expulsion of aliens.

Since there is no specific right to free movement in the ECHR, deportation and immigration decisions are considered in relation to three related rights: the prohibition on torture, degrading or inhumane treatment (Art 3); the right to family life under Art 8 and the right to an effective remedy before the national judicial authorities under Art 13.

Movement out of the UK

There are no restrictions on nationals wanting to leave the country; possession of a valid passport is not a precondition for travel abroad, although, in practice, travellers are not accepted on the main carriers without a passport.

Movement into the UK

Immigration laws and regulations determine who has the right of abode and who has only limited rights of entry. There are nine categories of nationality under the British Nationality Act 1981; out of these categories, only one, that of British citizenship, guarantees right of abode.

Persons claiming asylum can only be granted entry if they are considered to be political refugees for the purposes of the Refugee Convention. The Refugee Convention prohibits deportation of an asylum seeker to any country where his or her life is endangered ('refoulement') and the State's liability for breach of Art 3 of the ECHR is engaged in these circumstances even if the risk to which the deportee is exposed is not the direct responsibility of the State.

Article 8 may be invoked to invalidate a refusal to allow entry where family ties within the Member State territory are well established, although

there is no obligation on States to allow non-nationals in to marry people lawfully within the territory.

Determination of claims

The immigration officer's initial refusal of entry, decision on deportation and removal, refusal to extend leave, imposition of conditions on right to remain and refusal of asylum are appealable to an Adjudicator and then to the Immigration Appeal Tribunal. The Immigration Appeal Tribunal's decision may be appealed to the High Court on a point of law, otherwise, judicial review is the only available scrutiny.

A non-national may be deported on a number of grounds, most broadly, on the basis that their expulsion is conducive to the public good. Appeals against deportation on national security grounds are heard by a panel of judges selected to sit on the Special Immigration Appeals Commission.

Article 13 of the ECHR imposes an obligation on signatory States to put the substance of his or her ECHR rights to the judicial authorities of the Member State before being deported. The availability of judicial review of decisions relating to deportation and extradition in the UK has been held to fulfil this requirement. Article 13 has not been incorporated by the Human Rights Act and, therefore, may not be relied upon as an argument in national courts.

Restrictions on freedom of movement within the country

Under the Prevention of Terrorism Act 1989, a person may be excluded from the mainland or Northern Ireland if he or she is suspected of being involved with terrorist offences.

Freedom of movement in community law

Treaty provisions

The EC Treaty guarantees free movement of workers, establishment and services. The Treaty provision prohibiting discrimination on grounds of nationality also provides a general protection for the freedom of movement of EC nationals. Although the Treaty of EU grants a right of citizenship of the EU, this has not yet been successfully relied upon by individuals challenging restrictions on their freedom of movement within Member States.

The Treaty of Amsterdam revisions to the EC Treaty and Treaty of EU has improved the position of third country nationals by moving asylum and immigration policy into the Community 'pillar' of the EU, which means that the Court of Justice may scrutinise national measures with a view to harmonising Member States' laws in this area.

Secondary legislation

In addition, secondary Community legislation in the form of directives oblige host States to guarantee to family members of migrant workers, students and persons of independent means various benefits that would be available to their own nationals.

Member States may refuse entry or restrict the issue of residence permits on the basis of public policy and health. Derogations on these grounds will be assessed for their legality in the light of the provisions of the ECHR, in particular, the right to a family life and freedom of association and assembly. If the measure is deemed to have a disproportionate effect on these rights, it will be in breach of Community law. Migrant workers may also be refused permits to work in sensitive areas of the public sector.

'Third country' nationals

Non-EC citizens are not entitled to the rights to free movement guaranteed in the EC Treaty and secondary legislation. The difficulties of these 'third country' nationals arise partly out of the Schengen Agreement 1985 which, in the view of critics, has created a 'fortress Europe' in which asylum seekers are passed from one country to the other with no evenhanded determination of their claims. Article 73k of the EC Treaty provides for measures to be taken by the Council harmonising asylum policy, laying down minimum standards on the reception of asylum seekers and uniform procedures in Member States for granting or withdrawing refugee status. The aim of this is less to promote the rights of asylum than to ensure that the burden of dealing with refugees is equally shared between Member States ('balance of effort').

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INDEX

- Abortion392–93, 398, 481
- Abuse of power294, 295
- Academic law writers
 see Textbook writers
- Access to information444–47, 460,
 484–86, 491
- AIDS cases447
- Code of Practice210
- Data Protection Act447
- disclosure to third parties446–47
- in the EC485–86
- Access to justice327–29, 345
- Acquis communautaire*153
- Acts of Parliament6, 17, 31,
 125–27
- judiciary and46–47
- royal assent27, 47–48
- Acts of the
 Scottish Parliament36
- Administration
 see Government and administration
- Administrative law5
- Advertising Standards
 Authority172
- Advisory bodies167–68, 179, 184
- AIDS cases, access
 to information447
- Alternative dispute resolution198
- Amnesty International280–81
- Animal rights protests503–04
- Anne, Queen27
- Annulment actions,
 European Court
 of Justice351–53, 355
- Anti-social behaviour418, 424
- Anton Piller orders444
- Appeal
- compared to judicial review230–31
- exception to fair hearing
 right where appeal has
 cured unfair decision266–67
- Armed forces, State killing384–85
- Arrest402
- Arts Council166
- Assembly
 see Freedom of assembly and
 association
- Assisted suicide390–92, 398
- Association
 see Freedom of assembly and
 association
- Asylum388, 397–98,
 534, 547–50
- Audi alterem partem*258
- Audit178, 179, 184–85
- Audit Commission179
- Austin, Rodney177
- Australia74
- judicial review in228
- ombudsmen in221
- Austria
- criminal libel in477
- freedom of assembly/association496
- media regulation483
- ombudsmen in221
- Autonomy/liberty8–10, 16–17, 21–22
- Conservative Party and81–84
- European Community/Union and142
- Labour Party and90–91
- Banking ombudsman205
- Barlow Clowes affair217–19
- BBC483–84
- Benefits Agency165
- Benn, Tony124
- Bentham, Jeremy67
- Berlin, Isaiah10, 22, 512
- Bias192
- appearance of bias278–79
- different manifestations of281–82
- direct pecuniary interest and280–81
- ministerial bias282
- rule against bias258, 277–83, 286
- exceptions282–83
- test for279–80
- Binding over orders497, 509
- Bingham, Thomas278–79
- Birch, AH119

Birth	393–94	Civil disobedience	12
Black, Julia	166	Civil law	
Blair, Tony	121, 144	Civil Procedure Rules	329, 331
Blasphemy	477–78, 481	libel	473–77
Boxing Board of Control	261	proceedings	407–08
Braza, Nicolas	367	retrospectivity	427–31, 435
Breach of the peace	442–43, 495–96, 507–08, 509	common law	427
Bribery	192	EC law	430–31, 435
British Board of Film Classification (BBFC)	484	statute law	428–29
British Empire	73–74	Civil liberties	5, 360–61
British-Irish Council	39, 50–51	Civil Service	164
Brittan, Leon	146	Conservative Party and	87–88
Broadcasting Complaints Council	483–84	Civil War	56–57, 60, 63
Browne-Wilkinson, Lord	231–32, 280	Clark, Alan	147
Buckley, Michael	204	Clothier, Cecil	214
Building Societies Ombudsman	205	Coke, Chief Justice	61–62
Burke, Edmund	69, 119–20	Commission of the European Union	145–46, 168–69, 175, 179–80, 443
Cabinet	32–33	Commission for Racial Equality	518
Calvin, Jean	59	Commissioner for Information	210
Canada	74	Committee on Standards in Public Life (Nolan Committee)	6, 118, 129, 130, 136, 191
Capital punishment	383, 388	Commonwealth (17th century)	63–64
<i>Carltona</i> principle	247–48	Commonwealth of Nations (successor to Empire)	74, 75
Charles I	60–61, 62, 63	Communism	14, 15
Charles II	64	Community interests	15
Charter 88	90	Community safety order	92–93
Child safety orders	419, 424	Complaints procedures internal	193–94, 221–22
Child Support Agency	192, 206–07, 220	<i>see, also</i> , Ombudsmen	
Child Support Commissioner	194	Concordats, inter- governmental relations within UK and	41–42
Children, privacy rights against the State	451–52, 461	Conference of European Affairs Committees (COSAC)	150
Citizens' arrest	402	Confidentiality, national security and	467–68
Citizen's Charters	80, 88, 93, 172, 194, 216, 221–22	Conservative Party	79, 93–94, 120
Citizenship British	262, 536–37		
EU	541, 543, 545–47, 551		

- European Community/
 Union and143
 local government and 43
 principles and80–81
 UK constitution and ...79–80, 81–88, 95
- Constitutions15–22
 autonomy/liberty and ...16–17, 21–22
 constitutional law5
 democracy and17–19, 21
 European Community/
 Union140–41
 mediating tensions between
 constitutional goals20–22
 safety and
 security from19–20, 21–22
 UK
 see UK constitution
- Consultation, statutory270–71
- Contempt of court468–70, 487, 489
- Convention Relating to
 Status of Refugees534, 547,
 549, 550
- Cook, Robin90
- Cooke of Thorndon, Lord103
- Corruption
 local government43
 MPs129–31, 136
 officials191–92
- Council of Europe16, 50, 75,
 142, 363, 367
- Council of Ministers143, 147, 152
- Council on Tribunals194
- Countryside Commission166
- Court of First Instance142, 148, 351
- Court system44, 45
 conduct of
 criminal trials406–13
 contempt of court468–70, 487, 489
 dispute
 resolution and196–97, 198
 see, also, Fairness, right to fair hearing
- Craig, Paul101
- Cranborne, Lord81, 94
- Creutzfeld-Jakob disease (CJD)22
- Criminal Injuries
 Compensation Scheme33, 244–45
- Criminal law
 European Community/
 Union and139, 152–53,
 433–34, 436
 libel477
 retrospectivity426, 431–34, 435–36
 EC law433–34, 436
- Criminal trials
 civil proceedings
 compared407–08
 conduct406–13, 422
 cross-examination
 of witnesses410
 juries408–09
- Cromwell, Oliver60, 63–64
- Cross-examination
 of witnesses271–72, 410
- Crossman, Richard206
- Crown
 see Monarchy
- Curfews419
- Customs and Excise207
- Defamation473–77
- Defence12, 13, 18
- Delors, Jacques146
- Democracy11–12, 17–19, 21
 Conservative Party and84–87
 Dicey’s conception of101
 election of Members
 of Parliament (MPs)121–23, 135
 European Community/
 Union and143–44
 Labour Party and91–92
 see, also, Liberal democracy
- Denning, Lord174, 269,
 322, 323, 326, 453
- Department of Trade
 and Industry (DTI)217–18
- Deportation388, 397–98, 538–40
- Depression74
- Deregulation83–84

- Detention 399–400
 habeas corpus 417–18, 423
 immigrants 413–14, 423
 mentally ill 414–16, 423
 police powers during
 criminal investigations 400–406,
 421–22
 preventive 417, 419–20
- Devolution 40–42, 54, 84
 adjudication on
 devolution issues 225–26, 229
 Northern Ireland 30, 31,
 32, 37–39
 position of England 30–31
 Scotland 30, 31, 32, 34–37
 Wales 30, 31, 32, 39–40
- Dewar, Donald 36
- Dicey, Albert Venn 97–112, 113–14,
 119, 360, 494
 biography 97–98
 on constitutional
 conventions 110–11, 114
 critics 99–100,
 102–04,
 108–09, 111
 on parliamentary
 sovereignty 100–106, 113
 on rule of law 106–10,
 113–14, 169, 172
- Diggers 64
- Diplock, Lord 226–29,
 258–59, 287, 299,
 303, 310, 313, 322–23,
 325, 334, 336, 341
- Direct democracy 11
- Directives, EC 149–51, 158–59
- Disability
 discrimination and ... 517, 519–20, 529
 pre-birth diagnosis 394, 398
- Disability Discrimination
 Commission 520
- Disclosure
 public interest disclosure
 (whistleblowing) 471
 right of 269–70
 to third parties 446–47
- Discretion
 delegation of 246–48, 255
 discretionary powers of
 government 10, 172–73
 fettering of 244–46, 255
- Discrimination 511–28, 529–31
 assessment 527–28
 disability and 517, 519–20, 529
 EC law and 522–25, 530–31
 justified
 discrimination 520–21,
 523–25, 530, 531
 positive 521, 524
 race and 517–18, 529
 scope of anti-
 discrimination laws 515–21, 529
 sex and 516, 517,
 518–19, 522–23,
 529, 530–31
 sexual orientation and 525–27, 531
- Disorderly behaviour 502–03
- Dispute resolution 197–99
 importance of 189–90, 201
 types of dispute 190–93, 201
 types of dispute
 resolution 193–97, 201–02
see, also, Judicial review; Ombudsmen
- Domesday Book 57
- Donaldson, Lord 55, 303
- Downey, Gordon 129
- Due process 399–400
- Dworkin, Ronald 379, 391, 512
- Economic freedom ... 10, 13, 83–84, 86–87
- Education 20
 Conservative Party and 85
- Edward III 58
- Edward, David 148
- Election(s) 359
 electoral reforms
 19th century 70–71, 72
 20th century 75
 electoral systems 18, 31, 120,
 121–23, 135
- of Members of
 Parliament (MPs) 121–23, 135

- Elizabeth I60
- Emergency, exception to fair hearing right266
- Enforcement proceedings, European Court of Justice353, 355
- Enlightenment7, 67–69
- Environment Agency173, 174, 178
- Environmental protection167–68
- Equal Opportunities Commission519
- Equality511–28, 529–31
 assessment527–28
 disability and517, 519–20, 529
 EC law and522–25, 530–31
 justified
 discrimination520–21, 523–25, 530, 531
 principle of308–09, 359
 race and517–18, 529
 scope of anti-
 discrimination laws515–21, 529
 sex and516, 517, 518–19, 522–23, 529, 530–31
 sexual
 orientation and525–27, 531
- Estate agents ombudsman205
- European Commission
 of Human Rights367
- European Community/
 Union4, 18, 19, 20, 137–60, 161–62
 access to
 information in485–86
 accountability and
 control in179–80
 administration164, 168–69, 179–80
 citizenship541, 543, 545–47, 551
 common foreign
 and security policy139, 151–52
 constitution140–41
 creation75
 criminal matters and139, 152–53
 free movement
 of goods503–04
 freedom of
 movement in534, 541–47, 554–55
 derogation from544–45
 institutions144–49, 151–53, 161–62
 Commission145–46, 168–69, 175, 179–80, 443
 Council of Ministers143, 147, 152
 Court of First Instance142, 148, 351
 European Council148, 152
 European Court
 of Justice47, 142, 148–49, 347–50, 351–54, 355, 482–83
 European
 Parliament122, 143, 147, 152, 168
- law
 actions to enforce rights197
 compensation
 for breach of159–60
 direct effect of157–59, 162
 discrimination
 and522–25, 530–31
 human rights
 and377–78, 382
 interpretation159
 judicial review and229
 national legal
 systems and347–51, 355
 primacy of28–30, 104–05, 156–57, 162
 privacy in461
 retrospectivity430–31, 433–34, 435, 436
 legal base138–40, 161–62
 legislation149–51, 161–62
 directives149–51, 158–59
 regulations149, 158
 liberal democracy and141–44
 litigation347–54, 355
 direct proceedings
 before the ECJ351–54, 355
 national legal
 systems and347–51, 355

membership	137	retrospectivity	426, 428–29, 431–34, 435
ombudsman	205, 223	right to life	383–89, 392, 395, 397–98
Scotland and	35, 36	European Council	148, 152
soft law	175–77, 179–80, 185	European Court of Human Rights	21, 32, 47, 51, 197, 265, 365, 366–70, 381
UK and	25, 27–30, 31, 50, 53, 153–56, 162	procedures and remedies	367–69
European Convention on Human Rights	16, 21, 32, 47, 50, 51, 75, 142, 310, 327, 361, 362, 363–66, 381–82	who is subject to challenge by	370
actions based on	197, 366, 367–70	who may apply	369–70
derogation and reservations	365–66	European Court of Justice	47, 142, 148–49, 347–48
EC law and	377–78, 382	annulment actions	351–53, 355
equality	515–21, 525–28, 530	enforcement proceedings	353, 355
freedom of assembly and association	495, 496, 497, 504–08, 509, 510	freedom of expression	482–83
freedom of expression	463, 466, 467, 471, 473, 475–81, 483, 484–85, 486–87, 489–91	preliminary references	348–50, 355
freedom of movement	534, 535, 539, 553, 555	tortious claims against EC	35, 353–54
incorporation into UK law	16, 25, 32, 47, 84, 90, 105–06, 127, 364, 366, 371–77, 382	European Economic Community (EEC)	138
judicial review and	229	European Parliament	122, 143, 147, 152, 168
liberty of the person	399–401, 403–14, 416–19, 421–23	ombudsman	205, 223
privacy	438–41, 443, 446–47, 448–52, 454–57, 459–61	European Social Charter	50
proportionality principle and	310–12, 314	Europol	152
		Euthanasia	359, 390–92, 398
		Eveleigh, Lord	322
		Evidence evidential rules	171–72
		gathering of	400
		Ewing, Keith	378–79
		Exclusion orders	540
		Executive agencies	165, 183
		Expectation <i>see</i> Legitimate expectation	
		Extradition	388, 397–98, 539

- Fact, errors of 248–51, 253, 255
- Fair comment defence 474
- Fairness 257–58
- right to fair hearing 285–86
- content of hearing 269–67
- disclosure right 269–70
- distinguished from legitimate expectation 291
- legal representation 271–72
- licensing decisions 261–63
- reasons for decision, right to 273–77
- requirement
- of fair hearing 259–64
- restrictions on right 264–69
- statutory
- consultation 270–71
- witnesses 271–72
- written/oral evidence 270
- see, also*, Bias; Legitimate expectation
- Family 82–83
- privacy rights
- against the State 449–50, 460
- Fawkes, Guy 60
- Federalism 26, 101
- Feldman, D 464, 494, 533
- Feminism 15
- Feudalism 57–58
- Filkin, Elizabeth 129
- First World War 73
- France 16, 59
- Holocaust denial laws 478
- Revolution 69, 360
- Franks Committee 195
- Fraser, Lord 288
- Free movement of goods, freedom of assembly and association and 503–04, 510
- Freedom of assembly and association 493–508, 509–10
- assessment 506–08
- binding over orders 497, 509
- breach of the peace and 495–96, 507–08, 509
- free movement of goods and 503–04, 510
- nuisance actions 498, 509–10
- obstruction of the highway 497–98, 509
- Public Order Act 1986 500–503, 506, 510
- restrictions on 504–06, 510
- trespass and private property 498–99, 510
- Freedom of expression 463–87, 489–91
- access to information 484–86, 491
- assessment 486–87
- contempt of court 468–70, 487, 489
- media regulation 473, 483–84, 489
- Members of Parliament (MPs) 128–29, 135–36, 466
- national security and 467–68, 489
- Official Secrets Acts 471–73
- protection of 466–67
- protection of health or morals 480–83, 490
- protection of sources 470–71
- reputation of others 473–77, 490
- rights of others 477–80, 490
- whistleblowers 471
- Freedom of movement 533–51, 553–54
- assessment 550–51
- asylum 388, 397–98, 534, 547–50
- in EU 534, 541–47, 554–55
- from UK 535–36, 553
- into UK 536–38, 553–52
- nationals 536–37
- non-nationals 537–38
- involuntary removal from UK 538–40
- scope of 535
- within UK 540, 554
- Fukuyama, Francis 14
- Fuller, Lon 425, 427
- Furedi, Frank 22

- GCHQ* 128, 226–28,
258, 265, 287, 289,
299, 303, 310,
313, 337, 367
- Gearty, Conor 378–79, 494
- Gender (sex) discrimination ... 516, 517,
518–19, 522–23,
529, 530–31
- George V 73
- Germany
allocation of competences 26
freedom of expression 478, 479
history 73, 74
Holocaust denial laws 478
retrospective laws 425, 426
- Gibraltar 378
- Giddens, Anthony 90, 91
- Gladstone, William 71
- Globalisation 48–49, 54
- Glorious Revolution 60, 65–67
- Goff, Lord 277, 281
- Government and
administration 32–34, 163–81,
183–85
19th century reform 71–72
accountability
and control 131–32,
136, 177–80
Conservative
Party and 87–88
discretionary powers 10, 172–73
Ministers 32, 33–34, 163
political neutrality 164
status of public
officials 163–64
types of administrative
bodies 164–69, 183–84
types of
decision making 169–67, 184–85
in EC 175–77
policies 173–75
rules 170–73, 180–81
- Gray, John 13, 14
- Greater London Council 84–85
- Greece
freedom of assembly/association . 505
media regulation 483
- Greene, Lord 300, 301–02
- Greenpeace 335, 336–37
- Griffith, JAG 46
- Griffiths, Nigel 129
- Habeas corpus 417–18, 423
- Hague, William 80–81, 93–94, 133
- Hamilton, Neil 129
- Hansard Commission 126
- Harassment 418–19, 424, 503
- Harlow, Carol 213, 220, 431
- Hayek, Friedrich von 425–26
- Health Service
Ombudsman 204, 216, 223
internal complaints
procedures and 221–22
investigations by 207–08, 209
limits on power of 211
process 212, 213
- Hearing
fairness
see Procedural impropriety ground
for judicial review
judicial review 332
- Heartfield, James 130
- Heath, Edward 143
- Henry VI 59
- Henry VII 59
- Henry VIII 59
- Higgins, Rosalyn 362–63
- High Court 45, 225
- Higher Education Funding Council . 166
- Highway, obstruction of 497–98, 509
- Highway Code 170, 171
- Highways Agency 165
- Hill, Christopher 62, 63, 64
- History
15th century 59
16th century 59–60
17th century 60–67
18th century 67–69

- 19th century69–72
 20th century72–75
 importance of55–57
 Magna Carta55, 58
 Norman conquest
 and feudalism57–58
 principles from55–76, 77
 Hoffmann, Lord280, 359, 513
 Holocaust denial laws478
 Homelessness20
 Homosexuality9, 21, 83, 127, 369,
 450–51, 461
 discrimination514, 525–27, 531
 Hong Kong173–74
 House of Lords85, 123–24
 Acts of Parliament and125–26
 reform proposals124
 Howard, Michael46
 Human rights
 see Rights
 Illegality ground for
 judicial review227, 237,
 239–53, 255–56
 acting ‘outside
 the four corners’239–40, 255
 delegation of
 discretion246–48, 255
 errors of fact248–51, 253, 255
 errors of law248–50,
 251–53, 255–56
 fettering of
 discretion244–46, 255
 improper purpose243–44, 255
 ‘incidental’ powers240
 relevant and irrelevant
 considerations241–43, 255
 Immigration172, 289
 asylum388, 397–98,
 534, 547–50
 deportation388,
 397–98, 538–40
 detention of
 immigrants413–14, 423
 privacy rights
 against the State448–49, 460
 see, also, Freedom of movement
 Independent Complaints
 Adjudicator205
 Independent Television
 Commission167, 484
 India74, 75
 Industrial revolution70
 Information
 see Access to information
 Inland Revenue206, 294, 334, 429
 Innocence,
 presumption of87, 409
 Insulting behaviour496, 502, 503
 Insurance ombudsman205
 Interest rate swaps240
 International Covenant
 on Economic,
 Social and Cultural Rights361–62
 International Covenant
 for the Protection of
 Civil and Political Rights466, 478
 International
 Criminal Court51
 International
 organisations49, 50–51
 International treaties49–50, 51
 Interrogation by police402–04, 421
 ill-treatment during406
 Iraq130, 136
 Ireland
 history59, 63, 66,
 69, 73–74, 98
 see, also, Irish Republic; Northern
 Ireland
 Irish Republic37, 74
 information on abortion481–82
 North-South
 Ministerial Council39
 ombudsmen in221
 Irrationality ground
 for judicial review228, 237,
 299–312, 313–14
 human rights and305–08, 313–14

- judicial review
of 'merits' 300–301
proportionality and 309–12, 314
substantive
principles of review 304–09
Wednesbury
unreasonableness 301–03, 304
- Irvine, Lord 502
- Jacobs, Francis 148
- James I and VI 60, 61–62
- James II 64, 65, 66
- Jenkins of Hillhead, Lord 122–23, 135
- Jennings, Ivor 99–100, 102, 108–09, 111
- Judicial review 197, 225–35, 237–38
basis of court's power 229–32, 238
functions test 338–40
grounds 226–29, 237
European Convention on
Human Rights 372–76
illegality 227, 237,
239–53, 255–56
irrationality 228, 237,
299–312, 313–14
legitimate
expectation 259, 287–96, 297–98
procedural
impropriety 227, 237,
257–83, 285–86
new theory of 234–35, 238
ouster clauses 252,
315–24, 325–26
general principles 317–19
super ouster clauses 323–24
time limits (six
week clauses) 316–17,
319–20, 325
total 316, 317,
318, 321–23, 325
procedures 327–44, 345–46
access to justice 327–29, 345
decisions challenged
by judicial review 337–40, 346
exhausting
alternative remedies 329
full hearing 332
interlocutory
period 331–32
Ord 53 procedure 329–22,
340–44, 345, 346
permission of
the court 330–31
who may apply 333–37, 345
remedies 332–33
source of power test 337–38
traditional analysis 230–34, 238
problems with 232–34, 238
- Judiciary 44–45, 54
independence of 45–47
- Juries 408–09
- Jurisdiction, concept of 230–31
- Justice 213, 216, 328
access to 327–29, 345
- Kinnock, Neil 146
- Knox, John 59
- Labour Party 6, 73, 79, 120
aims and values 88–89
crime and 418
European Community/
Union and 143
funding 130
government of 1945 74–75
House of Lords and 124
local government and 43
principles and 80
in Scottish
Parliament 34
UK constitution and 25, 79, 88–94, 95
- Laissez-faire* 10, 13
- Laker, Freddie 174
- Lane, Lord 322
- Law
errors of 248–50,
251–53, 255–56
law writers
see Textbook writers
non-retrospectivity 425–34, 435–36
civil measures 427–31, 435

- criminal measures 426,
 431–34, 435–36
 rule of law 106–10,
 113–14, 169, 172
 Parliament and 107–08, 109–10
 Law Commission 328, 343
 Laws, Lord 103–04, 360–61
 Legal representation,
 right to 271–72, 403
 Legal Services
 Ombudsman 205
 Legal systems 44–45
 Legislation 125–28, 135
 European Community/
 Union 149–51, 161–62
 directives 149–51, 158–59
 regulations 149, 158
 primary 125–27
 rules attached to 171
 subordinate 33, 127–28,
 150–51
 see, also, Acts of Parliament
 Legitimate expectation 259,
 287–96, 297–98
 distinguished from
 fair hearing right 291
 doctrine 287–90
 substantive protection 292–96
 Levellers 64
 Lewis, Derek 177–78
 Libel
 civil 473–77
 criminal 477
 Liberal democracy
 characteristics 8–15
 autonomy/liberty 8–10, 16–17, 21
 popular
 participation 11–12, 17–19, 21
 safety and
 welfare 12–13,
 19–20, 21–22
 constitutions in 15–22
 autonomy/
 liberty and 16–17, 21–22
 democracy and 17–19, 21
 mediating tensions
 between constitutional
 goals 20–22
 safety and
 security from 19–20, 21–22
 European Community/
 Union and 141–44
 future of 13–15
 Liberal Democrats 79, 91, 95
 Liberal Party,
 early 20th century 72, 73
 Liberty
 see Autonomy/liberty
 Licensing decisions,
 fair hearing 261–63
 Life, right to 383–95, 397–98
 assessment 394–95
 asylum, deportation
 and extradition 388, 397–98
 duty to prevent death 385–87, 397
 medical treatment
 pre-birth 392–94, 398
 right to 388–89
 right to refuse 389–92, 398
 State killing 383, 384–85, 397
 Living will 390
 Lloyd George, David 72, 73
 Local Commissioner
 for Administration (LCA) 194,
 204, 221, 223
 investigations by 208–09
 limits on power of 211
 process 213
 reports 216
 Local government 30, 43–44, 53
 Conservative
 Party and 83, 84–85, 86–87
 functions 167–68, 184
 interest rate swaps 240
 officers 164, 179
 ombudsman
 see Local Commissioner for
 Administration (LCA)
 surcharges of
 councillors 267
 taxation 83

Locke, John . . . . .	.67	Meetings	
Lord Advocate . . . . .	.35–36	<i>see</i> Freedom of assembly and	
Lord Chancellor . . . . .	.26	association	
Loughlin, Martin . . . . .	.84	Members of	
Luther, Martin . . . . .	.59	Parliament (MPs) . . . . .	.117
		calling government	
		to account . . . . .	.131–32, 136
McCrudden, C . . . . .	.514	election of . . . . .	.121–23, 135
Macdonald, Gus . . . . .	.91	freedom of speech . . . . .	.128–29,
Macdonald, Ramsey . . . . .	.88	135–36, 466	
Mackay, Lord . . . . .	.83	honesty . . . . .	.129–31, 136
Mackinnon, C . . . . .	.465	legislation and . . . . .	.125–28, 135
Macmillan, Harold . . . . .	.123	Private Members’ Bills . . . . .	.126–27
Magna Carta . . . . .	.55, 58	as representatives . . . . .	.119–21, 135
Maitland, FW . . . . .	.65–66	social class and . . . . .	.124
Major, John . . . . .	.130	whip system . . . . .	.128–29
Maladministration . . . . .	.203–04,	Mental Health	
206–09, 214		Commission . . . . .	.167
Mandate theories . . . . .	.120–21	Mentally ill people,	
Markets		detention of . . . . .	.414–16, 423
as alternative		MI5/MI6 . . . . .	.441
to democracy . . . . .	.86–87	Michael, Alun . . . . .	.40
economic freedom . . . . .	.10, 13,	Mill, John Stuart . . . . .	.8–9, 437, 464, 511
83–84, 86–87		Milward, Alan . . . . .	.141
Marquand, David . . . . .	.89–90, 92	Ministers . . . . .	.32, 33–34, 163
Marshall, G . . . . .	.464–65	bias . . . . .	.282
Mary II . . . . .	.65–66	Misfeasance in	
Matrix Churchill . . . . .	.130	public office . . . . .	.192, 196
Mauritius . . . . .	.513	Monarchy . . . . .	.47–48
Media		feudal period . . . . .	.57–58
freedom of . . . . .	.463, 465–66	Restoration . . . . .	.60, 64
contempt of		royal prerogative . . . . .	.33–34, 48
court and . . . . .	.468–70, 487	Monnet, Jean . . . . .	.141
protection for . . . . .	.466–67	Morals, protection of . . . . .	.480–83
protection of sources . . . . .	.470–71	Mount, Ferdinand . . . . .	.109–10, 112
regulation . . . . .	.473,	Movement	
483–84, 489		<i>see</i> Freedom of movement	
rights of privacy and . . . . .	.452–56, 461	National Audit Office . . . . .	.178, 192
Medical treatment		National Consumer	
right to . . . . .	.388–89	Council . . . . .	.167
pre-birth . . . . .	.392–94, 398	National Health	
right to refuse . . . . .	.389–92, 398	Service (NHS) . . . . .	.20, 93
Medicines Commission . . . . .	.167	ombudsman	
		<i>see</i> Health Service Ombudsman	

- National security,
 freedom of
 expression and 467–73, 489
- Nationalisation 75, 86
- Natural justice 258
- Ne exeat regno* 535
- Nemo iudex in causa sua* 258, 277
- Neo-liberalism 10
- New Zealand 74
- News media
see Media
- Next Steps Agencies 165
- Non-departmental public bodies
 (NDPBs) 165
- Norman conquest 57
- North Atlantic Treaty
 Organisation (NATO) 19, 49
- Northcote, Stafford 71
- Northern Ireland 30, 31, 32
 executive bodies 38–39
 intergovernmental
 relations within UK 41–42
 judicial review in 225, 329
- North-South
 Ministerial Council 39
- Northern Ireland
 Assembly 37–38, 122
 parades in 500–501, 506
 religious discrimination 517
- Norton, Philip 84
- Norway 417
- Nuisance actions 498, 509–10
- Obscenity 480–83, 490
- Obstruction of
 the highway 497–98, 509
- Office of Fair Trading 166
- Office of Public Service
 and Science 221–22
- Ofwat 178
- Oliver, Dawn 234
- Ombudsmen 194, 203–22, 223
 Barlow Clowes affair 217–19
 future of 219–22
- internal complaints
 procedures and 221–22
 limits on powers 210–11
 maladministration
 and 203–04,
 206–09, 214
 process 211–16
 statistics of use 209–10
 types 204–06
- Oppression 406
- Organisation, levels of 3–4
- Ouster clauses 252, 315–24, 325–26
 general principles 317–19
 super ouster clauses 323–24
 time limits (six
 week clauses) 316–17,
 319–20, 325
 total 316, 317,
 318, 321–23, 325
- Paine, Thomas 68, 69, 118, 360
- Pakistan 75
- Pannick, David 477
- Parenting orders 419
- Parliament 18, 26, 73,
 117–33, 135–36
- Acts
see Acts of Parliament
 calling government
 to account 131–32,
 136
 diminishing
 importance of 132–33
 EC directives and 150
 functions 31–32, 53,
 118–33, 135–36
 historical
 development 61–62,
 63–64, 66, 117–18
 legislation 125–28, 135
 primary 125–27
 subordinate 33, 127–28, 150–51
 members
see Members of Parliament

- ombudsman
see Parliamentary Commissioner for Administration (PCA)
 rule of law and107–08, 109–10
 sovereignty153–54
 Dicey’s view100–106, 113
 whip system128–29
- Parliamentary
 Commissioner
 for Administration (PCA) . . .194, 203,
 204, 223
 future219–22
 investigations by206–07, 209, 210,
 214–15
 Barlow Clowes affair217–19
 limits on power of210–11
 process211–16
 reports215–16
- Parliamentary Commissioner for
 Standards129, 136
- Parris, Matthew91
- Passports535–36
- Paternalism9–10, 22
- Peace, breach of442–43, 495–96,
 507–08, 509
- Pergau Dam project335–36
- Picketing code171
- Pluralism10
- Police12, 19–20
 assemblies/
 processions and500–502
 breach of the
 peace and442–43, 495–96,
 507–08, 509
 detention by402–04, 421–22
 duration405–06, 422
 European Community/
 Union and152–53
 globalisation and49
 immunity of387, 395
 interrogation by402–04, 421
 ill-treatment during406
 powers44, 53
 arrest402
 detention402–04, 405–06, 421–22
 during criminal
 investigations400–06, 421–22
 search and entry powers .441–43, 459
 secret surveillance439–41, 459
 reasonable
 suspicion test400–02, 421
 State killing384, 385
 suicide and386–87
- Police authorities44
- Police Complaints Authority44, 441
- Policies173–75
- Politics
 involvement in11–12, 18–19, 79
 mandate theories120–21
 Parliament and120
 principles and79–94, 95–96
- Ponting, Clive408
- Pornography464, 465
see, also, Obscenity
- Positive discrimination521, 524
- Postmodernism7, 14
- Powers of authorities . . .230, 231–34, 238
 disputes about existence of190–91
see, also, Judicial review
- Predetermination, bias by281–82
- Preliminary references,
 European Court of Justice . .348–50, 355
- Press
see Media
- Press Complaints
 Commission166, 455–56
- Preventive detention417, 419–20
- Prime Minister48
 appointment of judges45
- Principles3–22, 23
 defined5–7
 from history55–76, 77
 legal rules and7–8
 politicians and79–94, 95–96
 reason and6–7
 textbook writers and . . .97–112, 113–14
- Prison14
 conviction and410–11
 rights of prisoners411–13, 422–23
 suicide in386–87

- Prison Services Agency165, 177
- Prisons Ombudsman Office 205, 223
- Privacy437–57, 459–61
- assessment 456–57
 - rights against private bodies 452–56, 461
 - rights against the State 439–52, 456, 459–61
 - children 451–52, 461
 - Data Protection Act 447
 - European
 - Commission’s powers 443
 - family relationships 449–50, 460
 - immigration
 - decisions 448–49, 460
 - private information
 - held by public authorities . 444–47, 460
 - search and
 - entry powers 441–43, 459
 - search orders 443–44, 459–60
 - secret surveillance 439–41, 459
 - sexual activity 450–51, 461
 - Private Members’ Bills 126–27
 - Private nuisance 498
 - Private property,
 - trespass and 498–99, 510
 - Privatisation 86
 - Privy Council 48
 - Judicial Committee 42, 226, 229
 - Procedural impropriety
 - ground for 227, 237, 257–83, 285–86
 - judicial review 227, 237, 257–83, 285–86
 - fair hearing 285–86
 - content of hearing 269–67
 - disclosure right 269–70
 - distinguished from
 - legitimate expectation 291
 - legal representation 271–72
 - licensing decisions 261–63
 - reasons for decision,
 - right to 273–77
 - requirement of
 - fair hearing 259–64
 - restrictions on right 264–69
 - statutory consultation 270–71
 - witnesses 271–72
 - written/oral evidence 270
 - history 257–59
 - legitimate expectation 259, 287–96, 297–98
 - distinguished from
 - fair hearing right 291
 - doctrine 287–90
 - substantive protection 292–96
 - rule against bias 258, 277, 286
 - appearance of bias 278–79
 - different
 - manifestations of 281–82
 - direct pecuniary
 - interest and 280–81
 - exceptions 282–83
 - ministerial bias 282
 - test for 279–80
 - Processions 500–501
 - Prodi, Romano 146
 - Property, trespass and 498–99, 510
 - Proportional
 - representation 122–23
 - Proportionality, irrationality
 - ground for judicial
 - review and 309–12, 314
 - Public interest
 - disclosure
 - (whistleblowing) 471
 - exception to fair
 - hearing right 265
 - Public law
 - constitutions 15–22
 - autonomy and 16–17, 21–22
 - democracy and 17–19, 21
 - mediating tensions
 - between constitutional
 - goals 20–22
 - safety and security
 - from 19–20, 21–22
 - UK 25–51, 53–54
 - liberal democracy
 - characteristics 8–15
 - constitutions 15–22
 - principles 3–22, 23
 - defined 5–7

from history	55–76, 77	Remedies	
legal rules and	7–8	European Court	
politicians and	79–94, 95–96	of Human Rights	368–69
reason and	6–7	habeas corpus	417–18, 423
textbook writers		judicial review	332–33
and	97–112, 113–14	libel	476
scope	4–5	for violation of	
Public nuisance	498	European Convention	
Public order	500–03, 506–07, 510	on Human Rights	376–77
Qualified privilege	474	Representative democracy	11
Quasi-non-governmental		Reputation of others,	
organisations (quangos)	165	freedom of	
Race		expression and	473–77, 490
discrimination	517–18, 529	Rescue, duty to	386
racism and freedom		Restoration	60, 64
of expression	464, 478–79	Retrospectivity	425–34, 435–36
Rape	432	assessment	434
Raz, Joseph	425, 463	civil measures	427–31, 435
Reason	6–7	criminal measures	426, 431–34, 435–36
Reasonable		Riddell, Peter	132–33
suspicion test	400–02, 421	Ridley, Nicholas	218
Reasons for		Rights	361–79, 381–82
decision, right to	273–77	access to justice	327–29, 345
Referendum Party	143–44	civil liberties	5, 360–61
Reformation	59	constitutions and	16–17, 21, 25
Refugees (asylum		EC law and	377–78, 382
seekers)	388, 397–98,	equality	511–28, 529–31
	534, 547–50	assessment	527–28
Regulation	13, 17, 22, 91	disability and	517, 519–20, 529
deregulation	83–84	EC law and	522–25, 530–31
regulatory bodies	165–66, 178, 183	justified	
right to fair hearing in		discrimination	520–21,
licensing decisions	261–63	523–25, 530, 531	
self-regulatory		principle of	308–09, 359
organisations	166, 178–70, 183, 205	race and	517–18, 529
Regulations		scope of anti-	
of the EC	149, 158	discrimination laws	515–21, 529
Reid, Lord	321	sex and	518–19,
Relativism	10	522–23, 529, 530–31	
Religion	82	sexual	
blasphemy	477–78, 481	orientation and	525–27, 531
fundamentalism	15	fair hearing, to	259–77,
religious discrimination	517	285–86, 291	
		freedom of	
		assembly and	
		association	493–508, 509–10
		assessment	506–08

- binding over orders 497, 509
- breach of the
 peace and 495–96,
 507–08, 509
- free movement of
 goods and 503–04,
 510
- nuisance actions 498, 509–10
- obstruction of the
 highway 497–98, 509
- Public Order Act 1986 500–503,
 506, 510
- restrictions on 504–06, 510
- trespass and private property 498–99,
 510
- freedom of expression 463–87,
 489–91
- access to information . . . 484–86, 491
- assessment 486–87
- contempt of court 468–70,
 487, 489
- media regulation 473,
 483–84, 489
- national security and . . . 467–73, 489
- Official Secrets Acts 471–73
- protection of 466–67
- protection of health
 or morals 480–83, 490
- protection
 of sources 470–71
- reputation of others 473–77, 490
- rights of others 477–80, 490
- whistleblowers 471
- freedom of
 movement 533–51, 553–54
- assessment 550–51
- asylum 388, 397–98,
 534, 547–50
- in EU 534, 541–47,
 554–55
- from UK 535–36, 553
- into UK 536–38, 553–52
- involuntary
 removal from UK 538–40
- scope of 535
- within UK 540, 554
- globalisation and 48–49
- irrationality ground
 for judicial review and 305–08,
 313–14
- judges and 360–61, 378–79
- liberty of the person . . . 399–420, 421–24
- assessment 418–20, 424
- conduct of
 criminal trials 406–13, 422
- detention outside criminal
 justice system 413–17, 423
- habeas corpus 417–18, 423
- police powers during
 criminal investigations . . . 400–406,
 421–22
- prison 410–13, 422–23
- to life 383–95, 397–98
- assessment 394–95
- asylum, deportation and
- extradition 388, 397–98
- duty to prevent
 death 385–87, 397
- medical treatment 388–94, 398
- State killing 383, 384–85, 397
- privacy 437–57, 459–61
- assessment 456–57
- rights against
 private bodies 452–56, 461
- rights against the State 439–52,
 456, 459–61
- retrospectivity 425–34, 435–36
- assessment 434
- civil measures 427–31, 435
- criminal measures 426, 431–34,
 435–36
- to silence 87, 404, 409
- sources of 362–63
- universality 362–63
- see, also*, European Convention on
 Human Rights; European Court of
 Human Rights
- Robertson, Geoffrey 486,
 533–34, 550–51
- Rose, Richard 122
- Rose Theatre* 334–35
- Royal prerogative 33–34, 48

Rule of law	106–10, 113–14, 169, 172	Sex discrimination	516, 517, 518–19, 522–23, 529, 530–31
Parliament and	107–08, 109–10	Sexual activity, privacy rights against the State	450–51, 461
Rules	170–73, 180–81	Sexual offences	92, 446
Rushdie, Salman	465, 477, 502	Sexual orientation <i>see</i> Homosexuality	
Russell, Conrad	56–57, 63	Shklar, Judith	426
Safety and welfare	12–13, 19–20, 21–22	Silence, right to	87, 404, 409
Conservative Party and	87	Six week ouster clauses	316–17, 319–20, 325
European Community/ Union and	144	Slynn, Lord	148
Labour Party and	92–93	Social Security Commissioner	194
Santer, Jacques	146	Soederman, Jacob	205
Sawoniuk, Anthony	431	Soft law	183–85
Scotland	30, 31, 32, 58	in EC	175–77, 179–80, 185
intergovernmental relations	41–42	policies	173–75
judicial review in	225, 329	rules	170–73, 180–81
legal system	44–45	South Africa	16, 74
Reformation in	59	Soviet Union	425
Scottish Administration	36–37	Special Adjudicators	194
Scottish Parliament	34–36, 122	Speech, freedom <i>see</i> Freedom of expression	
Scott, Richard	130, 136	Standing, judicial review	333–37
Search and entry powers, police	441–43, 459	Statutory instruments	33, 127–28, 150–51
Search orders	443–44, 459–60	Stock Exchange	166
Second World War	74	Subordinate legislation	33, 127–28, 150–51
Secret surveillance	439–41, 459	Subsidiarity principle	155
Securities and Investment Board (SIB)	217	Suicide assisted	390–92, 398
Security, national, freedom of expression and	467–73, 489	prisoners	386–87
Sedley, Charles	481	Super ouster clauses	323–24
Sedley, Lord	384	Surveillance	439–41, 459
Sedley, Stephen	14, 362, 363, 465–66	Suspicion, reasonable	400–02, 421
Selbourne, David	15	Switzerland	11
Select committees	131	freedom of expression	480
Self-incrimination	409		
Self-regulatory organisations	166, 178–70, 183, 205		

- Taxation72–73, 83, 429
- Telephone tapping293, 440–41
- Templeman, Lord306
- Textbook writers97–112, 113–14
- Thatcher, Margaret84, 85, 123
- Third parties, disclosure to446–47
- Tocqueville, Alexis de493
- Tompkins, Adam121
- Tort actions196
 claims against EC35, 353–54
- Total ouster clauses316, 317, 318,
 321–23, 325
- Trade unions82
- Tradition, as
 alternative to democracy85–86
- Transsexuality449–51, 527
- Travel
 see Freedom of movement
- Trespass498–99, 510
 trespassory assemblies499, 501–02
- Trevelyn, Charles71
- Trial, conduct406–13
- Tribunals194–96
 see, also, Fairness, right to fair hearing
- Turkey, freedom of assembly/
 association505
- UK and Ireland
 Ombudsmen Association206
- Ultra vires*230, 231–34, 238
 illegality ground for
 judicial review227, 237,
 239–53, 255–56
- Unfairness
 see Fairness
- UK constitution
 allocation of competences25–27
 between EC and UK27–30,
 31, 53, 140
 within UK30–48, 53–54
 constitutional
 conventions18, 27,
 110–11, 114
 devolution and30–31, 32,
 34–42, 54
 government and
 administration32–34, 163–81,
 183–85
 historical
 development55–76, 77
 international dimension48–51, 54
 judiciary44–47, 54
 liberal democracy
 and15, 16–17,
 18, 20, 21
 local government30, 43–44, 53
 monarchy47–48
 new constitutional
 settlement25–51, 53–54
 Parliament31–32, 53
 police powers44, 53
 political parties and79–94, 95–96
 Conservative Party79–80,
 81–88, 95
 Labour Party25, 79,
 88–94, 95
 textbook writers
 and97–112, 113–14
 unwritten nature18, 20, 27, 55–56
- United Nations4, 19, 49, 51
 Convention Relating to
 Status of Refugees534, 547,
 549, 550
- Universal Declaration
 of Human Rights (1948)16, 361
- United States of America14, 16
 allocation of
 competences26
 anti-racism laws478
 Revolution68–69, 360
- Universities499
- Unreasonableness
 see Irrationality
- Utilitarianism67

Vehicles Inspectorate	165	European Community/ Union and	144
Vibert, Frank	140–41	Labour Party and	93
Voluntary associations	3–4, 82–83, 84	Western European Union (WEU)	19, 49
<i>see, also</i> , Freedom of assembly and association		Whistleblowers	471
Voluntary codes	172	Wilkes, John	67–68
Wacks, Raymond	438	Willetts, David	128–29
Wade, HWR	341	William I	57
Waldegrave, William	130	William III	65–66
Wales	30, 31, 32	Witnesses	
Assembly	39–40, 122	cross-examination	271–72, 410
intergovernmental relations	41–42	right to call	271
Walker, David	82	Women	
War crimes	431–32	MPs	124
Warnock, Mary	93, 359	sex discrimination	516, 517, 518–19, 522–23, 529, 530–31
Warrant		votes for	71, 74, 98
arrest	402	Woolf, Lord	103–04, 273
search	442	Woolf Report	205, 328
Wars of the Roses	59	Working time	154
Washington, George	68–69	World Trade Organisation	4, 48
Weapons	22	Wright, Peter	468
<i>Wednesbury</i>		Written representations	270
unreasonableness	301–03, 304	Wrongful life claims	394, 398
Welfare system	12–13, 20	Young, Lord	218
Conservative Party and	87	Yugoslavia	547
creation of	72–73, 74, 75, 88		