5 Rule of Law

5.1 Development of the Rule of Law

5.1.1 Introduction

Rule of law – rules of law

When we use the term ‘rule of law’ we are referring to the rule of law in the English or common law sense, which is somewhat different to the French term ‘Etat de Droit’ and to the German notion of the ‘Rechtsstaat’. The obligation of states to follow the rule of law could be understood in a number of different ways:

- Does it refer to the rule of laws, that is, to the subordination of state institutions to particular ‘ideologies’ or natural laws understood as binding prestate principles to which positive law must adhere (notion of the French état de droit)?
- Does it refer to the rules of law, that is, to the obligation of state institutions to obey the positive laws enacted by the legislature (état légal in French or Rechtsstaat in German)?
- Does it refer to the rules of the laws, that is, to the subordination of state institutions to the positive laws, which in turn follow and are based upon particular pre-state ideologies?
- Or does it refer to the rule of law, that is, to the claim that there are universally valid pre-state legal principles, deduced by reason, to which all states and sovereigns including constitution-makers are subject? In this case one would have to ask the question ‘who is the universaliser’? That is, who has the authority to make binding determinations as to what the rule of law means and requires?

In the following pages we shall use the term ‘rule of law’ principally in the sense of the general idea of a universally valid, rationally deduced law.

Rule of law and “Rechtsstaat”

The idea that the positive embodiment of the state legal order must always adhere to the fundamental principles of law and justice was developed primarily within the Anglo-Saxon legal tradition. The German notion of the Rechtsstaat is an expression of the requirement that all authorities and institutions created under the constitution of the state must comply with the positive law. The Anglo-Saxon notion of the Rule of Law on the other hand encapsulates the basic and fundamental principle according to which political might and power is always limited and controlled by the law in the sense of pre-state and pre-positive law.
That men should not be ruled by men but by law was first expressed as the principle of the ‘Rule of Law’ in 17th Century England, by republican James Harrington in his famous work *The Commonwealth of Oceana* (1656). The idea itself is however much older. Early Greek political philosophers argued for the supremacy of law as protection against the arbitrary rule of tyrants (*Aristotle, Politics*, Book III, 15 ff). But it is principally the Western European medieval idea of a higher law that limits even the power of the King, which has shaped the modern concept of the rule of law. Within Western Europe the jurisprudence developed through the common law courts in England strengthened this legal principle. Through their case law the common law courts of England ultimately had a major influence on modern legal philosophy throughout Europe and the West.

**Preparedness of the common law for the development of the rule of law**

The common law system, which was continuously developed based on rational arguments before the courts and was able to adapt to social developments, proved itself to be much more receptive to the idea of the rule of law than were the continental European legal systems in which the law was fixed by the sovereign lawmaker. In addition to the practice of the common law courts, political philosophy also contributed significantly to the development of the idea of the rule of law. *John Locke’s* theory on the legitimacy of government was particularly influential. His claim that governments must achieve legitimacy by acceptance and consensus (*government by consent*) and that the authority of the power-holders can only be legitimate if it is based on the continuing support of the subjects, is ultimately derived from the principle of the rule of law.

In order to follow the emergence of the rule of law one must examine the historical development of the idea of the *authority of the law* within the English legal tradition. One can then take the further step of tracing the development of this principle in Germany and in France, which differed considerably from the way in which the principle developed in the United Kingdom.

### 5.1.2 The Development of the Rule of Law in the English Common Law Tradition

#### 5.1.2.1 Medieval Idea of the Supremacy of Law and its Effects on Modern Liberties

**Magna Carta**

The modern concept of individual liberty would not have been possible if the idea of establishing legal limits on the arbitrary acts of the Crown had not already gained acceptance in the age of European feudalism. In the early Middle Ages in
Western Europe this idea found expression in various charters, which guaranteed property rights of the King’s vassals and thus obliged the King to respect the private rights of his subjects.

As already mentioned in the context of the development of the principles of human rights, the *Magna Carta Libertatum* (The Great Charter of Liberties) of 1215 is a milestone in the legal history of the human struggle for personal liberty and the development of the rule of law. In contrast to the other charters drafted in the Middle Ages, the Magna Carta is still valid today. It was drafted under pressure from the peers of King John and aimed to impose limits on the arbitrary power of the King. The King was effectively forced to proclaim the charter in 1215. The Magna Carta can undoubtedly be seen as the document that laid the foundation for the later development of the rule of law.

In spite of the Magna Carta the English king remained an absolute monarch, but he could no longer make arbitrary decisions. A constitutional monarchy was thereby created. This meant that in England from that time on the King’s acts of executive power were legitimate as long as they were in accord with the established legal framework. The old Anglo-Saxon idea of the free man who is born with certain inalienable rights (privileges) against the Crown found its first legal expression in the Magna Carta. Thus the medieval principle of the supremacy of law became a constituent element of the common law.

The supremacy of law as a basic principle was deeply rooted in the nature of the medieval feudal polity, as it was based on a certain pluralism of power that was divided and balanced between various mutually limiting power centres. One could even say that to some extent this pluralism of feudal authority paved the way for the theory of separation of powers in the sense of mutual checks and balances between state powers and institutions. The concept of the rule of law as a product of the separation of powers however came about much later.

Much of the veneration of Magna Carta as one of the earliest constitutional documents in history is focussed on the famous provision in Article 39:

“No free man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgement of his peers, or by the laws of the land.”

**Mother of the modern state**

To this day scholars remain divided on the issue of the legal nature of the Magna Carta. Some argue that, like all other charters of that time, it merely confirmed existing customary law. Others contend that the Magna Carta was a fundamental constitutional law in the proper sense of the term, which made a revolutionary break with earlier feudal tradition and established new rights and freedoms. What is uncontested however is that the broad terms in Article 39 of the Charter, such as “no free man” and “by the laws of the land”, enabled interpretations which over the course of history saw the transformation of the Magna Carta from a charter of medieval feudal society into a modern document that has become an important foundation of modern law. The open and sometimes quite imprecise formulations
in the charter lend themselves to considerable expansion and adaptation to the social and legal context of the modern welfare state. In this sense, one can indeed rightly regard the *Magna Carta* as the ‘mother’ of modern liberty and constitutional government.

There are two main reasons for this assessment of the effect of the Magna Carta:

1. First, the formulation “no free man” is based upon the equality principle, and as such was able over centuries to be re-interpreted so that it no longer referred to the status of free aristocratic peers, but to all citizens.

2. Second, since the common law entails the ongoing development of legal rules on the basis of precedents and the logic of induction, it is much more flexible than the continental legal system of statutes and other fixed rules and regulations. The common law is therefore better able to take account of the requirements of modern society, by refining and developing the law on a case-by-case basis.

**Petition of Rights**

The *Petition of Rights* of 1628, a statement of the objectives of the English legal reform movement that led to the Civil War and ultimately to the execution of King Charles I in 1649, was also based on the traditional ‘liberties’ of England. The petition strengthened the claim that private property and personal liberty represented fundamental human rights, inherent in the common law and based on fundamental principles that were derived from nature and binding on the sovereign. The classical Habeas Corpus right of protection from arbitrary imprisonment was worded as follows:

“No man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disinh erited nor put to death without being brought to answer by due process of law” *(Petition of Rights, Section IV).*

**Habeas Corpus**

The *Habeas Corpus Act* of 1679 supplemented the Petition of Rights with a procedural guarantee under which every person has the right in the event of imprisonment to be brought promptly and directly before a court on a writ of habeas corpus to defend their freedom. This right was expanded by the *Habeas Corpus Act* of 1816, which extended the prohibition of arbitrary imprisonment in criminal cases to all cases of arbitrary and indefinite detention.

*(More on these basic documents in L. Basta, *Politika u granicama prava*, Belgrade 1984, p. 20–40).*

**From the Magna Carta to Habeas Corpus**

In Article 39 of the Magna Carta we can see the origins of the right to due process of the law, and thus the seed of the procedural and substantive rights guarantees later contained in the Vth (1791) and XIVth Amendments (part of the Civil War
Amendments of 1869) of the American Constitution as interpreted and applied by the Supreme Court.

Taking into account the political context of the charter and the potential for extensive interpretation of its major provisions, the Magna Carta was celebrated by Henry de Bracton in the 13th Century as the constitution of liberty (constitutio libertatis). Inspired by the underlying philosophy of this document, the famous judge and priest of the Cathedral in Exeter formulated the maxim which still figures as the most accurate formulation of the medieval supremacy of law doctrine: Rex non debet esse sub homine, sed sub Deo et lege (The king ought not to be under man, but under God and the law).

5.1.3 Major Constitutional Conflicts of the 17th Century

The institution of the British Parliament

Of major significance for the political and institutional development of the rule of law in medieval England was the appointment of the English Parliament as a permanent institution of the Crown in 1265, which continued to grow in its political influence. The fundamental principle for the authority of the English Parliament, no taxation without representation, had already been secured half a century earlier in the Magna Carta which provided in Article 12 that “no scutage nor aid shall be imposed in our kingdom, unless by the common council of our kingdom”. Nonetheless, it was only with the firm establishment of the Parliament that this principle gained full validity and recognition. The historical foundation for the later development of representative democracy was thereby laid. Furthermore, the road was paved for a revolutionary breakthrough to take place in the 17th Century: Parliament established legal limits on the power of the King, and the authority of Parliament was considerably enlarged.

Representation

The history of the English Parliament has no parallel on the European continent. In the period between the 14th and 16th Centuries it developed into a representative body, although it was not yet a democratic institution. Whilst Parliament was initially formed to consolidate and even to expand the political power base of the King, over time it became the most powerful competitor and opponent of the King’s authority. Thus the stage was set for the greatest constitutional conflict in English history, which led to a civil war from 1642–1649 and was brought to a close by the Glorious Revolution of 1688–1689 and the enactment of the Bill of Rights. The Parliament came out victorious and contributed a new milestone to the development of the rule of law: constitutional monarchy. The earlier balance between the Crown and Parliament was to be superseded by the sovereignty of Parliament.
No separation of powers

In order to understand properly the critical issues dominating the great constitutional conflicts of the time, one must bear in mind that at the beginning of the 17th Century there was no clear organisational or functional separation between the three powers (legislative, executive and judicial). The King-in-Parliament had the power to make laws, and at the same time sat as the highest judge in the highest court of Parliament. As the conflict between the King and Parliament reached its peak, it had to be decided which institution would ultimately have the upper hand. A political confrontation over the powers was unavoidable once the question emerged as to which bearer of power will prevail in the case of a conflict: the King, the Parliament or the courts of common law.

Crown prerogatives

In constitutional terms the conflict centred on the question of the royal prerogatives, i.e. those powers of the crown that were established by the common law. The first of the two Kings of the Stuart dynasty, James I (1603–1625), and his Chancellor, the famous philosopher Francis Bacon (1561–1626), exercised absolute monarchical power and were of the view that the King in the exercise of his prerogatives stood above the positive law of England, i.e. above both statutory law (the acts of Parliament) and the common law. The King thus had the power for example to amend laws passed by Parliament and to intervene in the practice of the courts to ‘correct’ common law precedents.

This view was firmly opposed by Sir Edward Coke (1552–1634), Chief Justice, first at the Court of Common Pleas and then at the Court of the King’s Bench. In a number of well-known cases Chief Justice Coke developed powerful arguments to support the supremacy of the common law not only over the royal prerogatives, but also over acts of Parliament. “In many cases the common law will controul acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void” (Coke CJ, Dr Bonham’s Case (1610) 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652).

The constitutional conflict over royal prerogatives was in essence a conflict between natural law, and the positive common law. It was also a conflict between two competing political and legal traditions, at the time equally dominant in Europe: the European continental tradition, and that of common law England. James I wanted to follow the continental European doctrine (which also applied in Scotland) of royal absolutism. According to this doctrine, the King was not subject to any parliamentary or judicial control, but stood above the law. The King not only enjoyed royal prerogatives, but as sovereign also enjoyed a higher authority than the legislature and the judiciary. This doctrine accorded with the classical, pre-modern natural law theory, such as that developed by Bodin. The King according
to this theory has divine royal rights vested in him by the grace of God, and is the highest law-making authority and the highest judge. He is the absolute sovereign, subject not even to his own laws. BODIN’s theory laid the ideological foundation for the absolutism of the French monarchy, and reflected the major contemporary political trends on the continent. It also gave James I the theoretical basis on which he could seek a constitutional justification for his absolutism.

**Collective wisdom constrains tyranny**

However, England had long since rejected the concepts of divine right and absolute monarchy. Legal theory and the practice of the courts in England were heading towards the modern age. At the same time major changes to the constitutional foundations of England were introduced in a manner typical of the English common law tradition: through a conservative form of an appeal to ‘common reason’ and the ‘collective wisdom of the generations’.

James I vehemently defended his ‘divine right’ to absolute and unlimited decision-making power under the royal prerogatives in an attempt to preserve the right of the King to exercise unconstrained authority. It was precisely this claim to absolute power that Parliament so steadfastly opposed. So it was that for the first time a fundamental power struggle between the King and Parliament arose. It is interesting to observe that the political power battle was fought using constitutional (legal) arguments.

EDWARD Coke and his supporters were fully aware of the magnitude of the challenge they faced: How to revise the constitutional framework to fashion a new relationship between the executive power on one side, and legislative and judicial, power on the other, and at the same time maintain the fiction that in constitutional terms everything remained fundamentally the same? Those who read the debates that took place in the English Parliament at that time will be impressed by the sharp contrast between the explosive, revolutionary political and constitutional positions being taken, and the cooperative and at times timid tone of the discourse by which these issues were resolved.

**Inviolability of rights is immanent to the common law**

It is only by bearing this historical context in mind that one can grasp the far-reaching impact of some of the early decisions of the common law courts. In the judgments of Chief Justice EDWARD COKE we can discern certain key elements of the rule of law as understood within the Anglo-American common law tradition (the most important of which are the *Case of Prohibition* (1608), the *Case of Proclamation* (1610) and *Bonham’s Case* (1610), see O. Hood-Phillips, *Leading Cases in Constitutional and Administrative Law* (3rd ed. 1967) London):

- That, unlike the continental law, the common law only recognises the validity of general rules if they have already been applied and developed in concrete cases. Only in cases of concrete application can it be determined
whether general rules have the capacity to regulate the situations of everyday life.
– That decisions and acts of the executive are legitimate only if they are formally proclaimed as legal acts.
– That the guarantee of the inviolability of individual rights is inherent in the common law and this guarantee stands above the positive law.

From this we can derive two postulates that are significant for the further development of the rule of law:

1. That the positive law should be controlled by fundamental legal principles and by reason. This idea dominated the constitutional debates of 17th and 18th Century England for only a few decades. The question of the sovereignty of Parliament was a more direct focus of these debates, including the notion that the sovereign is not subject to any pre-positive legal rules. And this debate in turn laid the foundation for the modern concept of a constitution as a written document that limits and controls the powers of the legislature.

2. That positive law, including the constitution, is neither the basis for nor the source of human rights, but rather the positive expression of the pre-existing obligation of the sovereign to observe human rights. This highlights another fundamental difference between the common law and the continental law. Constitutional jurists of the continent took the view that the constitution created human rights, and was not there merely to guarantee the protection of already existing rights.

These different standpoints led to fundamentally different understandings of the nature of the state in the two legal traditions. Whilst according to the Anglo-Saxon view the state is primarily a ‘moderator’ between different social forces, the state is seen in continental Europe as an instrument with which the ruling parties (the majority) can change society. During the two major modern revolutions in France and America, this difference became even more apparent and led to very different conceptions of the rule of law.

Institutions to limit the power of the rulers

The major constitutional conflicts in England all ultimately had a common goal: they were aimed at the establishment of appropriate legal institutions to limit the power of state authorities, in order to protect the rights of individuals against the abuse of power. This is why the two great themes which dominated political and constitutional theory of the 17th and 18th Century England, namely whether the sovereign parliament is bound by fundamental law, and the issue of the mutual control and limitation of the three powers, had a decisive influence on the modern understanding of the rule of law. Both themes – from different points of view – addressed the very leitmotiv of the rule of law: How to constitute ‘the empire of laws and not of men’.
5.1.4 Sovereignty of Parliament and the Fundamental Law

How can fundamental rights limit the sovereignty of parliament?

Almost every relevant writer in political philosophy in England at the time was engaged in the debate on the relationship between the sovereignty of Parliament and fundamental human rights. Over the span of two centuries two great names stand out in this context: JOHN LOCKE (1632–1704) and WILLIAM BLACKSTONE (1723–1780) argued that the claim of the lawmaker for limits on the extent of sovereign power (parliamentary sovereignty) on the one hand, and the claim for the universal validity of fundamental norms and values that protect and guarantee the rights of individuals on the other hand, are in their relation to each other complementary. It is only by combining these elements that limited government, i.e. government by law, can be guaranteed. However, there was also an influential minority of political philosophers which rejected any inherent relationship between the sovereignty of Parliament and fundamental law: THOMAS HOBBES (1588–1679) and JEREMY BENTHAM (1748–1832) both argued for the legally unlimited sovereignty of the state, and both influenced the analytical and positivist legal theory of the 19th and 20th Centuries.

The debate was conducted primarily in the light of the modern, rational philosophy of natural rights and social contract theory. The inalienable natural rights were translated into positive law in order to set legitimate limits on political power, and to charge government with the responsibility for protecting the rights of individuals.

The central issue of sovereign power

The reason why this debate is so important for the modern development of the rule of law lies in the fact that it tackled two propositions that until then had not been adequately addressed within the discourse on limited government:

- That the question of the nature of the sovereign power of the state implies in itself the question of the limits of sovereign power.
- That the rule of law can be interpreted as a legal principle that requires that state authority is bound by positive law, and not by fundamental pre-positive law in the classical sense of the rule of law.

While the latter positivist understanding of the rule of law became a key issue during the 19th and 20th Centuries, the nature of sovereign powers and their interrelationship was the focal point in the 17th and 18th Centuries. With the exception of HOBBES and BENTHAM, who defended the extreme variant of the unlimited sovereignty of Parliament, the answer to this problem was at the same time relatively clear but also in itself contradictory: In order to prevent the violation of human rights caused by the arbitrary exercise of power, political power must have clearly set limits. But what remains unclear is the nature or source of these limits: Are these limits based on positive law, on natural law, or moral principle? Most
proponents of the natural law doctrine held the view that natural law, positive law and morals were one unified entity. This was certainly the position of John Locke. His philosophy of natural rights and theory of limited government as government by consent mark the highpoint of classical liberal constitutionalism in England, which was later to be influential on the founding fathers of the United States.

Mixed government and separation of powers

At the centre of the debate over the protection of fundamental rights was the question of how the system of different powers could be combined with fundamental rights as a means of limiting the power of the sovereign. The classical theory of the common law posited the idea of a corporate sovereignty, in order to maintain the notion of a sovereign Parliament and at the same time recognise limits on Parliament imposed by fundamental rights. It is the King-in-Parliament who is the supreme legislator. This entails a functional symbiosis between the legislature and the executive (mixed government). The Parliament is the supreme bearer of legislative, law-making powers, and not of political power as such (sovereign power). Parliamentary sovereignty meant only that Parliament had absolute liberty in exercising legally defined legislative powers. During the American and the French revolutions a further distinction was made between law-making power and constitution-making power. This led naturally to the democratic principle that it is the people as the ultimate sovereign that possesses constituent power.

5.1.5 Separation of Powers, or Checks and Balances

Separation of powers as precondition for the rule of law

Why is the separation of powers necessarily linked to the idea of the rule of law? Because the political philosophy that underpins the separation of powers seeks to transform the political relationship between the different arms of government into a legal relationship. The doctrine of the separation of powers seeks primarily to realise a liberal goal: political freedom can only be achieved if it is also legally protected. In other words: one can interpret the separation of powers as the realisation of the rule of law, because it creates the institutional preconditions for government according to law.

What then have been the different emphases of this theory throughout history?

– Originally separation of powers was seen as a static concept of mixed government.

  a) In so far as the two branches of government are independent from each other they automatically also limit each other. It would be premature in this context to regard this as mutual control of powers.

  b) Only those activities of the Crown that fall within the powers and prerogatives of the Crown (intra vires) are a valid exercise of the power
of the Crown. Acts that go beyond the scope of such valid authority (ultra vires) however are illegitimate and thus illegal.

– The victory of Parliament in the constitutional conflict with the Crown over the scope of its powers meant that the legislature gained control over the Crown and its prerogatives. This opened the way for a shift from a static to a dynamic concept of mixed government. From this point onward, the focus was on the balance of the relationships between the different branches of government.

– Once the ability to control the other branches had become recognised as a major feature of the system of separation of powers it became clear that the theory of the separation of powers could no longer be limited only to the separation and division between the legislative and the executive branches and their functions (the judicial independence had already been guaranteed in the Act of Settlement). A real balance among the different branches of government can of course only be guaranteed when the powers are not completely, but rather only partially separated and thus able to mutually control each other (checks and balances).

It is probably for this reason that the real ‘founders’ of the of the theory of separation of powers, JOHN LOCKE and CHARLES-LOUIS DE SECONDAT MONTESQUIEU (1689–1755), referred in their writings primarily to the mutual control and balance of powers and less to the separation of those powers. In any case the theory of the separation of powers including the checks and balances inherent therein has since this time been regarded as a basic element of the rule of law.

In his Second Treatise of Civil Government (1690) Locke begins with the clear message that there would be no individual or social freedom if the same authority that enacts legislation also had the power to decide on the application and interpretation of that legislation (Chapter XII, §143). It is difficult to imagine a better formulation of the essence of this doctrine. Locke combines the traditional concept of sovereignty of the parliament with the idea of an autonomous executive to emphasise the dynamic balance of the two branches, which are only partially separated from each other. His model of the relationship between legislature and executive undoubtedly inspired the founding fathers of the American Constitution when they designed the relationship between the legislature and the President as Chief Executive.

Power should be a check to power

Montesquieu described the English constitution as an ideal form of separation of powers, although his description did not correspond to the reality of the way in which the British monarchical system functioned at that time. In any case his analysis did lead him to make a clear argument for the principle of separation of powers. In order to prevent the misuse of political power, it is necessary to establish a system of separation of powers under which the powers exercise mutual
control over each other. “Il faut que le pouvoir arrête le pouvoir” (power should be a check to power) (MONTESQUIEU, Esprit des Lois L. XI).

5.1.6 Modern Developments

5.1.6.1 The American and French Revolutions: The Rule of Law and/or the Will of the People as (the only) Fundamental Law

Whatever is not prohibited is permissible

The first modern constitutions brought the inalienable natural rights of life, liberty and property into direct relation to the state and its authority. These rights became protections against interference by the state, thereby making them rights of freedom from public authority: everything is legally permissible if not explicitly forbidden. With the first constitutions that were based on the entirely new concept of the social contract as the basis of modern polity, the individual ceased to be a mere object of domination. For the first time it was acknowledged that the individual as part of the sovereign people can participate in creating the rules and institutions by which he is to be governed. Accordingly, all individuals are to be seen as equal and autonomous rational human beings vested with rights and duties. The principle of formal equality thereby ultimately reduces justice to the equal distribution of rights.

Human rights and government by consent

In the American Declaration of Independence (1776) and in the first Bill of Rights (the first ten amendments to the American Constitution, which are known as ‘the Bill of Rights’), as well as in the French Declaration of the Rights of Man and Citizen (1789), the expression of universal natural rights as negative liberties and political freedoms was the means by which the idea of popular sovereignty was related to natural rights and the consent of the governed.

The American and French revolutions thus essentially had an identical revolutionary goal: to turn natural rights into positive legal rights and to establish democratic government. In both cases the constitution was the functional document that was supposed to realise this revolutionary goal. A written constitution was regarded as an act by means of which procedural prerequisites for arriving at a rational, democratically grounded consensus on political authority could be expressly laid down and given the force of positive law.

State as moderator – state as engine

It is here that the common features of the two great modern revolutions basically end. The differences, attributable to the very different historical backgrounds of
the respective revolutions – to which we have already referred – revolve primarily around fundamentally different understandings of the nature and the role of the state and its relation to civil society. According to the American understanding the role of the state is limited to finding a balance between the various forces within society. The state is ultimately a moderator between the existing social powers. According to the French view on the other hand, the state serves the function of changing society, that is, of transforming the old feudal society into a modern civilian society. From these different points of view there derive two different concepts in relation to:

1. The underlying principles of democracy through which popular sovereignty is to be realised and the form of government legitimised; and
2. The nature of constitutionally entrenched fundamental rights and the function of the constitution in relation to these fundamental rights.

Consequently there developed different conceptions of the relationship between the constitution and democratically based sovereignty.

5.1.6.2 USA

Fundamental rights versus colonial authority

The ‘revolutionary act’ of the American colonies was aimed at removing obstacles (British colonial rule) to the realisation of pre-existing basic human rights and providing the basis and conditions for the settlers to constitute their own independent state. In other words, the revolutionary conditions in America meant that America was predestined to conceive of and define sovereignty as a limited form of authority.

This implied that from the very beginning democracy was seen as an instrument to achieve the realisation of the liberal concept of human rights. The principle of popular sovereignty was practised through constitutional conventions and constituent assemblies.

The goal of the constitution was to guarantee and to realise existing pre-state and pre-constitutional human rights. The existence and content of these inalienable rights should be exempt from the democratic decision-making process. Here, the direct connection to the English common law tradition is unmistakeable. One of the leading political minds of the time, THOMAS PAINE, spoke of state authority as “government out of society” (PAINE, p. 65–67). In other words, the society produces the state. A logical consequence of this idea is that the power of the state must be limited, and must be subject to the consent of the people. The sovereign constituent power of the people remains nonetheless limited by the principles of fundamental and inalienable human rights.
**Private and public spheres**

The separation between human rights and democracy according to American constitutionalism goes back to the clear separation between the private and public spheres, that is, between the state and (civil) society. Individual liberties are considered by Locke to be inalienable rights which limit the power of the state to interfere with private rights and which also act as a constraint upon the tyranny of the majority. It is only logical that liberalism sees human rights as nothing more than constitutionally negative rights with primarily negative content.

On the other hand democracy is also seen as a result and consequence of the existing constitutional rights and freedoms. The primary function of democracy from this point of view is to protect the other more fundamental rights. If one follows this line of reasoning to its logical conclusion, one has to perceive human rights as rights that legitimise the democratic authority of the state. Democracy is legitimate in so far as it protects rights by its limitation of the tyranny of the majority and in so far as it puts those rights into effect by providing the right to participate in legislative decisions that limit individual freedom.

Such theories however are only plausible if one dispenses with the notion of the sovereign as the highest authority and the supreme and sole source of law. This in turn is only conceivable if the law and supreme political authority do not share the same source of validity. This intellectual approach was and remains to this day one of the most significant differences between the Anglo-American and continental legal philosophies and conceptions of the rule of law.

**5.1.6.3 France**

**Human rights and the transformation of society**

In contrast to the American Revolution, the French Revolution had first to produce the conditions for the protection of human rights and for the constitution of democratic government, and therefore to abolish the arbitrary rule of absolute monarchy. Natural rights, in consequence, could be given the force of positive law only as rights of the citizen. An individual can be free only as a member of political community; in other words: within the state and not against the state. This particular historical background to the French Revolution and its influence on fundamental political and legal principles left a decisive mark on the continental European concept of the state. Within the European constitutional tradition, the state and its constitution not only guarantee rights, but also establish and create rights.

Of course the actors and philosophers of the French Revolution were also motivated by democratic constitutional ideas and theories. These ideas corresponded to their own understanding of the État de droit as a parallel to the rule of law.
Sovereignty of the nation

Article 16 of the Declaration of the Rights of Man and Citizen of 1789 contained the noteworthy normative judgement that “any society in which the guarantee of rights is not secured or separation of powers not determined has no constitution at all”. Article 8 of the Constitution of 1791 provided that a revision of the Constitution would only be legitimate and legal if it was done in the manner and form prescribed by the Constitution itself. In this context it must be borne in mind that the French idea of the supremacy of the Constitution was directly related to the idea that the Constitution was an expression of the unlimited sovereignty of the people.

The French understanding of the ‘nation’ as the bearer of the sovereign constitution-making power was developed in order to provide a legitimate basis on which the people could be the ultimate source of both constitution-making and law-making power. ÉMMAUENIEL SIÉYÈS (1748–1836) made a distinction between constituent power (pouvoir constituant) and constituted power (pouvoir constitué) and effectively secularised the divine right to create a new constitution from nothing, transferring this power from God to the people. His further (ultimately unrealised) stipulation was that there should be provision for a ‘constitutional jury’ to examine complaints brought by citizens in relation to laws or actions that allegedly violated the Constitution. Here SIÉYÈS evinced the common, deeply rooted, mistrust of the traditional judicial power. The revolution mistrusted the royal courts that had been established prior to the Revolution, and this remains a significant feature of the French concept of the rule of law.

One of the primary functions of the constitution is to provide the force of positive law to the people’s absolute sovereign constitution-making power. The sovereign will of the people cannot be lawfully limited, but rather is the source and basis of all constitutional law. The constitution gives positive legal form to the sovereign will but cannot influence its content, since there is no fundamental law higher than the will of the people.

The absolute and unlimited people’s sovereignty can be exercised only by the people and is non-transferable. This means that a system of separation of powers that entailed a division of sovereignty would be neither conceivable nor permissible.

The notion that the law flows from the people as the highest source of legal authority is clearly expressed in the idea of the French nation: “What is a Nation? A body of associates, living under a common law, and represented by the same legislature” (SIÉYÈS, What is the Third Estate?, 1789). This is consistent with ROUSSEAU’S well-known radical democratic idea of the general will (volonté générale) as the ultimate source of law and justice.

Rule of law(s)

Given the historical background and theoretical foundations, it is easy to understand why the rule of law doctrine in France was oriented more towards a strict principle of legality than was the corresponding English doctrine. The rule of law
was in France originally understood as the rule of the laws passed by the sovereign Assemblée Nationale. The concept of État de droit did not arise until after the First World War. The progression to the notion of pre- or supra-state limits on the law and law-making authority first came about under the influence of more recent political and constitutional theories, which grapple with the questions of the extent to which there exist general international values and standards and the extent to which human rights are supranational rights which stand above the state and to which all states are subject.

**Rule of law versus volonté générale**

The various understandings of the rule of law all underscore the necessity of a common concept of constitutional democracy as the basis of the legitimacy of constitutional justice. Judges must have the authority to hold public authorities, including elected representatives, to account for unconstitutional actions and to compel them to uphold fundamental rights and freedoms. This hardly accords with the idea of democracy as developed by Jean-Jacques Rousseau. But nor does the idea of constitutional jurisdiction and judicial review expressly contradict Rousseau’s concept. The renewed form of democracy requires the constitutionality of legislation, because according to today’s understanding it is only then that democracy can be truly legitimate.

**5.1.6.4 The German Concept of Rechtsstaat (State Rule Through Law)**

**The idea of a minimal state**

Although Germany shares with France the same continental law tradition, and in spite of the fact that 19th Century liberal theorists were very strongly influenced by the ideas of the French Revolution, the concept of the Rechtsstaat remained a key concept of German constitutional theory and one that reflected the traditional German understanding of the state. At any rate, especially in its initial phases, the concept was significantly inspired also by the English rule of law. Common to all three (English, French, German) concepts is that the rule of law as a liberal idea envisages a minimal state.

**Law and state are not autonomous**

The German word ‘Rechtsstaat’ reveals in itself the far-reaching differences and the critical point of departure between the doctrinal foundations of the rule of law and the Rechtsstaat. The term ‘Rechtsstaat’ combines the words ‘Recht’ (law) and ‘Staat’ (state) into one entity; the two inherently belong together and are inextricably linked. In contrast, the Anglo-American tradition of the rule of law is a concept autonomously developed through the common law system, and does not postulate and inherent connection between the state and the law, but is as a concept separable from and independent of the state.
Prussia: the King as representative of the state

The term ‘Rechtsstaat’ and the ideas it encapsulated were first developed in the political theory of the first half of the 19th Century. This era in Germany was very different indeed to that in England, which had already had a constitutional monarchy for more than a century – a form of authority limited by the rule of law. The constitutional and parliamentary debates in England were by this stage focussed on electoral reforms to enlarge the democratic franchise. On the European continent on the other hand, the ‘enlightened absolutism’ of the Prussian monarchy was at its peak. It was uncontested that the King as sovereign represented the state vis à vis the subjects (not citizens). Neither the political fact of the absolute power of the state nor its legality were questioned.

‘Rechtsstaats’ principle as a principle of legality

In the early phase of modern German constitutional history, the concept of the Rechtsstaat was exclusively focused on the exercise of legal control over the administration. The Rechtsstaats concept was tied to legal and state positivism, which entailed a strict separation between the political and the legal. It therefore emphasised formal legality, and was normatively neutral in relation to any particular form of government. The idea of connecting the concept of the Rechtsstaat with popular sovereignty and the democratic form of government was not yet established.

Accordingly, even the liberal political thinkers of the time adopted this formalistic and positivist concept of the Rechtsstaat. The philosophical contribution of IMMANUEL KANT (1724–1804), which proposed a substantive and material concept of Rechtsstaat as a precondition for the very existence of the state, did not have a major influence on German political and constitutional thinking. As a convinced liberal (although with certain conservative views), KANT demanded that the strict separation between the public and private spheres be legally guaranteed, and emphasised the importance of mixed government as a means of ensuring checks and balances.

Robert von Mohl

We must also not overlook the fact that initially the Rechtsstaat concept was more akin to the Anglo-American idea of the rule of law than it was at the end of the 19th Century, when the formal positivist concept of the Rechtsstaat reached its climax. The theory of the Rechtsstaat emerged in Hannover, which, as a result of its royal connections with England after the Glorious Revolution of 1689, was influenced by English political and legal tradition more so than the rest of Germany. One of the founders of the Rechtsstaat concept, ROBERT VON MOHL (1799–1875), had studied the American constitutional system and was influenced by Anglo-American constitutionalism. MOHL placed the substantive principle of individual liberty at the centre of the concept of the Rechtsstaat. Nonetheless, MOHL...
accepted that liberty could be limited by special rights of state authorities and was strongly opposed to any form of the separation of powers.

**Positivism**

Largely as a result of the failure of the revolution of 1848, in Germany the substantive content of the *Rechtsstaat* principle was gradually lost (see FRANZ NEUMANN). The main liberal values and in particular human rights and their constitutional protection were sacrificed to the principle of legality. Infringements of human rights were permissible provided that they were set in accordance with the positive law and thus complied with the principle of legality. Individual freedoms were essentially at the mercy of the executive, which was controlled by the parliament only to a limited extent.

At the end of the 19th Century FRANZ JULIUS STAHL provided what remains the best-known definition of the *Rechtsstaat* as a negative, purely formal concept that strictly separates the legal structure of the state from its political structure. According to this definition, the concept of the *Rechtsstaat* is limited to legal form and has no bearing on the content or aims of the state. The *Rechtsstaat* merely addresses the legal form needed to enact a given content and a given state objective, whatever they may be. The protection of human rights has no place as part of the concept of *Rechtsstaat* so defined.

**Weimar: economic and social goals**

The Weimar Republic of 1919 led to a renaissance of the concept of the *Rechtsstaat*, and to the development of a substantive normative content to the concept. The Social-democratic constitutional doctrine during the Weimar era introduced a new constitutional concept, that of *institutional guarantees*. In contrast to the subjective rights of the individual, institutional guarantees were supposed to provide a constitutional means to achieve particular social goals. The entailed a new role for the modern state: the constitution should identify particular fields of action that are to be promoted and legally protected by the state and in which the state will work towards the achievement of specific social goals. (ULRICH K. PREUSS, *Constitutional Aspects of the Making of Democracy in the Post Communist societies of East Europe*, Zentrum für Europäische Rechtspolitik, Bremen 1993, p. 15).

Thus the door to a new constitutional paradigm was opened. The idea that the state should set and pursue particular social and economic goals threw two of the major pillars of the liberal *Rechtsstaats* concept into question: the first is the notion that social harmony results from the unimpeded function of the free market and that human rights place negative limits on public power; and the other relates to the separation/opposition of state and society (society understood as the simple aggregation of separate individuals) based on the understanding that the principal threat to individual autonomy is the state.
Rechtsstaat with normative content

HERMAN HELLER (1891–1933) re-enforced the normative constitutional concept of the Rechtsstaat by arguing that freedom is only possible when the social conditions for liberty, equality, and the secure protection of the law have been secured by the state. In 1930, HELLER wrote that the Rechtsstaat cannot exist without a consensus of all its citizens, and such a consensus can be reached only by means of social democracy, which must be the basis of the “sozialer Rechtsstaat” (welfare state rule through law) (H. HELLER, p. 443 ff).

After World War II the substantive concept of the Rechtsstaat was further developed by the Federal Constitutional Court of Germany. In some of its early decisions the Court invoked natural law as a ‘supra-constitutional’ principle to which positive law must be subject. Undoubtedly these decisions were also influenced by the German Basic Law, which expressly provides that the core of fundamental rights cannot be infringed by the constitution and that if the state should seek to disturb or overturn the basic democratic order, resistance against the state is constitutionally permissible.

5.1.7 Conclusions

Democracy and rule of law

The origins, trends and limits of liberalism and its relation to democracy have been central to the development of the rule of law. The far-reaching impact that the understanding of the nature and the role of state and law has for the relationship between democracy and the rule of law is clear. This impact can be summarised in the following question: Does the basic value of the inviolability of human rights which underlies the modern constitution, also limit and control the democratic sovereign? Or is it the other way around – that the democratic state determines the content of human rights? To put the question more provocatively: Who is to resolve a conflict between the legal and the political sovereign?

The formal versus the substantive ‘Rechtsstaat’

The key issue at stake here relates to the very nature of a given form of government and its basic political underpinnings. In other words: Is the rule of law limited to the formal requirement that political decisions be made and publicised in a prescribed legal form, or does the rule of law or ‘Rechtsstaat’ also necessitate effective limits and controls on the holders of political power?

What in the field of human rights can be universalised?

Each of these open issues could effectively be grouped under the umbrella of human rights. The idea that human rights are inalienable and that they are immanent to the concept of the rule of law itself leaves open a number of fundamental questions
that still need to be addressed at the level of international law and the international community. One such example is the key question, who has the legitimacy to decide over the content and abrogation of ‘universal’ human rights? The answer to this question is not merely of theoretical relevance, but rather in view of the place of the contemporary nation-state and the ongoing supra-national processes of globalisation it is of significant practical importance.

What is the content and meaning of the ‘universal’ values of life, liberty and dignity? Can universal rights be derived from these values that must therefore be observed by all states and all cultures, across all generations past, present and future? The problem of global actors also requires explanation: who has the right and the legitimacy to define what is universal and to determine who and which generation is in particular cases the legitimate ‘universaliser’? On what basis can unilateral or multilateral ‘humanitarian interventions’ be justified?

How is the basic liberal underpinning of the rule of law to be interpreted within a multicultural context? Which fundamental rights remains ‘universal’ in a multicultural society, and how should such society address demands that cultural diversity be accommodated? These questions can become explosive if diversity and fragmentation cannot be peacefully addressed through the political process. The democratic integration of the multicultural society as a new type of incorporative society and as a structural pre-condition for the viability of human rights policy, is yet to be achieved.

5.2 Development of the Rule of Law in the Different Legal Systems

5.2.1 Introduction

Growth in the scope of administrative powers

The powers of the state and administration have greatly expanded in the 20th Century in all states. This expansion of powers is particularly evident the increasing and ever more complex activity of the administration. The power of the state is today largely manifested as the power of the administration. In their daily lives, people are increasingly dependent upon and affected by the decisions of an anonymous bureaucracy. The administration guides, both directly and indirectly, the daily life of the citizens. Thus, if one wishes today to inquire into the rule of law and the Rechtsstaat, one needs to know how the power of the administration and its servants is or can be limited.

In order to limit the powers of the administration various states have developed different mechanisms designed to strengthen the rule of law, for example by improving access to justice, enhancing judicial independence and expanding the
jurisdiction of the courts. Such mechanisms aim at strengthening the protection of citizens against misuse of powers by the administration.

**What questions have to be asked?**

If one wants to know how the principle of the rule of law is concretely exhibited within administrative law, one must find answers to the following questions:

1. What are the basic fundaments of law and justice?
2. What kind of courts protect citizens against arbitrary acts or decisions by the executive?
3. What causes of action are available to individuals in order access the courts in matters of unlawful or erroneous exercise of administrative powers?
4. What jurisdiction do the courts have to protect individuals against misuse of powers by the administration and what remedies can they grant?
5. What are the criteria or standards on which the courts base their decisions?
6. What are the rights and obligations of the parties within the judicial process?

**5.2.2 What are the Foundations of Law and Justice?**

**Christian individualistic conception of man**

The European legal systems are marked by the Christian-individualistic conception of man. According to the Christian doctrine man is as an individual answerable to God, and must therefore also be an individual bearer of rights and obligations. Man is not embedded within the family or the tribe as for example in Japanese Shintoism. He is not a negligible part of the professional or social estate as in Confucianism, and he is not expected to find happiness within asceticism and in renunciation of his individualism as for example in Buddhism. Indeed, there is no other religion that places so much emphasis on the importance of the individual as does Christianity. Only within Christianity does man stand as an equal and individual person before God, and have to account to God for his individual actions.

Notwithstanding this common thread in all European legal cultures, the European legal systems have split – at least since the French Revolution – into two very different legal systems.

**Hierarchy and authority – collegiality and reason**

The legal system on the European continent was strongly influenced by the hierarchical thinking of canonical law. According to the basic idea of the Christian Church the higher up in the hierarchy someone is, the closer they are to God and thus to truth and justice. In the Middle Ages this reasoning resulted in the administration (as servant of the King) being accorded a privileged and authoritarian rank in the social and legal hierarchy, above the common people. After the French Revolution the divine authority of the King was replaced by the popular authority
of the head of state, or by the ‘volonté générale’, and thus the elevated status of the administration remained. Accordingly the jurisdiction of courts over the administration must be limited and it must respect the status and authority of civil servants. Courts are asked only to apply the law as determined by the absolute authority of the legislature, not to develop their own law.

**Common law: citizens as partners of the administration**

On the other hand the common law system finds its original roots in medieval England and in particular in the 17th Century marked by the Glorious Revolution and JOHN LOCKE. The Aristocracy was able to establish itself, after the Long Parliament and the Glorious Revolution, as a partner to the King. The Commons and the Lords were essentially a club of major landowners who administered their estates in common. In addition to Parliament which enacted the statutes, the courts retained their case-by-case law-making role. The land-owning majority of the members sitting in Parliament could not simply disregard the legitimate interests of individual members of the minority. The significant role of the courts in protecting legal rights and developing the common law and equity meant that the legislature’s expression of the public interest could not be elevated as it was in France to the status of a sacred volonté générale that was inherently true, just and unaccountable.

**The judge as moderator**

In the development of the common law system, the judge had no hierarchical position over the parties. He was rather a ‘moderator’ who stood between the parties and reached a decision based on relevant precedents. The judge had to ensure a fair trial, equal treatment of the parties before the law and equality of arms. According to the common law system, a just decision depends upon a fair procedure, rather than necessarily upon a good law.

**Whoever is right, wins – versus – whoever wins is right**

According to the continental European understanding of the law those who are legally ‘in the right’ should win the case. According to the common law understanding those who win the case are in the right. In the latter case, fair procedural rules that ensure the equality of arms between the parties are of particularly great importance.

In the common law world, the importance of the adversary procedure, the position of the parties (who determine the relevant facts and legal arguments that are to be presented) and the weak authority of the judge with regard to substance reflect a system based on a realistic image of the human being. The system recognises that no judge, civil servant or party is infallible, and that notwithstanding this fallibility the law must seek to ensure that the best possible result is reached.
Hierarchy of the world order

The countries of the European continent with civil law systems adapted the concept of hierarchical authority developed during monarchical absolutism, placing the state governed by the majority of the people at the top of the hierarchy (rather than the crown). ROUSSEAU’s *volonté générale* and HEGEL’s theory of the state as the peak of human development served as the philosophical underpinning. This artificial elevation of the state over the individual, so foreign to the common law way of thinking, had a decisive influence on the administrative law of civil law countries.

Institutions must be designed for fallible humans, not angels

The foundations of public law in common law countries are quite different. The common law does not accord a privileged or superior status to the state nor to the public interest. It is rather based on the idea that all humans including leaders and judges are fallible, and that good institutions must therefore be capable of functioning effectively and fairly with this reality in mind. If one proceeds from this supposition, then the rules of procedure and procedural rights assume considerable importance. Furthermore, the laws enacted by the majority of the democratically elected parliament are not the sole source of development of the law. The cumulative wisdom of generations reflected in the precedents of the common law has an important place alongside enacted legislation. Public office and the civil servants who are applying the laws and making administrative decisions on behalf of the executive therefore do not have the same status and prestige in the common law system as they do within the civil law system.

5.2.3 Common Law – Civil Law

Pro-active state concept

Civil law legal systems are marked by a pro-active concept of the state. According to this concept, state authorities and institutions have a legitimate social engineering function: they are responsible for setting and achieving certain political and social goals within the society. Countries of the common law tradition on the other hand are content to consider their government as a mere arbiter between various competing social interests. It is the task of government and the administration to maintain the balance among the different social forces, to prevent conflicts, and to provide for a just resolution of conflicts when they arise.

Different concepts of judiciary

These different understandings of the state can be explained in part by the different development of the legal and judicial systems over a period of centuries. Exponents of the common law system see the judge primarily as an independent
arbitrator, who has to solve conflicts and to find the just settlement between the parties. For those within the civil law system however, the judge is an extension of the law itself, that is, a representative of the state embedded within the hierarchy of the legal system. The task of the judge within the state hierarchy is to find justice and to impose the law as it applies to the parties before the court.

Thus, the judge has to play a much more active part in court proceedings of all kinds in the civil law system, than does his/her common law counterpart who is simply an impartial arbiter. In continental European legal systems, the parties are subordinate to the judge. The judge in criminal and administrative matters must determine the facts of the case, using the inquisitorial procedure whereby the judge or civil servant can make their own inquiries into the facts. In common law systems on the other hand, the judge merely assumes a coordinating function between the disputing parties. The law determines which party will bear the burden of proof, and what the standard of proof required will be. The questions then arise of who will bear the risk of insufficient evidence and whether a certain evidentiary test must be satisfied, such the ‘arbitrary and capricious test’ or the ‘substantial evidence test’.

In common law systems the judge has less power with regard to the fact-finding of the parties. However, compared to a continental judge, the common law judge has greater authority as an impartial arbiter and greater power to ensure procedural fairness and equality between the parties.

Influence of canonical law

These differences in the judicial function can be traced back to the fact that on the European continent in the 12th Century, the canonical law taught at the universities began to assume increasing importance. The law was no longer the law of the people, but rather the law of a scholarly elite hierarchically separated from the people. The judges representing the crown and the feudal hierarchy had to employ dogmatic, scientific analyses to find and apply the law for the parties seeking justice in their courts. Jurisprudence, interpretation of law and in particular the practice of the judiciary could therefore no longer be carried out by laymen but only by professionals and experts in the field of legal science.

Legal science and jurisprudence had to perform a number of functions. They had to systematise the law, summarise and analyse it, identify the relevant law applicable to a particular case, and then ultimately enable the determination of the relevant facts and the making of a decision based on the law.

Hierarchy of instances

The new development of a hierarchy of several instances in which lower instance decisions could be reviewed corresponded to this new hierarchical thinking. The more important – that is, the higher and closer to the crown - the experts and tribunals were, the more authoritative was their decision. The verdict or decision was
not the result of a dispute argued before a jury but a scientific application of the law to a concrete case. The law existed independently of the facts.

**Authority of the facts**

Civil law judges had not only to find the law that was to be applied to the facts, they had also to find the facts via an inquisitorial procedure. By way of contrast, in England the law remained to a great extent linked to the jurors chosen from the common people. Jurors, with the help of the judge, had to decide on the facts presented by the parties through an adversarial procedure, and the court then had to find just and relevant criteria according to which the case could be determined. Law and facts were much more closely interconnected than in the European legal thinking, where law was given and the facts had to be found by the judge.

**Ideal procedure**

This in turn led in the common law countries to the procedure for establishing the facts being given much more weight and value than the procedural rules on the European continent. For this reason in most common law proceedings the adversary system is used, whereby the parties are responsible for presenting (contradictory versions of) the facts. The rationale behind the adversary system is that a process whereby the parties seek to prove their contested versions of the facts provides the optimal likelihood of arriving at the truth. Within the civil law inquisitorial system, the judge and the administration are entrusted with the power and obligation to search for and establish the facts.

The lengthy and often costly adversarial procedure for the establishment of facts has led to the removal of the fact-finding function from the courts in many administrative matters. Typically for administrative law matters in common law jurisdictions, the facts of a dispute are determined by administrative tribunals, which are required to follow rules of procedural fairness and evidentiary rules relating to the burden and standard of proof. The common law courts generally consider only questions of law in such matters, the facts having been argued and settled at the tribunal stage.

**The right to be ‘heard’**

It is revealing that with regard to the basic entitlement to a fair ‘hearing’, in civil law countries the principle is reduced to the right of the parties to submit written statements. In contrast, in the common law countries the principle of natural justice or due process is only satisfied if parties are heard in an oral procedure before an independent judge. In the USA administrative decisions (adjudicatory acts) with similar status to court judgments can be made in a trial procedure in which the facts are established according to the same adversary system practised in the courts.
Administrative law: Execution of legislation

Administrative law in civil law countries serves primarily to implement the public interest of the society determined by the legislature (Mirjan R. Damaska). The judicial review of administrative actions fulfils two different functions in these countries: On one side it has to ensure that the public interest and the will of the democratic legislature are properly realised; On the other hand it must, as in the courts of common law countries, protect the rights and interests of individuals against the state and the administration.

Lack of distinct administrative law branch of common law

Administrative law as a special and distinct branch of the law is practically non-existent in common law countries (although in some common law countries in recent decades there has been a growth in legislation dealing specifically with administrative law). The state apparatus of those countries does not enjoy privileged status over individuals as does the administration of civil law countries. The administration is charged with running the bureaucratic apparatus and securing public order. It derives its powers and duties from legislation. If a civil servant acts beyond his/her legal authority he/she can be held legally accountable just as any other private person acting illegally. The court which has to decide on the legality of administrative acts or omissions has to determine whether the administration acted outside or in breach of its legislative powers and responsibilities.

Status of legislation

However legislation has a different meaning for the judge in common law tradition than it does for judges in civil law systems. As for the American courts the constitution is part of the highest applicable law of the land, American judges have much greater scope when reviewing administrative activities to take into account basic constitutional principles of fairness and justice. Of course, they must also consider and apply relevant legislation in order to reach a decision. But written legislation does not have the same value as on the continent, where the role of the continental European judge is limited to determining whether the administrative act was legislatively authorised. In common law jurisdictions, in addition to legislation, the recognised principles and rules of the ‘rule of law’ which limit the discretion of the administration have to be taken into account.

Access to justice

For citizens who wish to bring an action against the administration, access to the court and the availability of legal remedies are essential starting points. Recognition of this fact has led over the course of history in common law countries to great importance being placed on the development of formal writs and remedies. Causes
of action and corresponding legal remedies have been given almost the same importance in the common law tradition as the continental legal systems have given to fundamental rights. Thus, it may be understandable that scholars of common law countries see the ‘Rechtsstaat’ principle of civil law countries that do not have prerogative writs as having major drawbacks. On the other hand civil law scholars regard a state without a written constitution such as New Zealand as fundamentally suspect.

### 5.2.3.1 Common Law

**Ruled by law not by men**

As already mentioned the common law builds upon the basic principle that men should not be ruled by men but by law. Law is not reduced merely to the positive legal rules enacted by the legislature. All values that are authoritative for the realisation of justice through legal institutions, including the precedents and principles that judges are to follow in reaching decisions, also form part of the legal system.

**Private law – public law**

Furthermore, contrary to the continental European law, there is no clear separation between private and public law, as the ordinary common law courts have jurisdiction to hear disputes between private persons as well as complaints of private individuals against the public administration.

### 5.2.3.2 Continental European Law

**French Revolution**

Legal systems of the countries on the continent have their philosophical roots in the French Revolution. According to the theories of the French Revolution, the national Parliament (Assemblée Nationale) is the bearer of absolute sovereignty, including law-making and constitution-making power. The law-maker is sovereign and is therefore the original and exclusive source of law and justice. It determines and defines the volonté générale. The French Revolution not only centralised the French territory, but also the entire legal system. From the time of the Revolution onwards, the only law was that which was enacted by the National Assembly. The task of the judge was to apply the positive law made by the legislature, and to use the abstract legislative norms to deduce a conclusion in each concrete case. The ‘Rechtsstaat’ according to this understanding, is realised to the extent that all positive rules enacted by the legislature are correctly applied in each concrete case.
The State as an institution for social engineering

Napoleon regarded the state as an instrument with which to change the hierarchical feudal society into a modern society of individual citizens enjoying equal rights. In order to achieve this goal he needed a strong and independent executive that was able to implement the will of the legislature in society. He was of the opinion that this difficult task could only be achieved if the administration became independent from the traditional jurisdiction of the ordinary courts. The conservative judges had to be prevented from interfering with or exercising control over administrative acts and decisions. Thus, Napoleon decided to create a new field of law that was exclusively applicable to the administration and excluded from the jurisdiction and control of the ordinary courts. The immunity of the executive and its administration from the traditional court jurisdiction was the principal justification for the newly created public law. From this point on in France, it was the public law which regulated all legal relations between the state and private persons.

Ideological separation between public and private law

The result of this separation was that all matters relating to the administration were regulated and controlled only by the public law. The traditional courts with private law jurisdiction no longer had the authority to deal with legal issues in which the public administration was involved. The public law was withdrawn from their jurisdiction. Disputes between private individuals and the administration were controlled exclusively by the public law. Neither the executive nor the administration had any legal responsibility in terms of the jurisdiction of the classical traditional courts. In order to give individuals some legal protection against misuse of public power by the administration, the public law had to provide for certain instruments and remedies with which private individuals could seek to hold the administration legally accountable.

Since the French Revolution, there has been a continuous battle between democracy and the state administration with regard to the strengthening and expansion of the jurisdiction of the administrative courts. While in common law countries the traditional courts were able to expand their jurisdiction with regard to the administration through the development of case law and through the creation of new writs by the Lord Chancellor, on the continent only the legislature had the authority to expand the jurisdiction of the administrative courts by new or amended statutory law. The 19th and 20th Centuries were marked by this permanent struggle for better legal protection of private individuals against the administration on one hand, and the need of the administration to have the necessary powers to fulfil its legal functions on the other hand. The outcome in civil law countries was that the administrative courts that were created by the continental legislatures were vested with fairly limited jurisdiction only to quash administrative decisions, but had no power to enforce decisions by holding servants of the administration in contempt of court.
5.2.4 **Principles of Jurisdiction over Administrative Cases**

5.2.4.1 **Conception**

**Administrative courts with jurisdiction over public law statutes**

Administrative courts have special jurisdiction to hear complaints brought by private individuals against the administration. In a special legal procedure, the court can review the legality of the actions of the administration based on the rules of public law.

This kind of jurisdiction first developed on the European continent towards the end of the 19th Century, but became more significant and established in the 20th Century after World War II. Such administrative law jurisdiction is only possible if the following conditions are fulfilled:

1. There is a special public law that regulates decisions and actions of the executive and the administration.
2. This public law empowers the administration to unilaterally establish legal rights and obligations for individuals, and thereby submits citizens to the authority of the state and to the public interest enforceable by the state.
3. It is recognised that although the executive and the administration enjoy certain privileges of office, they can make mistakes and therefore their decisions must be capable of review by other institutions.
4. The rights of private individuals, which must be protected against the administration and the executive, are recognised.
5. There is a conviction that a judicial procedure involving two more or less equal parties provides the optimal conditions for accurate fact-finding and a just decision.

**‘Immunity’ of the administration**

With the establishment of public law, separate and independent from the private law, a new and autonomous legal system was created. With this new law, the administration could grant rights to or impose obligations on individuals by way of ‘administrative acts’. The decisions of the administration became enforceable in a manner analogous to judicial verdicts issued by a court. The administrative institutions such as police were required to enforce the decisions.

The new public law laid the foundation for the legitimacy of the modern authoritarian state. The authorities, that is, the executive and the administration, embodied the public interest or general will in the sense of ROUSSEAU’S *volonté générale*. As the *volonté générale* could not be questioned or reviewed, there could be no legal proceeding that questioned the authority of the executive. The public law relieved the executive and the administration of accountability to the ordinary courts.
Fallible administration?

It was only gradually recognised that the executive branch including the administration can make mistakes, and that it is therefore in the interests of the legislature to submit the application of and compliance with its statutes by the administration to the jurisdiction of the courts. This insight enabled the gradual development of the jurisdiction and powers of administrative courts. However, the jurisdiction and powers of administrative courts are still considerably limited even today. They can only review administrative acts, and those acts can only be quashed in respect of the future, not with retrospective effect (ex nunc and not ex tunc). Moreover, erroneous administrative acts that are not challenged within the prescribed deadline will be deemed to be healed of their faults, because upon the expiry of the deadline the acts become final and valid administrative acts that are not open to question. Thus, the institutions required to enforce administrative acts must enforce even erroneous acts if they have become valid through the passage of time.

Immunity of the state?

Public law assumes that the administration and the executive are superior to individuals and citizens, and that those who work for the state as the holders of public office require special protection in relation to the carrying out of their public functions.

More pragmatic is the Anglo Saxon concept. Of course in England, the Crown also enjoys immunity from legal suit. However, the Crown is neither above the law nor is it subject to a specific public law excluded from traditional court jurisdiction. It is because the judge is a servant of the Crown and makes decisions in the name of the Crown that the Crown cannot be party to a civil dispute. As long as servants of the Crown act within their lawful authority, they cannot be called to account for their actions before a court. Only when they act beyond their powers (ultra vires) are they subject to the ordinary jurisdiction of the courts. The assessment of whether civil servants have acted within their powers (intra vires) or beyond their powers (ultra vires) is part of the traditional jurisdiction of the courts. Actions that are found to be ultra vires cannot be remedied nor can they be quashed in respect of future application (ex nunc). As they were always beyond the law, they are deemed never to have had any legal validity.

In the Crown Proceedings Act of 1947, the British Parliament decided that in tort cases where parties require financial compensation for damages caused by the administration, a writ against the state may be permitted and thus the courts can require the state to pay damages for unlawful damage or injury caused by its servants.

Principle of legality

The tremendous expansion of the administration over the last century has many different reasons and causes: The separation of government from the royal prerogatives empowered the legislature, but also expanded the power of the administration; the welfare state necessitated the creation of new agencies with vague and
discretionary powers; and people’s need for security within a society threatened by new and unforeseen dangers empowered the state with additional means to control the individual. As a result of this increasing responsibility of state administration it became necessary to significantly extend the scope of court jurisdiction over administrative actions. However, this development progressed rather differently in England than it did on the European continent.

### Development of the continental European administrative law

According to the British tradition, a minister, even in his capacity as a member of government, was subject to the common law and could therefore be brought before a court. However, the continental European legislatures accorded ministers and civil servants a privileged status over ordinary people under the public law, which provided them with general immunity. This immunity protected ministers and civil servants from criminal charges and from civil suit in most circumstances. With regard to their public activities they have no personal responsibility for their measures and decisions; if they violate the law legal action can be brought against the office but not the office holder.

It was not until the end of the 19th Century that administrative law jurisdiction began to develop, led by the French Conseil d’Etat. This was a significant development for public law and included remedies for complaints against the administration for action beyond discretionary power.

### Control of administration

There are many different ways in which control over the administration can be designed and many different manners in which such control can be carried out. However, in order to limit administrative power effectively, some form of judicial control is essential. The extent of the jurisdiction of an independent judiciary over the administration reveals the degree of tension between a state based on partnership on one side and the authoritarian state on the other, thereby making clear that the legal conceptions of civil law and common law are ultimately based on different understandings of human nature. In the civil law system, civil servants appointed by and working on behalf of the state have a higher status and legitimacy than ordinary citizens, because they are believed to act in the interest of the public or in the interest of the volonté générale. However, as the two systems have begun to merge, these fundamental differences are gradually diminishing.

### Privilege of the executive

States that have a separate and independent administrative court system responsible for applying the public law assume that the state and the executive must be equipped with their own public law in order to implement their legislative tasks and goals. This law privileges the executive, as it empowers the executive and its administration to enact decisions that have similar force to a judicial decision. States that do not have a separate field of public law, such as common law states,
do not enjoy special privileges *vis à vis* the courts – besides the immunity of the Crown. These states are ‘partners’ of the citizens, and citizens can challenge the validity of acts and omissions of the state administration before the ordinary courts.

**Democracy**

The concept of democracy is based on an individualistic view of man (*one man, one vote, one value*). Accordingly, the individual as a member of the nation shares in sovereignty and can, as part of the majority, create new law, modify it, abolish it and change it. The French Revolution transferred to the legislature (as the body representing the nation, giving expression to the *volonté générale*) the exclusive power to create new law. The second and the third branches of government were charged with enforcing and implementing the law enacted by the legislature. Courts were no longer able find their own law based on reason and traditional, historical and collective wisdom. The French Revolution was a significant turning point for the development of continental European administrative law.

**Legal protection of the individual and the will of the legislature**

Within this system, the courts and their jurisdiction do not play a role in controlling the administration. A limited form of control of the administration developed in France through the Conseil d’Etat, but only as a quasi-executive (non-judicial) body and only gradually.

In cases of complaints by citizens against the administration and the executive, the Conseil d’Etat primarily looked into the question of whether the government and the administration had correctly implemented the will of the legislature. It was only very slowly that administrative law jurisdiction became an element of the legal protection of individual rights. The need for proper legal protection of the individual with regard to administrative misuses of power was only addressed as part of the control of the public interest and the correctness of the implementation of the law. This was particularly true for French and Swiss administrative law, less so for the development of German administrative law.

The principle of legality and the idea that the administration can only impose obligations on the individual based on a clear statute, serve primarily a democratic function. The administrative judge must ensure that the administration complies with the laws and that it only interferes with the rights of citizens when it has been so empowered by the majority – that is, by the legislature.

**Protection of pre-constitutional rights in the common law tradition**

Contrary to the continental law, the legislature in the common law world never completely displaced the judge as a law maker. The Parliament, at least in the UK, enjoys absolute sovereignty. However, for matters in relation to which no statute has been enacted, it is the role of the judge to apply and develop the common law. The court is not responsible for examining whether the administration or the executive has generally implemented the statute correctly according to the public
interest. It has only to assess the plaintiff’s writ and examine whether the administration has acted *ultra vires* and thereby violated the rights of the individual. The individual is a bearer of pre-constitutional rights which can only be limited or reduced by the Parliament and therefore have to be protected by the courts against the executive and its administration. Under the American Constitution, which largely adopted JOHN LOCKE’s philosophy of inalienable rights, the judge has to protect individual rights not only against misuse of administrative power, but moreover against infringement by the majority of the legislature. The individual is, independent from the will of the majority, the bearer of pre-constitutional rights. The fundamental rights and freedoms of the American people are not granted by the grace of the legislature or the constitution maker, but rather precede the Constitution.

**Administrative courts and ‘état légal’**

The specialised administrative judiciary finds itself in a conflicting relationship with the principle of democracy. On one hand, the jurisdiction of the administrative courts facilitates the proper implementation of democratically adopted legislation and thus the realisation of the democratic ‘will’ of the legislature. On the other hand, it limits the space or freedom of the executive and the administration to realise the political will of the majority (*volonté générale*) and to carry out this task with the minimum necessary control mechanisms. In this sense, the administrative judiciary fulfils a similar function to judicial review of legislation by a constitutional court. The judicial control of the constitution protects the minority against the power of the majority-controlled legislature. Judicial control of the administration protects citizens against the misuse of powers by the all-powerful administration. Ultimately the administrative courts ensure, via the principle of legality, that the rights of citizens can be limited and legal obligations imposed only where expressly and validly provided for by law.

**Different understandings of the separation of powers**

The idea of MONTESQUIEU, that freedom can only be guaranteed if the different powers or branches of the state are separated and able to hold each other in check, has led to two different concepts of the separation of powers. In the American Constitution the focus is on the functional separation of the different arms of government. For example, judicial power can be exercised only by the courts, which means that the courts cannot be restricted in the exercise of their judicial function either by the legislature or the executive. It also means that all legal disputes between the administration and citizens will ultimately have to be decided by a court. And this view of separation of powers finally leads to the consequence that adjudicative functions which are carried out by the administration can only be credibly exerted if the administration observes a procedure which is similar to a court procedure.
Thus, only courts have the right to make a final determination in legal disputes, including disputes involving the administration. Within the framework of checks and balances the judge has the right, as the only legitimate authority that can mediate and decide a legal controversy, to intervene in legislative and executive power to the extent that this is necessary for the resolution of the legal dispute.

A completely different understanding of the concept of separation of powers is found in the French legal tradition. The French concept focuses on the independence of the different branches of government from each other, regardless of their function. In other words, the focus is not on mutual checks and balances but on separation of powers. The functions of the three separate branches may be overlapping. Therefore the executive may exercise judicial functions and decide complaints against the administration (ministre juge), and in doing so its independence from the judiciary must be guaranteed. Thus, it is not the function that is independent, but the institution or the authority. For this reason the judicial branch has no authority to intervene in the executive branch or to adjudicate on the actions or decisions of the administration. Even if the administration exercises judicial power, it still belongs to the second branch of government (executive) and is therefore not subject to the jurisdiction and control of the ordinary courts.

But in France, even within the framework of the executive branch, the independence of the administrative court (Conseil d’Etat) and its jurisdiction to hear complaints about the administration developed only gradually. The Conseil d’Etat has to decide on legal disputes between the administration and private individuals, and so performs a judicial function. At the same time, its decisions ensure the correct enforcement of the law and in this sense it serves the executive branch.

**Even magistrates make mistakes**

The different understandings of the separation of powers can be traced back to different conceptions of the human being. Those who believe that human beings are fallible even if they are selected to serve as magistrates, will have to create institutions that remain effective even with flawed human beings. For this reason, the founding fathers of the American Constitution stressed the limits of powers and the mutual checks and balances between the different branches of government. Those who believe, however, that each citizen is committed to the volonté générale, will place greater trust and authority in an elected magistrate and thereby ensure that the Magistrate is able to carry out his/her functions efficiently without the burden of restrictions and controls. According to a German saying, those who are given an office by God are also given the necessary intellect to carry through their responsibility (“Wem Gott ein Amt gibt, gibt er auch Verstand”).

The effective protection of liberty and property according to the common law tradition is only possible by limiting the power of all institutions through a system of checks and balances among the branches of government and by guaranteeing procedural fairness, not by the written guarantee of rights.
Human rights

There are two important differences that should be highlighted between countries with common law tradition, and countries with civil law tradition in relation to human rights and the related demand for legal protection against the misuse of power. Within the civil law countries, fundamental rights are rights granted to the individual by the state and in particular by the constitution, and are generally negative freedoms to protect the individual from certain types of interference by the state. Constitutional and administrative courts will step in to protect individual rights in cases where plaintiffs can show that their subjective rights have been violated. For an Anglo-Saxon judge however, such rights are pre-constitutional. Administrative authorities can only interfere with individual freedom and property when they are expressly legislatively authorised to do so.

The second important difference is closely connected to the first: civil law countries generally focus on the guarantee of substantive rights and freedoms such as freedom of expression, association and movement. Common law countries on the other hand, focus primarily on procedural rights: they guarantee a fair hearing before an independent judge in order to protect unlawful interference with property rights or constitutional liberties. The procedure is considered to provide for even more effective protection of property rights and other freedoms than does the substantive constitutional law. This approach reflects a view of human nature that credits the judge with the ability to find justice after according the parties a fair hearing in a fair adversarial procedure, without having to rely on constitutional rights, whereas in civil law countries the judge is bound to the will of the constitution maker and has much less freedom in applying constitutional provisions to a concrete case.

Secularisation of the state

The Christian conception of the world, marked by the idea that human beings have to serve two masters – namely, God and the Emperor – laid the foundation for the separation of spiritual and secular authority. Only based on this idea was it possible to transform the godly Kings who ruled by divine right into Kings who ruled by the grace of the people, and thereby to secularise state authority. And of course, a state administration dependent on secular legitimacy can more readily be subject to judicial control than a state authority legitimated by the grace of God that protects the common interest of its people in God’s name.

While on the continent this secularisation is tied up with positivism and the vesting of law-making authority exclusively in the legislature, in the UK, the judge retained the role of finding and utilising the rational legal wisdom that preceded the state.

Minimalising human error

A further important element of European legal tradition that is much more pronounced in the Anglo-Saxon sphere is the insight into the fundamental fallibility
of human beings. Whether as a citizen, judge, king or a member of parliament, man is fallible. Whilst this fallibility may be mitigated or minimised through education and experience, a risk of error or misconduct always remains. Even if judges and civil servants receive the best professional education and training, they will always be tempted to misuse their power. It is for this reason that the value of state institutions has to be assessed on the basis of their capacity to minimise human error, or to limit the impact of such errors.

It would therefore be a mistake for the constitution or the state to vest government or civil servants with uncontrollable power or a monopoly on the use of force. As civil servants acting in the name of the state are just as prone to error as private individuals, they should not be granted any special powers or privileges. Only the common law systems take this wisdom to its logical conclusion and implement it. In continental Europe on the other hand, the administrative law makes a legal distinction between the office and the office-holder. In other words, authorities are not acting as private persons, even when they act beyond their authority or in breach of the law. This means that any representative of a public office functions in an abstract official capacity, detached from their concrete personality, and thereby can exercise through the fiction of the public office almost the same authority as a judge. As administrative acts and decisions are made not by civil servants but by the office, such decisions are final and enforceable in a manner similar to a decision of the court.

**Adversary system**

The recognition of the fallibility of man has not only influenced the different concepts of separation of powers, but also court procedures. The adversary system is based on the idea that the truth as to the legally relevant facts can best be established in a procedure in which both parties pit their accounts against each other and contest the facts, with equal arms and on equal footing. The parties are expected to fight for the truth by presenting evidence and argument before the ‘blind’ jury or the ‘blind’ judge. Anything that could unfairly influence this fact-finding (prejudicial media reports, inadmissible evidence, etc.) has to be prevented in order to exclude any possible prejudice of the judge or jury.

The adversary system was displaced in the continental European legal system with regard to criminal and administrative procedures by the inquisitorial system. The inquisitorial procedure required the procurator representing the state in the procedure to actively search for and determine the facts. His office had the obligation to examine all facts and to provide conclusive answers to the court. The court was only required to verify this truth. Thus, the procedural rights of the defendant were limited to questioning the facts produced by the procurator, but he was not entitled to present his view of the facts with equal arms and equal opportunity. These two very different approaches led to the development of quite different procedural systems, including different functions of the judges and the jury in civil law and common law countries.
5.2.4.2 What are for Comparative Purposes the Distinctive Elements of the European Legal Culture?

Essential elements of the European culture of administrative law are undoubtedly the separation of powers, the allocation of jurisdiction between the different courts, divergent procedural rules, different remedies and different concepts with regard to the sources of law, as well as a quite different function of the judiciary in terms of jurisdiction to control the administration.

Similarity between the continental European and the Anglo-Saxon concept of judicial control of the administration can be found in the design of the independent judicial or quasi-judicial instance (Conseil d’Etat), which can review decisions of the administration based on complaints from affected persons. However, we should not overlook that with regard to the question of how independent an instance must be in order to recognised as a judicial instance, there exist significant differences of opinion between continental and Anglo-Saxon lawyers.

Different rules have however been developed in relation to the subject matter for review, the independence of the court, the possibilities for appeal and the fact-finding procedure.

Subject matter of the dispute

What can be the subject of a legal dispute with the administration? According to the French and Swiss legal systems, only formal administrative decisions (called administrative acts) can be subject to review by the court, whilst in the German system any legal controversy can be brought to the administrative court if it concerns the alleged infringement of basic subjective constitutional rights by any action of the administration. In Switzerland under a recent constitutional amendment, access to justice against administrative measures has been considerably enlarged. In 2007 the legislature passed enabling legislation to give effect to the constitutional amendment concerning the right of access to justice, however there is still no constitutional review of federal legislation and the new constitutional provision in principle excludes decisions of the parliament and of the federal executive council from judicial review (Art 189 para 4).

In the UK, the subject of the dispute is not a pertinent issue. The common law, developed on the basis of different types of legal action, is more concerned with whether there is an applicable writ available with which to bring an action. The writs determine the goal of the action and the jurisdiction of the court, including the remedies that can be issued and enforced by the court.

Independence of the judiciary

The common law tradition is based on the principle that men are governed by law and not by men. Men are vested with inalienable rights that cannot be changed or modified by the constitution or the sovereign. Thus, the courts are the trustees which guarantee those inalienable rights.
According to the continental system the sovereign is the fountain of justice, and produces, according to ROUSSEAU, the *volonté générale* or the general will. The courts have to apply the general will of the sovereign, and thus they have to be accountable to the public.

How independent are the courts or the administrative tribunals? In the Anglo-Saxon British or American legal system, most legal disputes with the administration are decided before the ordinary courts. In Germany and in part in Switzerland, special administrative courts have jurisdiction over legal disputes with the administration, or, as in Switzerland, special chambers or divisions of the ordinary courts. In France, at the lower level administrative tribunals are vested with jurisdiction over public law, and in the final instance such matters are heard before the Conseil d’Etat. As an administrative court the Conseil d’Etat has developed de facto independence from the executive, although it is not independent in the same sense as the *Juges ordinaires*.

**Ministre juge**

Another significant feature of civil law systems is the fact that a legal dispute may in the first instance not be brought before a court, but rather determined by an administrative body that is competent to supervise and review decisions of its subordinate administrative agencies. This concept, known in the French system ‘*ministre juge*’, is foreign to the common law tradition, since the administration has no power to exercise judicial or quasi-judicial functions (functional separation of powers). However, in many common law countries one can find administrative tribunals that can determine administrative matters at first instance, although they do not formally exercise judicial power nor have the status of a court.

**Fact finding**

An important difference is also to be found with regard to procedure. The procedure for establishing the facts before a court in the common law system is essentially an adversarial contest between the parties. On the other hand, civil law countries in matters of public law follow the inquisitorial principle. Accordingly, it is the task of the administration and ultimately the administrative court to find and declare the facts of the case. As the administration bears responsibility for fact-finding, there is no provision for distribution of the burden of proof as with civil law matters.

The administration is of course obliged to find and produce the *true* facts relevant to the case at hand. In continental administrative law this has become established as a legal obligation to investigate and determine the facts, and at the same time, the necessary procedural rights and obligations for fact-finding have been transferred to the administration to enable this role to be fulfilled. This has led to the administrative acts that result from this fact-finding procedure being accorded the same status and validity as a decision of the court, even though the facts are...
not determined within a procedure providing equal arms and chances to the parties concerned.

The English administration is of course also obliged to objectively present the relevant facts, even without express legal obligation. In an administrative law dispute the court will examine the facts presented by the administration for ‘error on face of the record,’ but it does not certify the objectivity and truth of the facts presented by the administration. In common law jurisdictions, it is ultimately an adversarial contest between the parties that is seen to provide the fairest means of arriving at the facts.

**Contempt of court**

Whilst common law courts can enforce their decisions by means of *contempt of court*, that is, by threat of criminal sanction, administrative courts of civil law countries have no equivalent or corresponding method of enforcement. Civil law administrative courts can quash a decision of the administration, but they cannot enforce their decision via contempt of court, nor can they compel a civil servant to perform or refrain from specified actions. This leads to the result that, even in countries in which administrative courts are empowered to order the performance of certain tasks by the administration, the courts cannot enforce their orders. If the administration is not willing to obey the court, the court has no appropriate charge or penalty at its disposal for the purposes of enforcement.

### 5.2.4.3 Reasons for Differences

**The special status of the administrative act or decision**

With the separation of public law from private law, Napoleon not only separated the jurisdiction of the courts and laid the basis for two separate court systems, he also handed the administration an important instrument for the execution of administrative decisions: the administrative act (*acte administratif*). Though this instrument was developed prior to the Revolution, it was after the creation of Napoleonic ‘public law’ that it became the central and decisive instrument for administrative law on the whole continent. The French *acte administratif* became, through the scholarship of OTTO MAYR, the crux of German administrative law doctrine until the enactment of the new statute on administrative procedures after the Second World War. It also had a decisive influence on Swiss administrative law with the reception of the German administrative law by FRITZ FLEINER and its later development by MAX IMBODEN.

**Function of the administrative act**

The administrative act fulfils many different functions at the same time: It is the binding order of a competent administrative authority with an effect similar to a judicial ruling. It also ensures that a particular administrative procedure is followed.
In addition, the administrative act creates trust and provides legal security, as it can only be revoked in accordance with specific rules. The administrative act is enforceable and enjoys the privilege of the assumption of its validity, as long as it is not challenged. If the act is not challenged before the court or a higher administrative instance within the legal deadline, any flaw in the act is healed. Thus, it has to be executed by the relevant enforcement authority even though it was originally faulty.

**Similarity to judicial ruling**

With the institution of the administrative act, the administrations of the continental European countries were able, unlike their common law counterparts, to enact decisions that were directly enforceable with regard to the persons affected. The idea that was developed in the Middle Ages of a centralised, hierarchically structured and rationally based legal system was thus strengthened with the Napoleonic concept of an executive and administration additionally empowered with competences similar to judicial jurisdiction.

**The adjudicative power of the administration**

The overemphasis on executive and administrative power can also be seen in the doctrine of the formal and substantive legal validity of administrative acts, which is a status otherwise reserved for and only justified in relation to decisions of independent courts reached after a fair judicial process. The very fact that administrative acts are automatically legally valid and enforceable, and that they are assumed to be correct and only reviewed in case of a complaint, reveals the fundamental importance of this institution for the continental European legal thinking and legal system.

**Volonté générale**

As long as the citizens (or subjects) do not contest administrative acts, they have to tolerate their enforcement. Ultimately, administrative acts are to be seen as a means to implement and enforce legislation, in respect of which the administration has a privileged position relative to the subjects. The administration can implement legislation via the administrative act on its own initiative and can also determine the relevant facts in concrete cases. It can make enforceable decisions, which if necessary can be executed by the police force or other administrative means available. Thus, the doctrine of the administrative act is closely connected to the dependence of the citizens on volonté générale, which is given expression in legislation enacted by the legislature, and whereby the common or general interest will always be privileged over any private interest.

**Administration subject to law**

Administrative power and jurisdiction over the administration developed very differently in England. Like the courts in other monarchies, the courts of the UK were also courts of the Crown that determined legal disputes in the name of the
Crown. In contrast to other monarchies however, the principle ‘The king can do no wrong’ had a purely procedural meaning. The king and the courts acting in his name were not above the law, and were not at liberty to distort or bend the law in favour of the Crown. For this reason, the common law courts could always apply the law to servants and offices of the Crown and could thereby determine whether the administration had acted within the limits of its legal powers (intra vires), or whether it had exceeded its legal powers and acted beyond the law (ultra vires).

Although servants of the Crown have to act and decide on behalf of the Crown for the benefit of the common interest, their decisions are not akin to a court ruling and are not automatically enforceable. If an administrative decision has to be enforced against the will of the person concerned, a separate order of the court is required. Thus, public obligations with regard to the administration are treated similarly to private obligations. The administrative law of the common law countries functions effectively without the weighty construct of the ‘administrative act’.

The king can do no wrong

If one wants to bring an action against a servant of the Crown, the king or queen has to waive their immunity from suit. English kings have made provision for such waiver for centuries, which enabled the early development of the prerogative writs (complaints against the servants of the Crown) including habeas corpus and the writs of certiorari and mandamus. In all such cases the king or the Lord Chancellor gave the courts the power to require the administration to justify imprisonment or other restriction of personal liberty (habeas corpus), to order the administration to make a decision (certiorari) or to compel or prohibit an activity or measure of the administration (mandamus, prohibition, injunction).

5.2.5 The two Types of Administrative Jurisdiction

Consequently, the continental civil law and the common law have developed two different types of administrative law and administrative jurisdiction. Within the common law system, disputes between private individuals as well as those between private individuals and the administration or between different administrative authorities are all heard and decided by the ordinary courts within the framework of their existing powers and prerogatives. In countries with a continental legal system, specific administrative courts (Germany and Switzerland) or the Conseil d’Etat and administrative tribunals (France) have been established and are responsible for all disputes involving the administration.

Criteria for assessment

The common law courts assess the activities of the administration essentially according to the same sources of law and basic legal norms that apply to actions of
private individuals. This means that an action or decision of the administration will be contrary to the law if it cannot be justified on the basis of the common law, parliamentary statute, royal prerogative or by natural justice. If the power to take such action cannot be supported by any of these sources of law, the administration has acted *ultra vires*. In making this assessment however, the court does not interfere within the discretion of the administration. If the administration acts within its legal powers, the decision or measure is considered to be lawful because it is *intra vires*. As far as the court observes the statutes enacted by the parliament, the criteria for assessment correspond to a large extent to those which in civil law countries are known as principle of legality (Gesetzesvorbehalt).

**Common law remedies**

In common law systems, citizens do not have to wait until the administration formally issues a decision in order to have recourse to the courts. Rather, using the appropriate writ, a person may bring an action before the court seeking an order to compel the administration to perform a certain action or an order to prevent it from a certain planned activity.

With the remedy of habeas corpus, those who have been deprived of their liberty through imprisonment, involuntary admission to a psychiatric clinic, imposed tutelage or deportation order can demand to be brought before an independent judge within twenty-four hours. The judge then has to assess the lawfulness of the restriction of liberty. Habeas corpus is one of the oldest prerogative writs, dating back to the Middle Ages.

Other prerogative writs include certiorari, mandamus and prohibition. The writ of certiorari enables a person who is affected by an administrative decision to have that decision quashed by the court. The writ of mandamus is a remedy that orders the administration to take a certain positive action, for example, an order that mandates the construction of a road. With the remedy of the writ of prohibition or prohibitory injunction, the court can prohibit the administration from carrying out certain activity (such as the construction of a proposed public building).

Today, the various prerogative writs have largely been consolidated under the traditional injunction (a court order to compel or prohibit an action).

**Recours pour excès de pouvoir**

In civil law countries, the French principle is generally observed whereby a complaint can only be made against an administrative act that has already been made, and in all other cases the only possible recourse is a claim for compensation against the administration if damages have been suffered. The *recours pour excès de pouvoir* is the most important and traditional remedy of the French administrative law (complaint for acting beyond discretionary power, akin to the common law concept of *ultra vires*).

In Germany, the formal administrative act was once a prerequisite for invoking the jurisdiction of the administrative courts and making a complaint, however it is
now possible to bring any legal dispute against the administration before the administrative courts, provided the complainant can show that the matter raises a question of substantive rights (based on the guarantee to access to justice under Article 19 of the Grundgesetz or Basic Law).

**Standing**

Standing to bring a claim against the administration before a court has been expanded in many countries in recent decades in order to open access to justice against the administration. In earlier times, only those who could claim the violation of subjective rights (Germany), legal rights (England) or property rights (USA) could have access to the court. Today however, in most countries access to justice is generally available if the citizen can show that his/her interests are affected.

**Function**

Whilst in the UK and in Germany the function of administrative justice is mainly to protect individual interests against illegal actions or decisions of the administration, in France and Switzerland it serves the additional function of safeguarding the public interest. For this reason standing is sometimes expanded in order to provide scope for court review in cases where the public interest might be harmed. One important example is the right of NGOs in the field of environmental protection to complain against administrative decisions that purportedly violate general environmental interests. This in turn transfers to the court greater responsibility for control of the administration and the legislature, which they are not always well placed to fulfil.

### 5.2.6 Conclusion

**Partnership v hierarchy**

The two different concepts of judicial control of the administration can be traced back to the different conceptions of the state and of human nature that underpin the respective views. The strong position of the courts in the common law system must be understood in the context of the strong position of the parties and the restriction of the judge to the decision-making function. In contrast, we have seen that the continental European system places the judge in a hierarchically superior position to the parties, accords fewer procedural rights to the parties and is thereby a more hierarchically structured and authoritarian system than the partnership-like common law system.

**Dominance of the volonté générale**

Justice in the continental European sense is to be found in the hierarchy of the legal order through the volonté générale determined by and expressed through the
democratic law-making procedure, whilst in Anglo-Saxon law, justice can only be found through an adversarial procedure between parties on an equal footing. According to the common law view, the correct or just law can only be found in a legal battle before an impartial arbiter, whilst on the continent the correct or just law is that which is created through the democratic legislative process.

The administrative law of civil law countries therefore gives expression to the view that citizens are no longer the subjects of an absolute ruler, but rather subjects of the volonté générale of the democratic legislature. Government and administration are executing and administrative organs of the volonté générale and must therefore have the appropriate authority to implement the will of the majority. This inviolable position is in England enjoyed only by the Crown. However, as the law has increasingly separated government and the administration from the privileges of the Crown, administrative authorities can no longer claim a special status relative to citizens. In contrast to the German ‘Fiskustheorie’, which distinguishes between the private legal actions and public legal actions of the executive, in England the government and the administration were increasingly subject to the general jurisdiction of the courts.

In common law countries, the administration did not retain the patriarchal character that it assumed in civil law countries. The superior, super-human character of magistrates, civil servants and administrative authorities in civil law countries, which finds expression for example in the rights of immunity outlined above, is based solely on the fact that the administration is responsible for realising the will of the majority (the volonté générale).

**European Human Rights Convention**

The forces of globalisation compel both systems to move closer together. In this process, each system can learn from the other. The civil law system should accord much greater value to the procedural rights of parties, especially in relation to fact-finding. The common law countries must acknowledge that process alone is not sufficient to effectively guarantee justice. The substantive law and substantive constitutional rights, such as the right to life for example, are at least as important as procedural rights.

In Europe, the European Human Rights Convention and the broad jurisdiction of the European Court of Human Rights are contributing to the gradual but discernible merging of the two systems.

**New Public Management**

Finally, mention should be made of the recent developments that can be grouped together under the term ‘New Public Management’ (NPM). These developments include the privatisation of certain public utilities and services, which in some cases has been required of member states of the European Union. This new development applies a private sector management approach to the public sector, and
includes principles of private competition within the administration. NPM requires authorities to address citizens as customers or clients rather than subjects.

NPM aims to make government more cost-efficient, and assumes that the administration should be steered by clear function-oriented goals. Within the framework of these goals, the administration should decide which measures it will undertake to achieve the optimal realisation of its goals. The allocation of revenue is determined on the basis of the goals to be achieved, and expenditure is measured against the performance of goals.

If one assumes that this new approach to administrative activity is primarily designed to handle citizens as clients or customers rather than as legal subjects, then NPM should be conducive to the legitimacy of the modern administration. With regard to the rule of law and to fundamental rights, the basic idea of the NPM development is that greater competition and market-orientation in the public sector will also result in the better protection of human rights. This might be the case in certain areas. However, in areas where the public interest requires the public monopolisation of a certain function or service, legislative protection of the public interest and access to administrative justice are indispensable.