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# Constitutional & Administrative Law

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## The Parliamentary Commissioner/Parliamentary and Health Service Ombudsman

6.47 The first thing to note is the title of the office. Despite the fact that the holder of the office performs the role and functions of what would be called an 'ombudsman' in a different jurisdiction, in the UK, 'Parliamentary Commissioner for Administration' (PCA) is the title used in the 1967 Act even though, in modern practice, the holder of the office is referred to as the 'Parliamentary and Health Service Ombudsman' (PHSO). In the years following the creation of the PHSO, the ombudsman concept has spread domestically, with the result that ombudsmen have appeared in other fields such as local government and the National Health Service. Indeed, in *JR55 v Northern Ireland Commissioner for Complaints* (2016), Lord Sumption noted that 'there are currently 19 statutory officers charged with the handling of complaints against government departments, local government, the National Health Service and other public authorities or undertakers'.

### The functions of the PHSO

6.48 The role of the PHSO is to investigate complaints of 'injustice' resulting from 'maladministration'. Despite the key nature of these concepts, neither is defined by the 1967 Act. However, during the passage of the Bill before Parliament, the minister responsible, Richard Crossman, observed in the House of Commons (HC) that 'maladministration' meant:

*Bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on.*

### Maladministration

6.49 The 'Crossman catalogue' represents the classic statement on the meaning of 'maladministration'. Nevertheless, as the words 'and so on' clearly indicate, it is not an exhaustive definition. Other forms of conduct not expressly referred to may also come within the definition of 'maladministration'. A precise statutory definition would seem to have been avoided on the ground that it may have been unduly restrictive. Thus, in the absence of a statutory definition, the PHSO has a measure of flexibility in the conduct of investigations. Doubtless each person who has held the office since its creation has had their own working definition of what constitutes 'maladministration'.

6.50 In *R v Local Commissioner for Administration for the North and East Area of England, ex p Bradford Metropolitan City Council* (1979), the CA gave some consideration to the meaning of 'maladministration'. Although each judge expressed himself slightly differently, a common thread emerges from the judgments: maladministration is concerned

It would be wrong to see the 'excluded categories' as a closed list. The decision in *ex p Bentley* accepted that the exercise of the prerogative of mercy could be subject to review, and yet this prerogative power had also featured in Lord Roskill's list. It therefore represents an example of what Lord Mance has described as 'the shift towards justiciability'. This jurisdiction to review the exercise of the prerogative of mercy has subsequently been exercised in both domestic and Commonwealth cases. In *R (on the application of Page) v Secretary of State for Justice* (2007), for example, the Administrative Court held that the Secretary of State had acted unfairly in not exercising the prerogative to release P from prison, where a mistake as to the proper date of his release had been made due to concurrent sentences for various offences and a successful appeal against one of his convictions.

The decision in *Page* reflects how the prerogative of mercy may be used in the context of remission. In modern times, the prerogative has also been exercised in relation to the grant of a conditional pardon (*Bentley*), where, as we have seen (**para 12.42**), it was posthumously recognized that the penalty imposed was not commensurate with B's offending. A third situation in which the prerogative of mercy may be exercised occurs where it is accepted that a defendant has been wrongly convicted and that there has been a serious miscarriage of justice as a result. In appropriate circumstances, a free pardon may be granted.

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***R (on the application of Shields) v Secretary of State for Justice* (2008):** The claimant (S) had been convicted in Bulgaria of the attempted murder of a bar worker, sentenced to fifteen years' imprisonment, and ordered to pay £90,000 in compensation. On appeal, the prison sentence was reduced to ten years. S was later repatriated to the UK under the Repatriation of Prisoners Act 1984 and the Convention on the Transfer of Sentenced Persons 1983 to serve the balance of his sentence. A public campaign was begun on his behalf on the basis that he had been wrongly convicted. Another UK citizen, who had been arrested by the Bulgarian police but released without charge, had later signed a written confession witnessed by his own solicitor. It was therefore argued on S's behalf that the SoS ought to exercise the prerogative of mercy and grant a pardon. The SoS was advised, however, that the 1984 Act and the 1983 Convention precluded the grant of a pardon where a person had been transferred to the UK from a foreign prison. S sought judicial review of that decision. Administrative Court (Admin Ct) held: that although the grant of a free pardon had been little used in modern times, the prerogative to do so undoubtedly remained. It was capable of being exercised in those very rare cases where justice had not been achieved by a concluded court process. The SoS had erred in thinking that he did not have the power or jurisdiction to grant a free pardon.

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Although the outcome in *Shields* was that the court declared that the SoS did have the power and jurisdiction to issue a pardon, whether or not to exercise it in favour of the claimant remained a matter for the minister. As Maddison J pointed out, 'it is not in dispute in this case that the formulation of criteria for the exercise of the prerogative to pardon are entirely matters of policy for the Secretary of State'. In the event, following an investigation by

# 11

## Judge-made law

### SUMMARY

In this chapter we turn our attention to a further source of the UK common law made by the judicial branch of the government as a result of the decisions of the courts.

### Introduction

**11.1** It will be remembered that for A V Dicey in his *Introduction to the Study of the Law of the Constitution* (1885), the constitution was the product of judge-made law. However, for some considerable time, judges were anxious to play down their law-making function. Thus in *Willis & Co v Baddeley* (1892), Lord Esher remarked:

*There is, in fact, no such thing as judge-made law, for the judges do not make law, though they frequently have to apply existing law to circumstances. It has not been authoritatively laid down that such law is applicable.*

**11.2** Eventually, however, as Lord Mance has noted, the 'declaratory' view of the law—that it was not made by the judiciary but merely declared from time to time—has given way to reality. Thus, as Lord Reid explained:

*There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law, the splendour and that on a judge's appointment there descends on him the power of the magic words *Open Sesame*. Bad decisions are given when the judges do not believe in the power of the password and the wrong door opens. But we do not believe in the magic any more.*

Thus, it is now widely accepted that judge-made law is a reality. It may take two main forms: the development of the common law or the interpretation of statute law.

**1.3** Echoes of Lord Reid's remarks are to be found in those of Michael Kirby, the former Justice of the High Court of Australia, when he wrote:

*Being a judge in our legal system necessarily involves the officer-holder in a creative function . . . It is well that . . . those who live in the dream world where judges make no law can be given a rude awakening . . . Nostalgic dreams of judges without choices, devoid of creativity, abjuring 'activism', may be found in fairy stories. But for judges, lawyers and citizens who are obliged to live in the real world, it is necessary to face up to the requirements of judicial choice . . . Choice about the interpretation of ambiguous legislation. Choice about the application, extension, confinement or elaboration of old principles of the common law to new facts, circumstances and times.*

### The common law

**11.4** This body of law comprises the rules and principles that have been declared to be the law by the courts over the centuries. Accordingly, as Lord Reed has noted, 'the common law is inherently rooted in our national history'. In the words of Lord Sales (2018), 'the courts are the custodians of the common law and are trusted by society to develop it'. Rather like statute law, the common law straddles the divide between private law, for example contract and tort, and public law.

**11.5** In the present context, we have already seen several examples of what may be properly described as judicial law-making. Thus in *Entick v Carrington* (1765), the courts established the principle that interference with an individual's property required prior authorization by the law (see **paras 3.24 and 3.28**). That which was done without lawful authority was therefore unlawful. In *Burmah Oil v Lord Advocate* (1965), the House of Lords (HL) held that the oil company had a common law right to be compensated for the destruction of its installations by British forces which were acting under the prerogative. Admittedly, that right was subsequently extinguished by the terms of the War Damage Act 1965 (see **paras 12.38–12.39**). Nevertheless, the case does illustrate how the courts may develop the common law in order to take account of new situations. More recently, in *M v Home Office* (1994), the HL showed itself willing to hold that a minister of the Crown could be in contempt of court for failing to comply with a court order (see **paras 3.25–3.26**).

**11.6** These examples reflect the development of the common law in a way which holds the executive to account. They show the courts performing their traditional role of protecting the rights of the individual against state interference. However, not every plea to extend the common law is met with a favourable response. Thus, in the context of the right to privacy, the courts have, on several occasions, shown themselves unwilling to declare that such a right exists at common law. In *Kaye v Robertson* (1991), for example, where a well-known

this is indeed the case, account would also have to be taken of an individual prior to their appointment. That this does not always appear to happen is evident from an example that Jaconelli uses—the career of the late Alan Clark, a minister and self-confessed serial adulterer.

### Individual ministerial responsibility

- 10.16** Individual ministerial responsibility for what is done in an official capacity employed in the minister's department is an important convention, although it only comes into play when something has gone wrong and mud is being thrown around. The Cabinet Secretary, Sir Richard (now Lord) Wilson, has pointed out, it only comes to account before Parliament, whether on the floor of either chamber, or in question, or in the committee room, for the exercise of ministerial powers is a means of ensuring that such powers are not abused. Indeed, the very idea of ministerial responsibility to Parliament has sometimes been regarded by the courts as a matter of judicial review either unnecessary or inappropriate. Admittedly, the argument is commonly used in respect of a decision that is deemed to be non-justiciable. The *Secretary of State for the Home Department, ex p Hosenball* (1977), where the Home Secretary, a citizen and investigative journalist, sought to challenge a decision to deport a foreign citizen, the Court of Appeal (CA) noted that the case involved a conflict between the interests of national security on the one hand and the freedom of the individual on the other. It concluded that achieving a balance between the two was a matter for the Home Secretary rather than the court, although in the words of Lord Denning MR, the Home Secretary was 'answerable to Parliament as to the way in which he did it and not to the courts'.  
**10.17** Ministerial responsibility thus entails a recognition of the democratic principle that a minister is responsible to the Parliament elected by the people. It is also a way of emphasizing the distinction between a minister's overtly political opinion on the one hand and the political neutrality of the Civil Service on the other. However, the convention of ministerial responsibility does pose some practical difficulties, not least of which concerns the appropriate response by a minister when there have been failings in his or her department.

- 10.18** Traditionally, departmental inefficiencies and failings have, where the matter is sufficiently important, resulted in the resignation of the minister. Thus in 1954 the Minister of Agriculture, Sir Thomas Dugdale, resigned over what became known as the 'Crichel Down Affair'. Although he had no personal involvement in the matter, it was enough that his department had been guilty of maladministration in its dealings with the former owners of a farm which had been transferred to the Ministry once it was required by the Air Ministry for use as a bombing range. In Jaconelli's (1998) view, such a case would be a clear case of the operation of a constitutional convention, since the political and administrative consequences are obvious enough. Similarly in 1982, the then Foreign Secretary, Lord Carrington, resigned amid public criticism that his department had failed to apprehend the true nature of the threat posed to the Falkland Islands by Argentina.

- 10.19** Ministerial resignations such as these can, however, be balanced against examples where a minister did not resign. Thus in 1968, the then Foreign Secretary, George Brown, did not resign from office even though a report by the Parliamentary Commissioner for Administration had found his department guilty of maladministration in its handling of a number of compensation claims under a scheme designed to compensate those who had been detained in the Sachsenhausen concentration camp. More recently, it has become possible to discern an increasing reluctance on the part of ministers to resign. In 1994, for example, the then Home Secretary, Michael Howard, refused to comply with demands for his resignation over the escape of prisoners from Whitemore jail. In his defence, he argued that as a minister he was responsible for policy and that responsibility for operational matters lay with the Director General of Prisons. The fact that he was able to remain in office indicates that he had not lost the confidence of either the backbench MPs in his party or, more importantly still, the PM. In the opinion of Lord Wilson, which is confirmed by the Ministerial Code (2022) (para 10.38), it is this which is 'the acid test, not some rule of automatic resignation in the event of a serious mishap'. Thus when in November 2020 the then Home Secretary, Priti Patel, was found by an inquiry to have breached behavioural rules in the Code relating to the treatment of civil servants, she remained in office because the PM continued to support her. The person who did resign was the PM's independent adviser on the Code.

- 10.20** The resignation of the former Deputy PM, Dominic Raab, in April 2023 after an inquiry upheld some bullying allegations made against him by departmental officials during his time as Justice Secretary, Foreign Secretary, and Brexit Secretary, reflected a course of action which he stated he would take should the inquiry reach such a conclusion. Since the allegations related to his own personal conduct towards others whilst acting in his ministerial capacity, they may be said to reflect a third limb of the ministerial responsibility convention (para 10.15). Had Mr Raab not resigned the then PM, Rishi Sunak, who set up the inquiry, would have been placed in a difficult position since he would have had to either back or sack one of his key supporters in cabinet.

### Collective cabinet responsibility

- 10.21** Collective cabinet responsibility, the second limb of the convention of ministerial responsibility, requires of the cabinet that it present a united front to the world at large. In other words, differences of opinion which may have surfaced at the formative stage of government policy during cabinet discussions are not to be acknowledged in any public pronouncements. Once a policy has been decided upon at cabinet level, the members of the cabinet are obliged to support and defend that policy whenever and wherever it is necessary to do so. If they feel unable to meet this obligation, the convention requires them to resign. Such a course of action is considered necessary since division within the cabinet can have a destabilizing effect upon the government and may even lead to its downfall. Resignation was the chosen course of action by the then Secretary of State for Trade and Industry, Michael Heseltine, when in 1986 he felt unable to support the government's decision to promote a rival bid to that which he favoured for the rescue of the

## The nature of constitutional conventions

**10.2** For Dicey, conventions amounted to 'understandings, habits or practices which they may regulate the conduct of . . . officials, are not in reality laws at all, but practices, maxims or precepts which are not enforced or recognised by the courts'. Latterly in the same work, he referred to these as 'conventions'. He has defended Dicey against those who claim that his proposition that conventions are not enforced or recognised by the courts is in fact contradicted by those cases in which the courts have considered them. He argues that Dicey used the phrase 'not enforced or recognised by the courts' to mean 'not enforced or recognised as legal rules by the courts'. To point further, Munro (1975) contends:

*Such an interpretation is supported by common sense. Dicey recognised that legal rules existed and were important, described them in considerable detail and criticised the 'unreality' of the lawyer's view of the constitution. He is scarcely likely to have suggested that the judiciary were unaware of the existence of such rules.*

**10.3** A critique of Dicey's distinction between laws and conventions is strictly beyond the scope of this book. However, it is worth noting at this juncture that it rests upon a distinction of enforceability: laws are enforced by the courts, whereas conventions are not. This may be an over-simplification since, in truth, the enforcement of laws is not the preserve of the courts. Administrative tribunals may be said, for example, to enforce law in accordance with powers conferred upon them by Parliament. Nevertheless, the distinction which is not completely devoid of merit, as will be discussed.

**10.4** Later writers have offered their own definitions as to what is meant by a constitutional convention. Writing in his *Modern Constitutions* (1961), Jaconelli defines a convention as 'a binding rule, a rule of behaviour accepted as obligatory by those concerned in the working of the constitution'. The binding nature of conventions is not, however, as important. Since they are non-legal rules, obedience to them is important only in so far as they have any constitutional value.

**10.5** Prior to considering some examples of constitutional conventions, it seems worth drawing attention to criticisms of the coverage that has been accorded to them by writers. Jaconelli (1999) has argued in a forthright manner that writers who have been too imprecise when discussing constitutional conventions. He argues that they have tended to focus too much on identifying purported examples of conventions (even though some may not be deserving of the description) and too little on the nature of constitutional conventions. In his analysis, he makes a well-justified point which is nevertheless important: that genuine or real constitutional conventions are those which are constitutional in nature. For Jaconelli:

*Matters constitutional are those which regulate the manner in which the business of government is to be conducted in such areas as . . . relations between*

*government as a whole and Parliament; relations between the two Houses of Parliament; relations between the United Kingdom and the member countries of the Commonwealth.*

**10.6** Jaconelli argues that in essence constitutional conventions are social rules, although he is quick to point out that not all social rules therefore qualify as constitutional conventions. In his opinion, 'constitutional conventions form only a sub-class of the genus social rule'. They may therefore be distinguished from habits which, irrespective of the length of their existence, do not have normative consequences, that is, they are not the basis for making a judgement as to what ought to have been done in a given situation.

**10.7** Barber (2009) has contended that the distinctions between laws and conventions which are often canvassed—for example, that laws are enforced whereas conventions are not—are unsustainable. Accordingly, he is of the opinion that:

*Constitutional conventions and laws are two brands of social rule which differ in the extent of their formalization. Laws and constitutional conventions behave in similar ways and share many common qualities. This makes it possible for courts, as well as legislatures, to transform conventions into laws on occasion. Furthermore, because the difference between conventions and laws is a soft one, it can sometimes be hard, perhaps even impossible, to state decisively whether a rule should be thought of as a constitutional convention or a law.*

**10.8** Constitutional conventions continue to be fertile ground for academic scholarship. Some of this has related to distinguishing between different types of convention. Thus Taylor has argued that the UK's 'political' constitution exhibits two types of convention: foundational and regulatory. As he explains, 'foundational conventions govern the behaviour of unelected constitutional actors and establish the democratic foundations of the constitution, whilst regulatory conventions govern the behaviour of democratically-elected politicians'. Thus, in his analysis, the former type of convention includes those which relate to the Crown, for example Royal Assent, and the convention that the monarch exercises their prerogative powers on the advice of their ministers. 'Regulatory conventions' include the Sewell Convention (see **para 10.47**) and individual ministerial responsibility (**paras 10.16–10.20**).

**10.9** Perry and Tucker have also contributed to the academic debate in this area by considering, amongst other things, the legitimacy of bottom-up and top-down constitutional conventions. Whilst acknowledging that there is scepticism amongst some academics as to the very existence of the latter, for them, a bottom-up convention is 'any non-legal constitutional rule grounded in a prescription'. They regard legitimacy questions relating to conventions as being important given that 'conventions are a form of self-regulation in a field where that might seem wholly and obviously inappropriate'. In their analysis, whilst bottom-up conventions have features which mitigate against objections to self-regulation (eg they are not made intentionally or expressly and are self-regarding in that they centre on a role such as that of the PM or the monarch), top-down conventions do not share

in deciding whether to depart from its own case law'. In the case of the SC, Feldman has noted, this entails asking itself 'whether it appears right to do so'.<sup>9.60</sup> extra-judicially, Lord Sales (2023) has commented in the present context that the approach to [assimilated] law departs from a strict *stare decisis* doctrine.

**9.60** As a result of an amendment made by s 26(1) of the European Union (Withdrawal) Act 2020, the inserted s 6(5A) of the 2018 Act empowers ministers to make regulations relating to a number of matters, including the categories of court to which what is now known as assimilated EU case law. It also empowers ministers to determine 'the test which a relevant court or relevant tribunal must apply in deciding whether to depart from' such case law (s 6(5A)(c)). Following a consultation exercise undertaken in July–August 2020, the then government decided to extend the power to depart from what was then known as retained EU case law to the Court of Appeal in England, Wales, and the equivalent courts in Scotland and Northern Ireland. This was accomplished by the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained Case Law) Regulations 2020, SI 2020/1525.

**9.61** Under the 2020 Regulations, which came into effect immediately after the implementation period ended, the CA is to apply the same test as the SC when deciding whether to depart from assimilated EU case law, that is 'whether it appears right to do so'.<sup>9.61</sup> Feldman has contended that this is 'hardly a test at all' given that 'no court is to depart from [assimilated] EU case law if it appears wrong to do so'. Lord Sales (2023) has contended that the approach adopted in relation to assimilated EU case law creates an exception to the doctrine of *stare decisis*, that is, judges follow the decisions of those courts which are higher in the court hierarchy, in that it allows the CA to depart from the judgments of the CJEU, its own judgments, and even those of the SC, from the down prior to the end of the implementation period. He considers, however, that in practice, it is perhaps unlikely that we will start to see the CA routinely overturning decisions on [assimilated] EU law'.<sup>9.62</sup>

**9.62** A penultimate point to note in the present context concerns a further exception to the general position under s 6 of the 2018 Act. It concerns s 6(2) which, as noted in para 6.40, permits courts and tribunals to have regard to post-Brexit CJEU case law 'so far as it is relevant to any matter before the court or tribunal'. Lord Sales (2023) has noted, this 'amounts to quite an open-ended test', not least because it leaves it to the court to decide when a decision of the CJEU may be said to be 'relevant'. Whilst it has been argued that there was no need for s 6(2) given that UK courts have traditionally been entitled to refer to the jurisprudence of other courts, Professor Craig has rightly pointed out that since the statutory authorization legitimizes the courts' regard to post-Brexit CJEU decisions, it will 'help shield them from those who might disapprove of such law'.<sup>9.63</sup> Similarly, Lord Sales (2023) has remarked that 'this is an area which has the scope to be politically charged and the UK courts will follow the directions given in the legislation'.<sup>9.63</sup>

**9.63** At the time of writing, s 6 of the Retained EU Law (Revocation and Enforcement) Act 2023) is not in force. When it becomes law, it will make a significant number of amendments to the 2018 Act.

to s 6 of the European Union (Withdrawal) Act 2018. These include replacing the test in s 6(5) of the 2018 Act as to when a higher court may depart from assimilated EU case law with a new test, which requires the court concerned to have regard to: (i) the fact that decisions of a foreign court are not (unless otherwise provided) binding; (ii) any changes of circumstance which are relevant to the assimilated EU case law; and (iii) the extent to which the assimilated EU case law restricts the proper development of domestic law. In *Lipton and another v BA Cityflyer Ltd* (2024) (para 6.41), the SC noted that this development was on the horizon without further comment.

**9.64** Section 6 of the 2023 Act will also insert new sections into the 2018 Act concerning references relating to what is now termed assimilated case law (formerly known as retained case law). Thus, by virtue of s 6A a court or tribunal (other than a higher court) will be able to refer a point or points of law which arise in relation to assimilated case law where it is bound by the assimilated case law, and where it considers that the point(s) of law are of general public importance. Such a reference may be made of the court's own volition, or following an application made by a party to the proceedings. Where the matter concerns the assimilated case law of the SC, the application will be made to that court. In any other case, it will be made to the appropriate appeal court (eg the Court of Appeal in England and Wales). A court which accepts a s 6A reference will be bound to decide the point(s) of law it raises, and the referring court will also be bound to apply that decision to the proceedings before it. It should also be noted that a new s 6B of the 2018 Act will, when it becomes law, empower law officers to make a reference relating to assimilated case law where the relevant proceedings have been concluded, no s 6A reference has been made, and an appeal has either not been made or has been finally dealt with. Whilst a court receiving a law officer's reference must decide the relevant point(s) of law, its decision will not affect the outcome of the proceedings to which it relates. It will therefore have a declaratory effect.

## The Protocol on Ireland/Northern Ireland

**9.65** Although the UK transition or implementation period came to an end on 31 December 2020, the land border between Ireland and Northern Ireland posed a problem in the sense that it now became the border between the EU and the UK. In order to maintain a 'soft' or invisible border between the two nations, and to protect the 1998 Good Friday Agreement (paras 7.79–7.81), bespoke arrangements have been set down in the Protocol which is attached to the Withdrawal Agreement which was concluded by the UK Government and the EU on 17 October 2019. Both the Protocol and the Withdrawal Agreement were given legal force in UK domestic law by s 7A of the 2018 Act. As Duhs and Rao explain, s 7A is drafted in much the same way as the now repealed s 2(1) of the European Communities Act 1972. Thus it 'creates a conduit pipe into domestic law for rights and obligations arising under the Withdrawal Agreement so they apply without the need for any further domestic implementing legislation'.<sup>9.65</sup>

content' (see Joined Cases 16–17/62: *Confédération Nationale des Producteurs de Légumes v EEC Council* (1962)). Thus where the legality of an EU act has been called in question, it may be necessary for the CJEU to examine the measure closely in order to determine its object and content and hence its true legal status.

### Reasons for making secondary legislation

9.8 In addition to having binding effect, regulations, directives, and decisions are distinguishable from recommendations and opinions on two further grounds: reasons and publicity. Article 296 of the TFEU states that legal acts that are regulations, directives, and decisions—must state the reasons on which they are based. Additionally, they must refer to any proposals, initiatives, recommendations, requests, or opinions required by the treaties. It would seem that these requirements include the need to state the legal basis for a Union act in its preamble. A statement of reasons serves a useful purpose in that it confirms why the EU institution considered it was necessary to legislate. Moreover, those reasons may, where they are unclear or imprecise, or indeed where they are non-existent, entitle the CJEU to annul the legislation.

### Publicity

9.9 Article 297 of the TFEU makes provision for the publication of certain types of instrument that have been adopted in a particular manner. Regulations, directives, and decisions adopted in accordance with the ordinary legislative procedure, as provided in art 294 of the TFEU are signed by the President of the European Parliament, the President of the Council and are published in the *Official Journal of the European Union*. Regulations and directives which are addressed to all member states are published in the *Official Journal*, as are decisions which do not specify to whom they are addressed. In all these cases, the relevant legal instrument enters into force on the date specified therein, or, where no date is specified, twenty days after its publication. Directives and decisions which do not fall into any of these categories are required by art 297(2) to be notified to those to whom they are addressed. They take effect on notification.

### Direct applicability

9.10 Of the various EU legal instruments, the wording of art 288 indicates that regulations are directly applicable. In other words, only regulations take effect in member states without any need for further enactment.

### Direct effect

9.11 Whereas art 288 of the TFEU (and its predecessors) specifically mentions the concept of direct applicability, it is silent as to the concept of direct effect. This is because the doctrine was established not by legislative means but by a decision of the ECJ.

**Case 26/62: *Algemene Transporten Expeditie Onderneming Van Gend en Loos NV v Nederlandse Administratie der Belastingen* (1963):** Van Gend en Loos imported a certain amount of a chemical substance into the Netherlands from the former West Germany. The Dutch revenue authorities applied an import charge of 8 per cent and the company appealed. It claimed that it ought to have been charged a duty of only 3 per cent and that by increasing the import duty after the entry into force of the EC Treaty, the Dutch Government had acted contrary to art 12 of the EC Treaty. Its appeal was dismissed. Van Gend en Loos therefore applied to the Tariefcommissie at Amsterdam. In accordance with what was then art 177(3) of the EC Treaty, the Tariefcommissie referred two questions to the ECJ: whether art 12 created rights capable of being enforced by the individual before a national court; and if the answer to this question was 'yes', whether the 8 per cent import duty was contrary to art 12. The ECJ held: art 12 had direct effect within the territory of a member state.

9.12 In reaching this decision, the ECJ dismissed objections from the Dutch and Belgian Governments that it did not have jurisdiction to examine the internal effects of art 12. With regard to the merits of the first question posed, the ECJ noted that the Treaty was 'more than an agreement creating only mutual obligations between the contracting parties'. Confirmation of this fact was to be found in the Treaty's preamble, which refers to individuals as well as to governments. In an important passage which has since been much quoted, the ECJ observed that:

*the Community constitutes a new legal order in international law, for whose benefit the States have limited their Sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member-states but also their nationals. Community law, therefore, apart from legislation by the member-states, not only imposes obligations on individuals but also confers on them legal rights. The latter arise not only when an explicit grant is made by the Treaty, but also through obligations imposed, in a clearly defined manner, by the Treaty on individuals as well as on member-states and the Community institutions.*

9.13 Thus a Treaty article was capable of conferring legally enforceable rights on an individual: it could have direct effect. Whether or not it did have direct effect depended, however, on whether the article was clear and unconditional, and did not require further legislative intervention by the state. If these criteria were satisfied, the article was directly effective.