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REPORT

The relation between law and facts in case-law and the limits of investigation of law and facts in constitutional review

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I Introduction

In December 2004, in the most important decision yet made by the British courts under the Human Rights Act 1998, the presiding judge described the primary function of the courts in these words:

> "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself". [2]

In adjudicating on impeachment charges in April 2004, the Constitutional Court of Lithuania said:

> "In a democratic state under the rule of law, all state institutions and officials must follow the Constitution and law. The responsibility of state power for the public is inseparable from the constitutional principle of a state under the rule of law; the responsibility is constitutionally consolidated by establishing that state institutions serve the people, that the scope of power is limited by the Constitution, that state officials who violate the Constitution and laws …may be removed from office under procedure established in laws" (p 8)

The duty of judges to interpret and apply the law runs through all legal systems: it has a special significance in constitutional adjudication.

II The wide extent of constitutional adjudication

Today, a very wide range of matters comes for decision to a Constitutional Court or Supreme Court (called here, for convenience, "the court", meaning the national court or tribunal that performs constitutional adjudication at the highest national level)

The following recent examples of matters that arise for decision are taken from the *Bulletin on Constitutional Case-Law* [3]:

The constitutionality of a decision by the French Community that, to avoid congestion in the courts, grandparents should be barred from appealing when deprived of the right of access to their grandchildren (Belgian Court of Arbitration)
The constitutionality of legislation protecting classified information that required lawyers who acted as defence counsel in criminal courts to have a security clearance (Czech Republic Constitutional Court)
Whether an applicant for citizenship by naturalisation who had poor hearing but was not otherwise disabled was entitled to be exempted from examination in the Estonian language; and whether a medical student could be refused subsistence benefit under social welfare law simply because he rented a room in a student hostel (Estonia Supreme Court)
Whether new legislation amending the Criminal Code that penalised hate-speech would endanger fundamental rights (Hungarian Constitutional Court)

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2 *A (FC and others) v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 WLR 87. And see the Annex below.

3 Venice Commission, No 1 of 2004.

The constitutionality of Cabinet regulations that restricted prisoners receiving food parcels and buying food at the prison shop at a time when the Government was failing to ensure that prisoners generally had sufficient food (Latvia Constitutional Court)
The constitutionality of laws that restricted advertising of alcohol; and whether penalties imposed on breaches of the state monopoly on alcohol were disproportionate (Lithuania Constitutional Court)
Whether it was constitutional to fine newspaper editors for filming someone on her way out of court who had been convicted of a triple murder (Norway Supreme Court)
Whether evidence produced by telephone-tapping, and obtained through such evidence, ('fruit of the poisonous tree") was excluded from admissibility in a criminal trial (Portugal Constitutional Court)
Whether the election of a local mayor was valid when many breaches of electoral rules had occurred (e g voting had taken place outside polling stations) (Slovakia Constitutional Court)
Whether prisoners had a constitutional right to vote, although banned from voting by the Electoral Act (South Africa Constitutional Court)
Whether lawyers visiting clients in prison could be required to submit to a detailed security check (Swiss Federal Court)
Whether disciplinary procedures for judges breached the principle of judicial independence (FYR of Macedonia)
What the Constitution required in providing for the right of access to all levels of education; whether amendments to the Constitution had been properly made; and whether the termination of social protection for members of the armed forces and police breached the constitutional right to social protection (Ukraine Constitutional Court).

These decisions have in common the question of whether the legislative, executive or judicial acts under review observe relevant constitutional norms and respect the rights that arise from those norms (constitutionality in the sense of 'conformity with constitutional law', or 'constitutional legality').

III The wide variety of structures for constitutional adjudication

There is a wide variety of structures and procedures in European legal systems for enabling questions of constitutionality to be decided through adjudication.

In a very simplified outline, two models of constitutional adjudication exist in comparative constitutional law –

(1) There is a Constitutional Court with the monopoly of deciding questions as to interpretation of constitution; the Court is distinct from the ordinary civil and criminal courts, and is composed of specially appointed judges. Its jurisdiction is limited to what is specified by the constitution e g (a) dealing with issues of constitutional interpretation referred to it by other courts or authorities; and (b) reviewing the constitutionality of legislation before it has been promulgated or come into effect. This enables there to be abstract and not concrete review. The jurisdiction of the Court may be original and exclusive, with no right of appeal lying to another national court. [4]

(2) All civil and criminal courts have power (when necessary) to decide questions before them, even if they involve issues of constitutionality. Appeals are possible through the regular

[4] This is often referred to as the 'European model of constitutional review'; see e g Alex Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, 2000).

hierarchy of courts. InUS law, there is a requirement of a 'case or controversy' before constitutional questions may be decided. The US Supreme Court derives its jurisdiction from the Constitution, [5] and this extends to review over the constitutionality of laws made by Congress. In the United Kingdom, the judicial authority of the House of Lords as the final court of appeals derives from the 'common law' as varied or supplemented by Act of Parliament. In particular, under the Human Rights Act 1998, all courts and tribunals may decide questions about the observance of European Convention rights if these questions are relevant to proceedings before them; and the superior courts may declare that legislation is incompatible with Convention rights if no other interpretation is possible,

In the USA and the UK, questions about constitutional rights often arise from criminal trials. And issues of constitutionality may arise from civil litigation between parties that is primarily concerned with other areas of law. For instance,an action in defamation (civil liability) may raise question about the constitutional right to freedom of expression. [6] But this is not confined to USA or UK. See e g the Belgian case (above) on the rights of grandparents to have access to grandchildren.

Many important differences exist between the abstract review of legislation and the decision of constitutional questions that arise in the course of litigation. But there may well be more common ground between these two forms of adjudication than is often supposed.

IV The authority of decisions made through constitutional adjudication

Notwithstanding the variety of structures for constitutional adjudication, the primary task of the court is to decide whether certain action conforms with the constitution. This will involve applying and interpreting the constitution, not in an abstract vacuum, but in relation to particular fact-situations. This does not generally include the task of resolving disputes of fact (see section V below), but it ought always be possible to state the outcome of a decision of the court as a proposition of constitutional law. To take as an example the case from Estonia already mentioned of the deaf person seeking naturalisation – is he entitled to exemption from taking a language examination because of deafness? The importance of the Supreme Court's decision lies in its decision of this question. It is not the task of a constitutional court to decide that its judges do not believe that the individual is deaf!

If decisions of the constitutional court are to have authority for the future, we must be able to ascertain the operative facts relevant to a given adjudication – so that we can identify the proposition of law for which the decision is authority. One decision may support both a wider and a narrower proposition of law. In 'common law' systems, the use of case-law relies on the ability of later courts to determine the *ratio decidendi* of an earlier decision – that is, the rule for which the case is authority. The need to perform such an exercise arises in many legal systems and in the jurisprudence of European Court of Human Rights. For example, in *Vogt v Germany* [7] , the European Court decided that a school teacher might not be dismissed for her active membership of the Communist party. The question to be asked is – does this decision apply to all other employees in the public service, only to some other employees, or only to teachers? It

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5 As it was interpreted in *Marbury v Madison* 1 Cranch 137 (1803)

6 See e g *New York Times v Sullivan* 376 US 254 (1964); and *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442,

7 (1995) 21 EHRR 205.

is evident from the judgment of the Court (a) that the finding that the individual could rely on her right to freedom of expression under article 10(1) of the European Convention on Human Rights applies to all civil servants; but (b) that the Court's decision that the dismissal of a school-teacher (whose work with her pupils was in every way satisfactory) was disproportionate, must be read in the context of school-teaching and with reference to the facts of her case.

V Whether disputes of fact can arise for decision in the course of constitutional adjudication

Although the scope of the material facts is a key element in determining the authority of a constitutional judgment, it may seem that disputes of fact rarely have to be decided by a Constitutional or Supreme Court. Why is this?

(1) The court will often be an appellate or reviewing court: such a court must generally respect findings of fact made by the court at first instance. Often the possibility of new evidence on appeal is excluded; and in many jurisdictions, appeal is competent only on questions of law, and not against an adverse finding of fact. [8]

(2) Leave to appeal may be needed and if so, the scope of appeal is limited by the leave given. [9] Very often, an appeal is limited to deciding whether on the facts found by the court below, a correct decision in law was reached. Another procedure sometimes found is that the parties to an appeal are expected to agree on a joint statement of the relevant facts.

(3) In some legal systems, the constitutional court has jurisdiction only when a question is referred to it by one of the ordinary civil, criminal or administrative jurisdiction courts. The question to be answered is settled by the form of the reference and will not include questions of fact. [10]

(4) In many systems, whether as a matter of judicial practice or as a formal requirement, [11] a constitutional question must be answered only if the outcome of a case depends on it. For such a question arising from administrative proceedings, assume facts (based on *Golder v United Kingdom)* [12] in which a prisoner is refused leave by the prison governor to communicate with a lawyer regarding a possible civil action that the prisoner may have against a prison officer. The prisoner's primary remedy is in the administrative court, which must decide whether the governor's decision conformed to the Prisons Act and regulations, whether discretion was

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[8] However, where the line between questions of law and issues of fact can be drawn may depend on the practice of a particular jurisdiction. In the United Kingdom, it has long been an error of law for a court to come to a conclusion which is supported by no evidence – see e g *Edwards v Bairstow* [1956] AC 14.

[9] For appeals to the House of Lords in the United Kingdom, an appellant must show that the case involves a point of law of general public importance that deserves to be fully argued.

[10] In Canada, there is an exceptional procedure for the reference of constitutional questions to the Supreme Court, which has been used on matters of great importance. The effect of it is to give the Supreme Court original jurisdiction, and generally there is no trial at which evidence may be submitted by the parties. See P W Hogg, *Constitutional Law of Canada* (4th edition, 1997) section 57.2.

[11] See e g Constitution of Poland, article 193 : "Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution … if the answer to such question of law will determine an issue currently before such court".

[12] (1975) 1 EHRR 524.

exercised properly, in accordance with the principles of administrative law etc. If these questions are all decided in favour of the administration, the question of constitutionality arises: does a prisoner have a constitutional right of access to a lawyer for advice on his civil rights and obligations? But if the prisoner wins on grounds of administrative law, it is not necessary for the court to reach the question of constitutionality.

In such a case, if relevant facts have been established by the administrative court, the constitutional question must be answered. Usually, there is no need for new evidence. If the outcome depends on a factual issue that has not been determined by the court below, the constitutional court may decide **either** to issue a ruling covering two alternative bases of fact **or** to send the case back to the lower court for a decision of that issue. If necessary, the constitutional court can make certain factual assumptions to enable the question of constitutional law to be reached. To repeat an earlier point, it must be possible to identify the established or assumed facts in order to understand the ambit of the constitutional proposition laid down by the court – and thus the authority of the decision.

VI When factual issues may have to be decided in the course of constitutional adjudication

Although it may appear that factual issues rarely have to be decided in the process of constitutional adjudication, there are several reasons why such issues may arise.

(A) Many constitutional courts have forms of original jurisdiction that are inherently likely to give rise to disputes on factual matters – for example, disputes arising from the conduct of elections or referendums; the registration or activities of political parties; and impeachment proceedings. [13] Factual questions (concerning the procedure followed) may arise out of jurisdiction to decide whether legislation has been properly enacted or the Constitution has been amended.

(B) Some constitutional courts have jurisdiction to provide a constitutional opinion in reply to questions referred to them by the Executive, as in Canada. In Canada, the procedure for a reference does not include a trial or other procedure for taking evidence but, in a few cases, the Supreme Court has directed the trial of a factual issue. [14]

(C) Many constitutional courts (under the practice of 'abstract' review) must decide questions as to the constitutionality of proposed or newly promulgated legislation. This may involve the court in making decisions or assumptions (a) about the reasons for such legislation or (b) about the likely consequences of the legislation. (See section VII below, discussion of 'legislative facts')

(D) Even when the court decides that a case coming to it by way of appeal, review or reference involves a constitutional right of the individual complainant or party, this may not be enough to complete the case. Assume (to return to the example based on *Golder v UK*) that the prisoner has a constitutional right to communicate with a lawyer, what is the nature of this right? Is this an absolute right or is it a qualified right (as under Articles 8-11 ECHR)? If it is a

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[13] See e g Constitution of Poland, articles 188, 189; Constitution of Lithuania, articles 102, 105. The historic US case of *Marbury v Madison* (1803) arose from an Act of Congress that assigned original jurisdiction to the Supreme Court although this was not consistent with the Constitution.

[14] Hogg, *Constitutional Law of Canada* (above), s 57.2.

qualified right, and it appears *prima facie* that there was an interference with that right, further questions may arise (as they do under the ECHR): Was the interference for a permissible purpose? Was the interference prescribed by law? Did the interference exceed what was necessary in a democratic society? The test of proportionality requires a balancing process, that may often depend on further evidence being given about the events and the measure in question. Where a question of proportionality arises, the outcome may depend not on the general rule of constitutionality, but on the court's view of the facts that are claimed to justify the interference. Sometimes the decision on proportionality is in general terms; sometimes the decision depends on the individual circumstances that the court has found to exist. In such cases, it is particularly difficult to make a clear distinction between matters of law and matters of fact. According to the jurisprudence of the Strasbourg Court, decisions of proportionality are not questions of pure fact. [15]

VII The decision of factual matters in the course of constitutional adjudication

Since it is inevitable that in some forms of constitutional adjudication there may be disputes as to material facts, we must address the question asked by a leading Canadian constitutional lawyer, namely : how are facts to be proved in constitutional cases? [16]

It is impossible here to provide a full answer to this question. Some suggestions are offered.

(a) In respect of specific original jurisdiction (such as disputes arising from the conduct of elections), it is essential that the constitutional court's rules of procedure enable evidence to be given on disputed issues and permit affected persons to make submissions to the court.
(b) Much depends on whether a given legal system emphasises the merits of adversary procedure for dealing with a *lis inter partes* (as in the USA, the UK and Canada), or is more familiar with an inquisitorial procedure (as in some European systems of administrative law). It may be expected that the procedure in the constitutional court will be influenced by the procedure commonly followed in public law cases.
(c) In the case of abstract review of the constitutionality of new or proposed legislation, the task assigned to the constitutional court may exclude any possibility of the dispute being treated as a *lis inter partes* . It may require only that certain officials, groups or institutions should have the opportunity of submitting arguments about the proposed legislation. [17] This limited opportunity of bringing information to the notice of the court does not, however, mean that the court is absolved of the duty to base its decision on certain findings or at least assumptions as to factual matters. There may be some matters which a court may take into account on the basis of its own knowledge without the need for any evidence or proof. [18]

VIII The distinction between 'adjudicative facts' and 'legislative facts'

This distinction has been made in some Canadian and US writing on constitutional law.

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15 *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.

16 Hogg, *Constitutional Law of Canada,* s 57.2.

17 Article 106, Constitution of Lithuania, specifies the Government, no less than one-fifth of the members of the Seimas, the courts and the President of the Republic as having the right to address the Constitutional Court in relation to the constitutionality of various measures.

18 In English law, this is the doctrine of 'judicial notice'. Cf the Republic of Lithuania Law on the Constitutional Court, art 34 (Evidence): "It shall not be required to prove the circumstances which are recognised by the Constitutional Court to be publicly known".

'Adjudicative facts' are facts about the concrete dispute in the course of which a constitutional question has arisen: "who did what, where, when, how, and with what motive or intent?" [19] Such facts are like those that come within the day-to-day work of the ordinary courts sitting at first instance. They will have to be decided by a constitutional court only if this is necessary to exercise its original jurisdiction.

'Legislative facts' are matters that a court must take into account when it determines the constitutionality of disputed legislation. For instance, it may need to decide what interests are served by the legislation, whether those interests justify the legislation, and what the likely effect of the legislation will be. In some constitutional courts, their procedure does not require or enable 'evidence' to be given that would enable the court to make an informed decision. Indeed, the term 'legislative facts' is often controversial, since what is in issue may not be provable facts, but rather matters of opinion, principle or value-judgments. Sometimes a court may rightly feel that no evidence is needed on such matters. See for instance two recent decisions of the Swiss Federal Court: [20]

> (1) payment of social assistance (at a subsistence minimum) was conditional on the recipient taking part in employment training and integration measures. Was this condition constitutional? The Swiss court held that individuals were under a duty to help themselves: "Anyone who refuses such employment is not contributing towards finding a way out of hardship and cannot ask for assistance".
> (2) a lawyer wishing to interview a client in prison complained of security checks applied at the entrance to the prison; the checks involved him in removing his belt and shoes. The Swiss court held that the security procedures (details of which were explained to the court) did so far as reasonably possible protect personal freedom, and were proportionate.

These decisions were based in part on evidence about the scheme or procedure concerned – but how far does that evidence answer the issue of constitutionality? Does it enable the court to decide the outcome of the balancing process? In the cases before the Swiss court, it is easy to accept the court's decisions and the reasons for them. But it is possible to imagine more difficult cases, in which a constitutional court may be asked to make decisions on controversial matters. In the social assistance case, would the result be the same if the individual suffered from a psychiatric condition that caused her to be terrified of having anything to do with public officials? And in the prison security case, would the authorities ever be justified in requiring the lawyer to remove all his clothes as part of a security check? [21]

IX A case study - British government policy towards homosexuals in the armed forces [22]

In 1994, 3 men and 1 woman were dismissed from the armed forces, solely because they were homosexuals, in accordance with published policy of the Ministry of Defence. They sought judicial review of the policy in the administrative court (relying on the ECHR,

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19 Hogg, *Constitutional Law of Canada* (above), s 57.2. Also PW Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 Univ. Toronto Law Jl 386.

20 In *Bulletin on Constitutional Case-Law*, edition 1 of 2004, pp 138-140.

21 Cf the facts leading to *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406.

22 See *R v Ministry of Defence, ex parte Smith* [1996] QB 517 and its sequel *Lustig-Prean v United Kingdom* (1999) 7 BHRC 65, 29 EHRR 548

European Union directives etc). Their service records were in evidence, showing that their conduct and efficiency as members of the armed forces could not be impugned. Thecourt's decision took note of the individual facts, but inquired primarily into the policy : when was it adopted? Why was the rule inflexible? Why was it considered necessary? What was the practice in other European and North American countries? What were the views of senior officers in the armed forces, and their reaction to changing attitudes on homosexuality?

The British judges did not find this material to be very convincing. One judge said: " I will not assume that the views of the armed forces are not based on evidence, but that evidence is not before us". He also said that if the court could directly enforce ECHR rights, the court would need more material than the adversarial system normally provides, such as a 'Brandeis brief' (see section X below).

But the claim for judicial review failed in the English Court of Appeal, on grounds of administrative law. [23] The claimants went to Strasbourg, where the Court made an even more detailed examination of the history of the policy, the justification for it, and noted the rigorous interrogation of the claimants by military police. It decided that the interference with private life that had occurred exceeded the margin of appreciation that a state exercised in deciding what was necessary in the interest of national security (under Article 8(2) ECHR). The Court held that the policy was based on the negative attitudes to homosexuality held by senior officers; there was no concrete evidence to show that the effectiveness of the armed forces would be damaged if the policy were changed; only a small minority of other European countries operated a blanket legal ban; and attitudes to homosexuality in domestic law were changing. The government had not given convincing reasons for the policy, nor for the intrusive investigations made into the applicants' private lives. One judge (Loucaides J) dissented, but on the sole ground that he accepted the government's concern at the difficulties where accommodation had to be shared between homosexuals and other soldiers. The key findings made by the Strasbourg Court in this case appear to have been findings of 'legislative fact'.

Many national constitutions protect fundamental rights in the same manner as the ECHR. The structure for decision-making found in the ECHR can be helpful also in constitutional adjudication, especially where the case concerns a claim for the breach of an individual's rights: [24] the claimant must first establish interference with his/her Convention right, and the burden then shifts to the government to establish justification for the breach. To decide this, the court must assess the evidence before it and decide whether that evidence is persuasive. This evidence may include (a) details of the claimant's circumstances; (b) the action taken against him; (c) the government's reasons for adopting a certain policy; and (d) if a law has been passed giving effect to the policy, the legislative history (government proposals, reports of official committees, draft laws, parliamentary debates etc). It may possibly include evidence of the views of interested organisations, the churches, public opinion, scientific researchers etc.

As has already been seen, courts in the United Kingdom had formerly no power to review the constitutionality of primary legislation, but under the Human Rights Act 1998 the

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[23] The case was decided several years before the Human Rights Act 1998 was enacted; the Act now requires all courts in the United Kingdom where possible to protect an individual's Convention rights, except only where this is prevented by express provision in primary legislation. Today, the Act would enable the national court to decide in favour of the dismissed soldiers.

[24] For an instance of this approach being closely followed, see the decision of the Latvian Constitutional Court concerning prisoners' food, cited above.

superior courts may review such legislation to decide whether it is in conformity with rights under the European Convention on Human Rights. This has required the courts to develop an important new jurisdiction and the Annex to this report contains a brief account of the decision made in December 2004 that is the most important yet to be made under the Human Rights Act. While the idea of 'legislative facts' must not be exaggerated, this decision illustrates how such 'legislative facts' may be fundamental to the outcome of the case.

X Technique of the Brandeis brief

Evidentiary material that casts light on the policy considerations that lie behind legislation has in US law been given the name of a 'Brandeis brief'. This dates back to the evidence containing social science and economic material submitted by the lawyer, Louis Brandeis (later Justice of the US Supreme Court) in 1908 when he defended a state law that limited the hours that women could work. [25] The most famous example of 'legislative facts' being submitted in this form was in *Brown v Board of Education of Topeka.* [26] Given in evidence was a 'Social Science Statement' signed by 32 experts, summarising current psychological and sociological knowledge about the effects on children of racial segregation in public schools. This statement was relied on by the Supreme Court in striking down the 'separate but equal' doctrine in public schools, first laid down in the 19th century: The Court held that segregation of white and black children had a detrimental effect upon the black children, and said. "Whatever may have been the extent of psychological knowledge at the time of [*Plessy v Ferguson,* 1896], this finding is amply supported by modern authority."

Many questions arise. Is the court expected to be able to decide these questions from its own knowledge and experience? If not, who is to provide the 'evidence' that the court may consider necessary – the parties, or other organisations? Should the court appoint 'impartial' scientific assessors or expert witnesses to advise it? Need the court do more than read the legislative history of a law? Should the court permit third party interventions, by non-governmental organisations or pressure groups? Recent British practice in difficult and important cases has been that the courts may permit third party interventions, but closely regulating what they can do. [27]

By contrast with this method of receiving evidence of 'legislative facts', the Conseil Constitutionnel in France appoints one of its number as rapporteur, who (working in a very short period of time) prepares the file containing necessary material with assistance from the Secretary-General and the legal staff of the Conseil. The report contains (a) legislative texts (b) parliamentary debates (c) other legal materials (learned articles, government statements etc. According to one account of the Conseil's procedure,

> "The reporter remains master of the procedure. He may consult or listen to whomsoever he likes, and take note of whatever he wishes… Like an administrator building up a

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25 *Muller v Oregon* 208 US 412 (1908)

26 347 US 483 (1954)

27 In *R (on application of Limbuela) v SSHD* [2004] EWCA Civ 540; [2005] 3 All ER 29, the court had to decide whether asylum-seekers who were denied social assistance support would be able to survive (with philanthropic support) or would be forced to steal to pay for food and housing. The court accepted evidence from the Refugee Council; a charitable organisation for the homeless appeared as intervener; and a report by the Mayor of London on homelessness was read by the court. And see A Henderson, "Brandeis briefs and the proof of legislative facts in proceedings under the Human Rights Act 1998" [1998] *Public Law* 563.

dossier, the reporter follows up all interesting leads until he considers that he has seen all sides of the question". [28]

There have been developments in this respect in France since 1994. Today, the procedure for reviewing the constitutionality of ordinary laws includes a 'contradictoire' exchange of the arguments made by those who are challenging the constitutionality of a law and the competing arguments presented by the government. These arguments are now published. [29]

XI Conclusion

It is not the aim of this paper to be prescriptive as to the methods or approach that any constitutional court or supreme court should follow. Its purpose has been to raise issues which merit closer discussion by those who are experienced in discharging the responsibilities connected with constitutional adjudication.

The propositions that have been emphasised above include the following:

(a) Even an 'abstract' proposition of law declared by a constitutional court has to be read within a certain factual context if the significance and authority of the court's decision are to be properly understood.

(b) Very many cases coming to the court (whether by way of appeal, review or reference) can proceed on the basis of given facts, but some types of case arising for decision in a constitutional court require disputed issues of fact to be determined.

(c) In the protection of constitutional rights and freedoms, the process of 'balancing' the rights of individuals against the interests of the state and deciding the issue of proportionality frequently requires close examination to be made of the circumstances of an individual or group claim.

(d) In relation to the constitutionality of legislative norms and administrative policies, the court may often be able to answer the questions of principle that arise on the basis of its own knowledge and experience; where this is not the case, the court may need to consider whether it could derive assistance from receiving evidence as to the relevant 'legislative facts' and, if so, how this may best be done.

(e) In many European countries, a constitutional court exists that is separate from the ordinary civil and criminal courts. The reasons for such a court are likely to render it less suitable for determining 'adjudicative facts', but if it is required to decide such questions at first instance, the court must create appropriate procedure for doing so. In contrast with this, the reasons for the existence of a separate constitutional court may make it more suitable for determining the 'legislative facts' that are often relevant if questions of constitutionality must be decided.

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[28] J Bell, *French Constitutional Law* (1992), pp 45-46. According to Bell, "Pressure groups may telephone the reporter at home or invite him out to lunch… Interested persons may write letters to the reporter, and he makes such use of them as he considers fit." Many constitutional courts would find this an unduly informal way of gathering the necessary material!

[29] See L Favoreu et al, *Droit Constitutionnel* (6th edn, Dalloz, 2003), pp 303-304.

Two further points may be made. First, the fact that the constitutional court has ultimate authority to determine questions of constitutionality need not prevent such questions being decided in other courts, at least provisionally, when they are raised in the course of proceedings in those courts. [30] Secondly, in the practice of constitutional review, there is no universal line of demarcation between matters of fact and matters of law. On some key issues, the constitutional court may need to be satisfied that the decision being reviewed was correct (for instance, where an individual's rights depend on his being able to establish his citizenship). [31] On some issues, it may be sufficient for the court to be satisfied that a reasonable basis existed for the decision taken by the executive or the legislature. [32] And on other issues, the court may have to decide whether its views on the proportionality of a decision correspond with the decision under review.

ANNEX – The constitutionality of detention without trial in response to terrorism

In the autumn of 2001, following the destruction caused on 11 september by terrorist attacks in the usa, the united kingdom parliament gave the executive new powers to deal with dangers arising from international terrorism. part 4 of the anti-terrorism, crime and security act 2001 contained a remarkable power of detention without trial. it applied to foreigners (and not to british citizens) who were suspected of involvement in international terrorism, but against whom there was insufficient evidence to enable them to be prosecuted and who could not be deported from the country because to do so would expose them to the risk of torture or inhuman treatment contrary to article 3, echr. [33]a dozen or so foreigners were certified by the secretary of state as suspected international terrorits and they were detained on this basis in a prison in london in december 2001. three years later, nearly all of them were still detained. although detained so long as they were in the united kingdom, the individuals were in law free to leave the country if they could find another country where they would be admitted.

The power of detention without trial fell outside the permissible powers of detention authorised by Article 5 ECHR, and a notice of derogation from Article 5 was communicated to the Council of Europe, on the ground that there was a 'public emergency threatening the life of the nation' (Article 15, ECHR).

The scheme of the 2001 Act entitled the detainees to appeal to a special judicial tribunal known as the Special Immigration Appeals Commission, but did not permit the detainees or their regular legal representatives to hear the evidence available to the security services that was considered to justify their detention. Such evidence was made available to the Commission and to special advocates appointed to act in the interests of the detainees, although the special advocates were not permitted to communicate the secret evidence to the detainees. The Commission found that the scheme for detention was discriminatory and in conflict with Article

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30 This observation is admittedly based on the experience of legal systems such as the United Kingdom, Canada, New Zealand and the USA.

31 See *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74.

32 As regards practice in Canada, Hogg has observed that this limited role of the court in constitutional review explains why less strict methods of establishing 'legislative facts' are acceptable than would be appropriate for proving adjudicative facts: "Proof of Facts in Constitutional Cases" (note 19 above) at page 408.

33 See *Chahal v United Kingdom* (1996) 23 EHRR 413.

14 ECHR, since the power of detention did not apply to British citizens. On appeal, the Court of Appeal reversed the Commission's decision, and upheld the legality of the detention.

When the case reached the ultimate court of appeal (namely, the Law Lords, the senior judges who sit on the Appellate Committee of the House of Lords), the court took the highly unusual step of sitting as a court of nine judges. Four decisions were made. [34]

> (1) It was held by 8-1 that the decision that there was a public emergency threatening the life of the nation was a decision that could, on the basis of the open evidence, properly be made by the Government. On this question, great weight should be given to the view taken by the Government and by Parliament, as a pre-eminently political judgment had to be made.
> (2) It was held by 7 judges that the European Convention on Human Rights required national authorities to afford effective protection of the detainees' rights and that measures to restrain their liberty must be limited to what was strictly required. On this approach, the scheme of detention was held to be disproportionate and defective, since it applied only to foreigners suspected of terrorist involvement; it did not apply to British citizens who were so suspected; and it permitted foreigners who were so suspected to leave the country and carry on their terrorist involvement abroad.
> (3) The scheme was in breach of Article 14 ECHR since it was discriminatory against foreigners, who were being treated differently because of their immigration status.
> (4) Acting under the Human Rights Act 1998, the Law Lords by 8-1 quashed the derogation order issued by the Government and declared that the scheme of detention under the Act of 2001 was incompatible with Articles 5 and 14, ECHR.

The declaration of incompatibility went to the essence of the power to detain. Although the effect of the Human Rights Act is that legislation declared to be incompatible remains in force and has not been quashed, the Government promptly accepted that the power to detain without trial could not continue, and obtained different but equally controversial powers from Parliament to impose control orders restricting the freedom of movement of both foreigners and British citizens suspected of terrorist involvement.

It is not possible here to summarise the essence of the approach taken by the Law Lords who, in the tradition of common law jurisdictions, gave individual judgments that totalled around a hundred printed pages. For present purposes, we may note that the majority accepted the evidence given by the Government that there was a 'public emergency threatening the life of the nation', but went on to hold that the power to detain without trial could not be described as being 'strictly required' by that emergency. One commentator has asked: "how did the House of Lords *know* that there was a public emergency threatening the life of the nation?" [35] Equally, it could be asked of the judge who dissented on this point: how did he *know* that there was *not* a public emergency threatening the life of the nation? The majority evidently regarded the issue as involving political considerations that required considerable deference to be given to the views of the executive. The effect was thus to accept that the executive enjoyed a wide margin of appreciation in reaching the view that there was a public emergency threatening the life of the

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[34] *A (FC and others) v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 WLR 87. For discussion of the Act of 2001, see A Tomkins, "Legislating against Terror" [2002] *Public Law* 205. For comment on the Law Lords' decision, see A Tomkins, "Readings of *A v Secretary of State for the Home Department"* [2005] *Public Law* 259.

[35] Tomkins, [2005] *Public Law* at 261.

nation. This is a broad proposition as to the law that necessarily minimises the need for the judges to make more specific findings of fact based on a close appraisal of the evidence. The decision on this matter thus illustrates the point made above [36] that on some constitutional issues it is sufficient for the executive to establish that there is a reasonable basis for its decision, not that its decision is correct.

Although the majority of judges accepted that there was a public emergency threatening the life of the nation, they were not willing to show the same deference to the executive on the further issue of whether the scheme of detention without trial was 'strictly required' by the nature of the emergency. In the view of the majority, there were two flaws in the 2001 Act: namely, that the power to detain did not apply to British citizens, and that foreigners who were detained were at all times free to leave the country. Again the question may be asked: how did the judges *know* (or conclude) that these two aspects of the scheme were flaws that were fatal to the legality of the scheme for detention? Were they making an intuitive ruling based on a 'common sense' approach to the matter?

It is difficult to classify a decision of this kind as being merely a ruling of law; still less does it seem to be a decision of disputed fact. Possibly, at the risk of some evasion, it may be said to involve a mixed question of law and fact. Another approach is to say that the decision is essentially based, in the terminology used above, on what may be called 'legislative facts' (as pointed out above, such 'facts' are inherently different from the 'adjudicative facts' that commonly come before the ordinary courts). It is relevant to this approach that the scheme of detention without trial had on several occasions between 2001 and 2004 been subject to review by parliamentary committees and by senior politicians. [37] Their reports, and the criticism of detention without trial that the reports contained, were given in evidence and read by the Law Lords.

Without the authority given to them by the Human Rights Act 1998, the United Kingdom judges would have been unable to decide whether the scheme of detention without trial authorised by Parliament in 2001 was compatible with the rights guaranteed by the European Convention on Human Rights. The United Kingdom still lacks a written constitution, nor does it have a constitutional court in the strict sense of the term. However, this Annex may demonstrate that the jurisdiction exercised by the Law Lords in this case is fully comparable with the process of constitutional adjudication that exists in many European countries.

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36 See text at note 32 above.

37 See Tomkins, [2005] *Public Law* at 259, note 7.