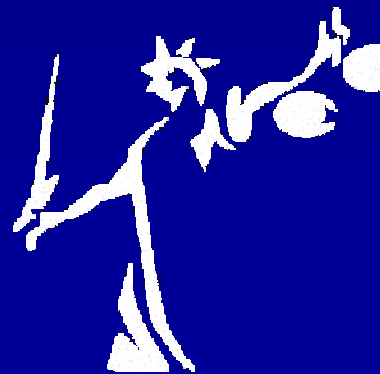


# The Impact of the HRA on Public Law

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# What is public law?

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- Law governing relationship between individual and the state
- Historically, the law relating to judicial review of administrative decisions
- Post-HRA, includes judicial review plus Convention challenges to compatibility of primary legislation



# Basic principles of public law pre-HRA

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- Doctrine of parliamentary sovereignty
- Courts have no power to review primary legislation (but c.f. s2(4) of the ECA 1972)
- Judicial review of *executive* action (inc policies and decisions), secondary legislation (inc orders in council), and inferior administrative tribunals

# Basic principles of public law pre-HRA

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## Recognised grounds of judicial review:

- *Vires*
- Error of jurisdiction, law or fact
- *Wednesbury* unreasonableness
- Principles of natural justice (esp procedural unfairness)
- Bias and bad faith
- Relevant & irrelevant considerations
- Abdication or fetter of discretion
- Conspicuous unfairness and breach of a legitimate expectation



# Basic principles of public law pre-HRA

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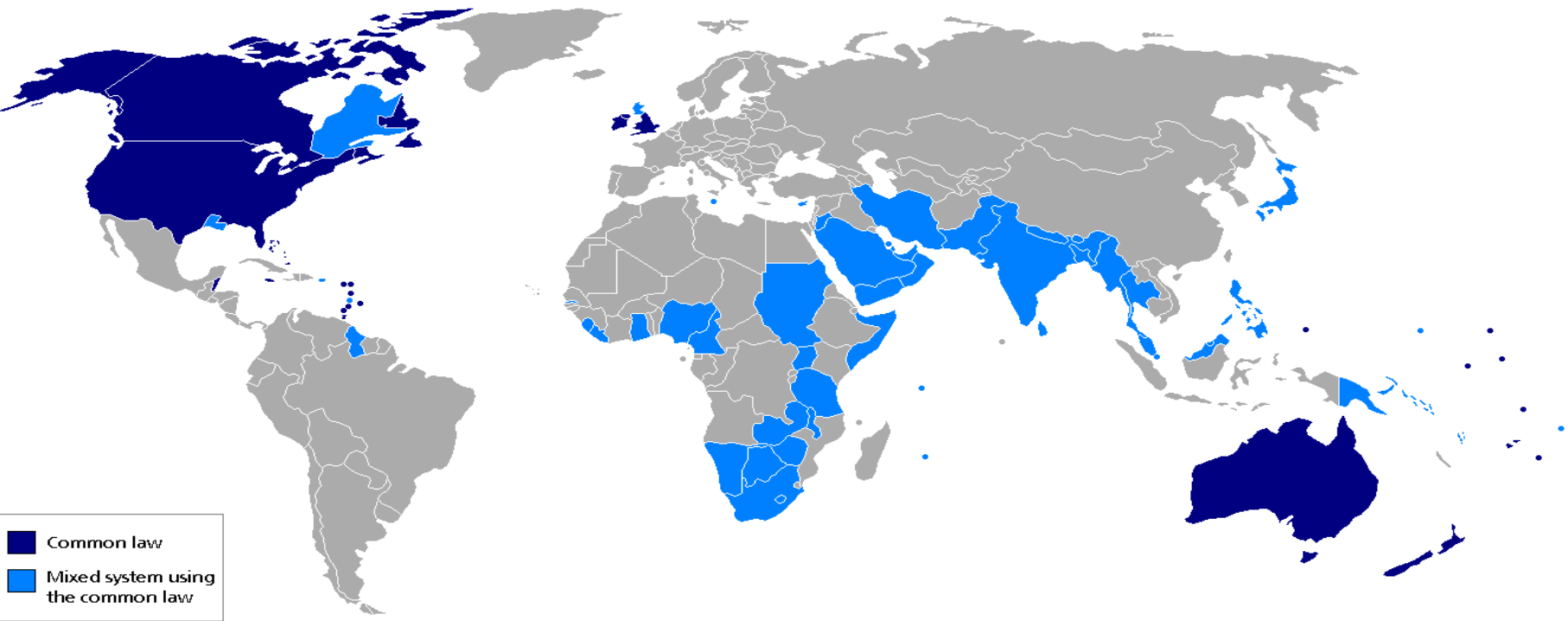


## What judicial review is not:

- a reconsideration of the facts
- a fresh decision on the merits
- an appeal
- a substitute for the original decision

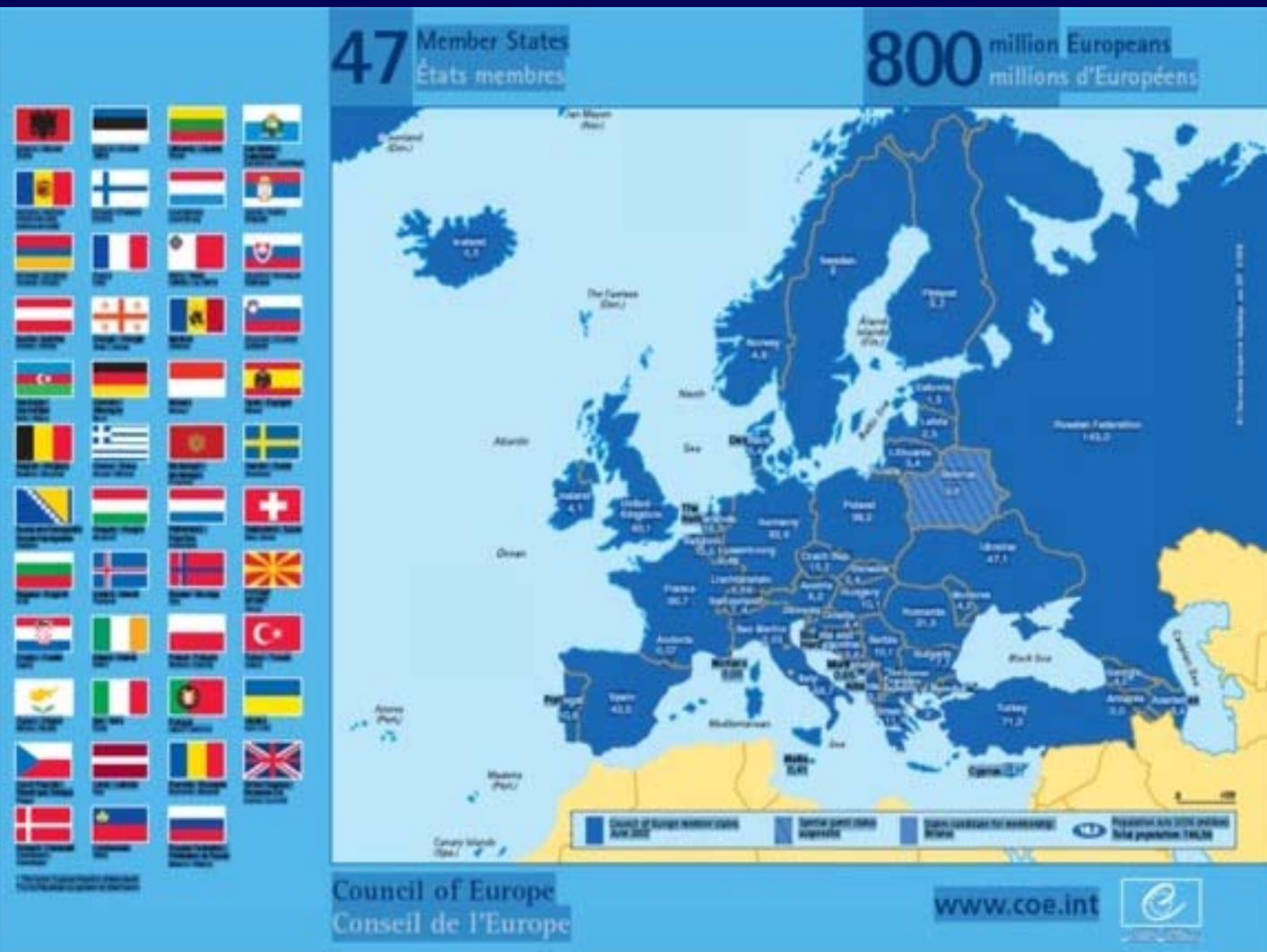
# Basic principles of public law pre-HRA

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- US Bill of Rights 1789
- Canadian Charter of Rights and Freedoms 1982
- New Zealand Bill of Rights Act 1990
- South African Bill of Rights 1996
- Human Rights Act (Australian Capital Territory) 2004, Victoria Charter of Rights 2006

# The European Convention on Human Rights



1950

UK influence

13 rights

14 protocols

Art 2 Life

Art 3 Torture

Art 5 Liberty

Art 6 Fair trial

Art 8 Privacy

Art 10 Speech

Art 11 Assn

Art 14 Equality

# The Convention and the HRA

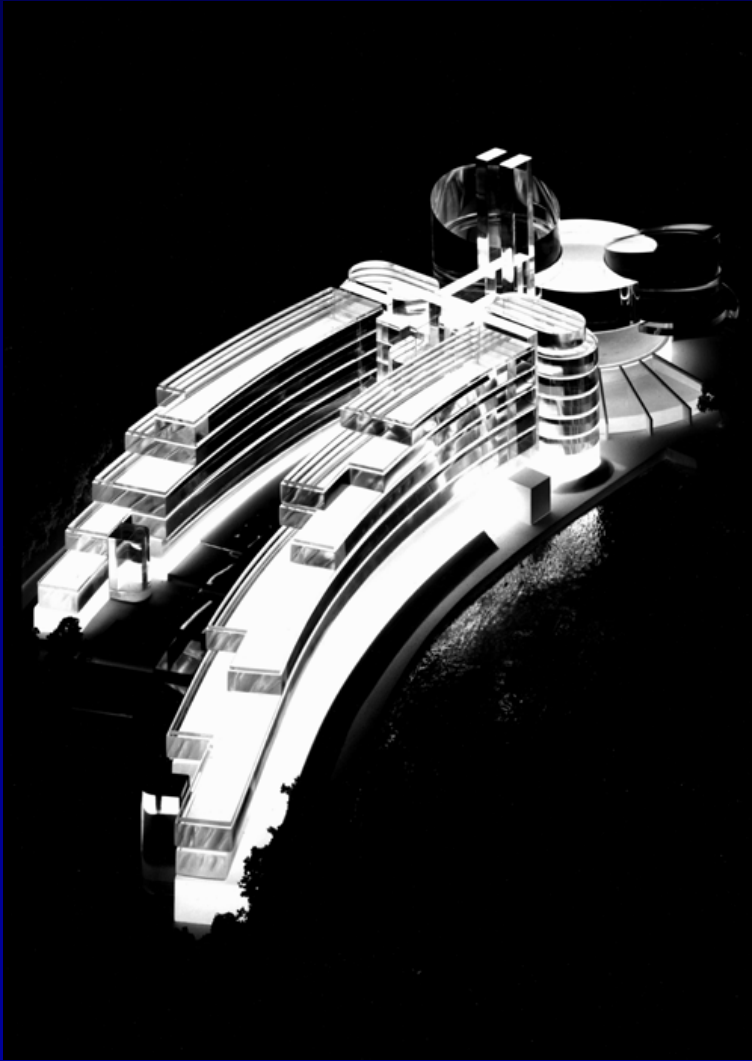
- No direct effect
- Lengthy delays – 7 years av
- Increasing number of violations
- Section 2: ‘take into account’ Strasbourg judgments
- Section 3: read-down
- Section 4: declaration of incompatibility
- Section 6: duty on public bodies to act compatibly with Convention rights





# The Convention and the HRA

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**Absolute** rights: arts 2, 3 and 4

**Derogable** rights: arts 5 and 6

**Qualified** rights: arts 8, 9, 10, 11

- ‘Prescribed by law’
- Restriction ‘pursues a legitimate aim’
- ‘Necessary in a democratic society’
- Rational connection
- **Proportionate**

# Proportionality under the HRA

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‘In essence, [proportionality] amounts to this: a measure which interferes with a Community or human right must not only be authorised by law but must correspond to a pressing social need and go **no further than strictly necessary** in a pluralistic society to achieve its permitted purpose ; or, more shortly must be appropriate and necessary to its legitimate aim’

*B v Secretary of State for the Home Department* [2000] UKHRR 498 per Sedley LJ

# Proportionality under the HRA: some key cases

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- *R (Alconbury) v Secretary of State for the Environment* [2001] UKHL 23: judicial review of SS's decision sufficient for article 6; proportionality now 'part of English administrative law'.
- *R v Secretary of State for the Home Department ex parte Daly* [2001] 2 AC 532: searches of correspondence disproportionate under common law and article 8; proportionality involves 'more intensive review' than traditional JR.
- *Begum v Tower Hamlets* [2003] UKHL 5: judicial review sufficient for art 6 purposes even where primary decision-maker not independent; but see *Tsfayo v United Kingdom* [2009] 48 EHRR 19.
- *Huang v Secretary of State for the Home Department* [2007] UKHL 11: 'a tendency ... to complicate and mystify what is not, in principle, a hard task to define, however difficult the task is, in practice, to perform' (para 14); important to strike a 'fair balance' between rights of individuals and interests of community.

# Recent public law cases under the HRA

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- *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61: reviewability of prerogative orders; right of abode not sufficiently engaged.
- *R (Wright) v Secretary of State for Health* [2009] UKHL 3: declaration of incompatibility against Care Standards Act 2000 because no opportunity to be heard prior to provisional listing constituted breach of art 6 ECHR
- *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5: 'kettling' in Oxford Circus not a breach of article 5 ECHR.

# Recent public law cases under the HRA

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- *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10: not a breach of art 6 ECHR to rely on closed material in relation to safety on return; SIAC's conclusions concerning risk of ill-treatment on return not *Wednesbury* irrational.
- *AF and others v Secretary of State for the Home Department* [2009] UKHL 28: following ECTHR judgment in *A and others v UK* (19 February 2009), use of closed material contrary to art 5(4) ECHR.
- *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45: art 8 ECHR required DPP to publish guidance on his discretion to prosecute assisted suicides abroad to enable individuals to regulate their conduct.

# Recent public law cases under the HRA

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- *A and others v HM Treasury*: UK Supreme Court 5-8 October
- *A v B*: UK Supreme Court 19-20 October
- *Al Rawi and others v Security Service and others* (2009) EWCA 2959 QB