FROM GOVERNMENT TO GOVERNANCE, FROM JUDICIARY TO…?

Abstract

It is clear from the research on the political and legal constitutions around regulatory power that it is a complex picture. The question for this paper is whether there is a relationship between regulatory governance and institutions and the judiciaries, i.e. are they constrained by the rule of law in the same way as classical administration? The first part of this paper will start to chart out an expansion and contraction of judicial power in relation to executive powers. The second part will provide a comparison between England and France's regulatory systems and their relationships to their respective judiciaries. The conclusion sets out to answer the main question of where the judiciary sits in an a complex political, economic and legal tapestry to control a hybrid institution that sits outside of a legal constitution.

Key words: Regulatory state; constitution, judicial review

Introduction

Since the late twentieth century, many western democratic societies have seen a marked shift in the way that they are governed, especially the move away from nationalised industries, public services, and centralised government, towards privatisation, and regionalisation. The focus for this paper is on the shift towards regulatory governance, what this means for constitutional law and more especially, what it means for the position of the judiciary vis-à-vis the executive power that is not exercised by the state but by regulatory institutions, some of which are statutory, but many of which, are either self-regulatory bodies or a hybrid of the two. The main problem is one of legitimacy from both sides. On the one hand, the regulatory systems may lack transparency and

effective legal and political oversight. On the other hand, judges (theoretically) lack expertise and democratic credentials to decide on technically complex issues decided by regulators.[1]

It is very clear from the research on the political and legal constitutions around regulatory power that it is a complex picture. There is fragmentation in the legal constitution with influences from international norms. Furthermore, the political shift from centralised government to specialised governance has created legitimacy issues that are not easily solved through institutional design- it has been and continues to be a steep political learning curve – especially after the global financial crisis of 2008. I became interested in writing about the role of the judge in this changed constitutional environment, especially with the wide-ranging powers wielded by regulators. Therefore, this paper discusses how the judiciary in England and France has responded to changes in administration. This is a constitutional law issue whereby shifting paradigms in the executive has affected the paradigms of justice, especially access to justice.

The first part of this paper focuses on institutional design of regulators, in principle and comparatively. The second part of this paper will provide case studies of England, and France's regulatory systems and their relationships to their respective judiciaries. France and England have been chosen as the case studies for this article, as both have strong influences in the legal culture of Europe, but also in respect of their broader international influences through their Commonwealth legal systems. England represents the home of Common Law, and France the home of Civil Law. Furthermore, whilst they have in common a parliamentary system at the heart of their constitution, both countries have responded differently to the advent of the current regulatory systems. As such it is interesting to look at the convergence of increased use of

[1] This is not the place to discuss the theoretical role of the judge in relation to a conservative or liberal approach to the separation of powers. Suffice to say that there will be a deeper discussion about judicial deference in the paper below.

regulatory systems in place of traditional administrative law in these two very different legal systems

The question for this paper is whether there is a relationship between regulatory governance and institutions and the judiciaries, i.e. are they constrained by the rule of law in the same way as classical administration?

1. Institutional design, legitimacy and accountability

a. Institutional design

Most legal systems have recourse to regulations as a mode of governance.[2] The very *raison d'etre* for the creation of regulators appears to be to be able to deal with the polycentric nature of markets to create "better performance of public programs",[3] and manage relationships within that framework efficiently.[4] However, one of the main complexities of institutional design, is that there is no fixed concept of "regulator".[5] They can be command and control type institutions, using the law in a bureaucratic and narrow way; there can be self-regulatory bodies, where private organisations come together to regulate themselves without legal interference; or they can be hybrid, with some foundations in law, but requiring bodies to take responsibility to regulate themselves.[6] These regulators can take different approaches, such as prescriptive regulation (command and control), systems-based approach, which requires monitoring to take place within an organisation (such as health and safety type checks); and performance-based regulation, which emphasises outcomes.[7]

[2] M. Asimow et al., 'Between the Agency and the Court: Ex Ante Review of Regulations', *The American Journal of Comparative Law*, 68/2 (2020), 332-75.
[3] P.J. May, '*Regulatory regimes and accountability*' 1 Regulation & Governance 8 p.11; see also J.-M. Sauvé, '*Les agences: une nouvelle gestion publique?*' (France) [Conseil d'État] Paris, La documentation française, Étude annuelle p.4 [Agencies: a new public management? (France) [Council of State] Paris, French documentation, Annual Study]
[4] M. De Visser, '*Judicial Accountability and New Governance*' Legal Issues of Economic Integration 41 p.54.
[5] Sauvé *supra* no. 3 p.3.
[6] Cafaggi et al, *supra* no.8
[7] May *supra* no. 3 p.10.

However, given the hybrid nature of regulatory power- to make rules, execute rules and to enforce rules (affecting personal and property rights), it is important that they are not only politically legitimate and accountable, but also that those affected by regulatory decisions can challenge decisions judicially.

Regulators are able to provide an "institutionalised response" to disputes in industries from a broader societal and market perspective than those of two individual sets of legal interests- be it regulatory or rights based,[8] as well as responses to a crisis situation.[9] As such, not only do regulators not fit neatly into constitutional or administrative frameworks,[10] there are also multiple types, making one framework to define them, let alone hold them to account, a challenge.[11]

Morgan has argued that rights and regulations represent different solutions to a variety of problems- with rights focusing on claims and entitlements, and regulation dealing with economic efficiency, which is often "framed as a social practice that restricts rights".[12] However, she further argues that "…rights and regulation form overlapping and complementary aspects of processes of disputing and rule-elaboration that can be captured by two well-known triads - 'naming, blaming and claiming' and 'rule-making, monitoring and enforcement'."[13] This is very much dependent on how policies are designed, what instruments are made available to the regulators, and the 'quality of regulation.[14]

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[8] B. Morgan, *The intersection of rights and regulation : new directions in sociolegal scholarship* (Ashgate 2007) pp. 9-10; see also Sauvé *supra* no. 3 p.4

[9] See Morgan *supra* no. 5 p.5

[10] Ibid pp.2-3; see also G. Majone, '*From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*' 17 Jnl Publ Pol 139 P.159

[11] F. Cafaggi and A. Renda, 'Public and Private Regulation: Mapping the Labyrinth', *DQ*, (2012), 16. One can distinguish between social and market regulation, though the practices of one area may well impact others, as one can see the regulation of energy markets (or lack thereof) is currently causing a cost of living crisis in England which will (arguably) create social problems for the country https://www.bbc.co.uk/news/business-61610296 last access 09/06/2022 This paper focuses on market regulators more generally.

[12] Morgan *supra* no.5

[13] Ibid p.3.

[14] May *supra* no.3 p.11.

In England, the design of regulators has shifted from deregulation, to the "regulatory state" which attempted regulation by "less burdensome methods", e.g. in the area of environmental protection, instead of stating environmental standards, regulators used pollution charges.[15] This situation led to a separation of ownership and control, whereby public monopolies such as transport and energy, became privatised.[16] This reflected growth of EU regulatory law.[17] This was followed by a shift to next steps type organisation, which is a system of procurement to gain services more efficiently from the private sector.[18] This required an examination of legitimacy and accountability for the provision of what were still felt to be public services in private hands. The 1980s-1990s saw managerial reforms of government in the form of New Public Management and other 'government by objective' policies. This meant that the focus shifted to regulating those who provided services, rather than with the services provided, thus leaving a gap in accountability.[19]

The biggest risk with the rise of the regulatory authorities (*autorités administratives indépendantes*)[20] in France was to fundamental rights, and it became the task of the regulator and courts to balance those rights to the promotion of free competition.[21] Initially, regulators in France did not have the diarchic powers of administration and dispute resolution as it went against the French legal culture. However, as with England, it did come to reflect a movement away from centralised government to specialised governance.[22] Regulatory authorities are not considered a

[15] Majone *supra* no.7 p.143.
[16] Ibid p.144; the experience is similar in France, see Sauvé *supra* no. 3 p.1
[17] Majone *supra no. 7* p.144-146.
[18] Ibid p146.
[19] Ibid p.147.
[20] As opposed to social regulatory agencies.
[21] D. Custos, '*Agences indépendantes de régulation américaines (IRC) et autorités administratives indépendantes françaises (AAI). L'exemple de la' 20 Politiques et Management Public. L'exemple de la "Federal Communications Commission" (FCC) et de l'autorité de régulation des télécommunications (ART)"* 67 p.68 [Independent Agencies of American Regulations (IRC) and French Independent Administrative Agencies (AAI). The example of the "Federal Communications Commission" (FCC) and the Authority of Telecommunications Regulation (ART)]; see also T. Perroud. Administrative Law and Competition: How Administrative Law Protects the Mar- ket? Leviathan as an Ordinary Market Player in Europe? . 2018. hal-01699025 p.5
[22] J. Chevallier, 'La Régulation Juridique En Question', *Droit et société*, /3 (2001), 827-46. p.828 & 835

negative development for the French state, as they are flexible enough to solve problems arising from a free market. They are considered to be "… the state 'otherwise'".[23] France did eventually follow the English in their pattern of development, with influences from NPM and the EU.[24] Chevalier has discussed a similar evolution of regulatory bodies in France, as in England. He describes three conceptions of the concept of legal regulation. Firstly there is the regulatory function of the law, which is considered to be rather essential, especially for legal order and social cohesion. However, legal regulation is very much entwined with other forms of regulation, including social (environmental, health and education) and economic (markets and competition).[25]

The second concept is that of regulatory law ("Le droit régulateur").[26] Under this concept, it's not just an intrinsic aspect of the law, it is also a type of law in and of itself, in that it acts as a limitation on people's activities and protects the freedom of people. Regulators do use the law to create certain environment in which both social and economic actors are expected to operate within. The third concept is "other law" (autre droit), which is used by regulators to meet the challenges of a globalised world in the 21st century.[27] This is characterised by "pragmatism and flexibility",[28] relying on deterrence rather than repressive measures.

Regulatory bodies are now a part of the French political and administrative constitution, implementing the notion of universal services in areas of traditional monopoly.[29] They have also seen a growth in power since the 1990s, in terms of decision making against individuals (especially powers of sanctions and injunctions), and with respect to investigative resources and powers.[30]

[23] Sauvé *supra* no. 3 p.5 "*c'est l'État autrement*".
[24] Ibid p.4
[25] Chevallier, *supra* no.19 pp830-831
[26] Ibid p832
[27] Ibid p.833
[28] Ibid p.834
[29] Custos *supra* no.17 p.69
[30] N. Decoopman, '*Le contrôle juridictionnel des autorités administratives indépendantes*' le Droit administratif en mutation, puf, Paris 212 p.211. [The jurisdictional control of independent administrative agencies]

These experiences reflect MacRory's two main principles of regulation: sanctions and governance. On the one hand, the idea behind sanctions is to create a system of effective compliance, to ensure that no organisation can benefit from ill-gotten gains, and to deter non-compliant behaviour in future.[31] In order to be able to do this, the regulator must be responsive (flexible) yet proportionate in their response to any breach of regulatory rules.[32]

The remarkable thing (I find) is that regulators can create the rules and apply the sanctions, which gives them a quasi-legislative, executive, and judicial role. This means that they do not fit neatly into a traditional constitutional law framework.[33] As such, when designing regulatory authorities, there should be political and judicial oversight built in to ensure that the regulator will also be proportionate in its approach.

b. Legitimacy

In response to this issue of regulatory design, the most obvious development in administrative law in England has been that of proportionality under EU law and Human Rights jurisprudence. The French judiciary (both ordinary and administrative) have seen similar tools develop further for them through European law, but they have dealt with the constitutional anomaly of regulatory power differently, as it has taken a bit longer for it to be constitutionally accepted as a mode of governance, rather than merely a policy tool.[34] Sanctions can range from criminal offences,[35] to civil sanctions.[36] MacRory argues that criminal sanctions can sometimes be

[31] R. Macrory, 'Reforming Regulatory Sanctions–Designing a Systematic Approach' in *The Regulatory State: Constitutional Implications* eds Oliver, D.,Prosser, T., & Rawlings, R. 2010, Oxford University Press, p. 229.
[32] Ibid p.231.
[33] Majone *supra* no. 7 p.159
[34] S, Rose-Ackerman and Thomas Perroud, 'Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment', *Colum. J. Eur. L.*, 19 (2012), 225. p273
[35] "Administrative responses can include the variation, suspension, or revocation of a licence where the regulatory system includes licencing powers, and the issuing of various sorts of enforcement notice, which require the company concerned to come back into compliance within a specified time." Majone *supra* no. 7 p.232.
[36] Ibid pp.232-235.

ineffective as a good lawyer can argue that a company is in technical breach of regulatory law but will not necessarily fall under criminal liability.[37] This is important, as it shows a lack of understanding by judges and prosecutors of the nature of regulatory law, and may also explain the basis for any deference in judicial review of regulatory decisions in English courts. This may take the sting away from any administrative law tools that the courts may be able to apply, including proportionality.

A problem identified in France in relation to these quasi-judicial powers, is the lack of independence required in law of these regulators when applying these sanctions.[38] Bétaille is particularly concerned that independence of regulatory authorities is particularly weak in areas such as environmental control.[39] He describes a general absence of an obligation (in law) for regulators to be independent, which is especially alarming given the judicial powers of sanction that they hold.[40] He describes attempts by the *Conseil Constitutionnel* to define these powers to sanction, though he is critical that this is limited in scope. [41] Furthermore, he notes that administrative law does not explicitly require independence of the authorities in question with the power to sanction.[42] Whilst he does not find a requirement for independence within the French constitution, or even French administrative law, he does find it in the basis of European competition law, and the requirement that the regulator is independent from market operators.[43] If extended, in principle, it could also reduce the stringency with which sanctioning decisions could be reviewed by the courts.

[37] Ibid pp.234-235.
[38] J. Bétaille, '*L'indépendance de l'autorité titulaire du pouvoir de sanction*' Revue de science criminelle et de droit penal compare 289 [The Independence of the titular authority of the power to sanction]
[39] Ibid p.291
[40] Ibid p.292 excluding the power to deprive a party of his liberty
[41] Ibid p.293
[42] Ibid p.293
[43] Ibid p.294

Perroud has also discussed the principle of freedom of trade, to limit the powers of state regulators and other administrative actors.[44] This restriction on public action was even to the extent that local authorities could not provide local services if they were seen as a threat to free trade.[45] Competition law has now taken the place of this principle of free trade, and administrative judges have developed a set of tools to restrain regulators within general principle of law.

c. Accountability

Good governance is arguably key to accountability of the regulatory system, and this reflects political rather than judicial oversight (transparency, consultation and public participation). The one thing that regulators bring to bear that civil servants and judges may not, is that of expertise, on top of the neutrality and polycentric outlook.[46] On the one hand, there can be political accountability through ministerial accountability, and reports that are accessible to the public and to parliament. However, parliament (UK) has a certain respect for specialisation, and often does not dig very deep, until things go very wrong.[47] This looks to the political system to be responsive to regulatory failures. Political accountability requires politicians to be able to learn and adjust regulatory policies and instruments.[48] The main challenge for political accountability is that it is reactionary rather than preventative,[49] which is not dissimilar to judicial accountability.[50]

In France, there is *ex ante* review of regulations by the Advisory Department of the Council of State (Advisory Department). Its review process is open to listening to other voices in this polycentric setting. Firstly, anyone may submit a brief to the Advisory Department. Secondly, Advisory Department may draw on internal expertise to provide an opinion on proposed

[44] Perroud supra no.17, p15-16
[45] Ibid p.22
[46] Sauvé *supra* no. 3 p.7
[47] E.g. Financial crisis 2008 ibid p.237; or the 2022 energy crisis.
[48] May *supra* no. 3 p.12.
[49] Ibid p.13.
[50] Asimow *et al supra* no. 2 p.353-359

regulations. Lastly, "some interest groups write submissions without seeking prior authorization from the Advisory Department. These briefs can be included in the advocate-reporter's study if they contain interesting materials and if the Advisory Department decides to accept them."[51] Using Trubek's terminology, this puts France's regulatory system, at least in the review phase, in "high visibility" arena.[52] Whilst much of the common law literature is sceptical about common law approaches to regulation and its transparency, there is much formal and informal consultation taking place by English regulators with the public and all stakeholders.[53] France has utilised existing institutions to control regulation, in much the same way it controls administration, the English have Parliamentary Committees to take oversight, but have a tendency towards deferring to the expertise of the regulator.

2. Institutional Design of Judicial Review

Judicial review operates in the area of administrative law. This is a broad term which encompasses two things: on the hand, judicial review offers a possibility for individuals to challenge public decisions; and on the other hand, it is part of "... the law governing the organisation and activities of administrative agencies."[54] This latter aspect looks especially at the powers granted to an agency to carry out their specified duties, framework rules that define the responsibilities and accountabilities; and decision making processes within the agencies themselves. This indicates that administrative law is a much broader concept than that of judicial review.

Related to administrative law, is the concept of an administrative state.[55] This is one which has an impact on our daily lives (decisions about schooling, housing, health care, social care etc). This growth of

[51] Ibid
[52] D. M. Trubek, 'Public Advocacy: Administrative Government and the Representation of Diffuse Interests' in M. Cappelletti and B. Garth (eds), *Access to Justice: Emerging issues and perspectives*, vol Vol. III (Dott. A. Giuffre' editore/ Sijthoff and Noordhoff 1978) p.457
[53] OECD, "*Regulatory Consultation: A Mena-OECD Practitioners'guide For Engaging Stakeholders In The Rule-Making Process*" 2011 p.36 at https://www.oecd.org/mena/governance/MENA-Practitioners-Guide-%20EN.pdf last accessed 09 June 2022
[54] M. Elliott and R. Thomas, *Public Law* (Oxford University Press, 2017). Pp.478-479
[55] R. Rawlings and C. Harlow, *Law and Administration* (Cambridge UP, 2009). P.19

the administrative state in the last century has required many states to become more imaginative about guards against the abuse of power. The growth of the administrative state, without a parallel growth of judicial review in courts has meant that more than one method of accountability is needed.[56] Furthermore, aside from the question of institutional capacity to cope with the growing administrative state,[57] there have also been some discussions surrounding the issue of judicial restraint. On the one hand, there is a question of whether judicial review provides a procedure of appeal or review. Judicial review looks only at the procedures followed to decide in an area of administrative law; whereas an appeal allows the court to judge a case on its merits. This is a question of relative institutional competence: which institution is most competent to deal with the question of substance.[58] This is further connected to the principle of democratic legitimacy, seeing as many agencies are set up by a statutory framework- this strengthens the argument that agencies have democratic legitimacy to make decisions in their fields, whereas judges do not.

The difficulty for a jurisdiction like England, is that it has long denied the existence of an administrative state, and therefore administrative law, under Dicey's theories. Those who have continued to espouse his work, belong to a camp where individual rights are more important than collective decision-making. This is important for controlling excesses in government. However, this approach ignores the deeper role of the administrative state.[59]

Administrative law has largely moved away from an administrative law based on individual rights (though still important). It has moved to a perspective that "… sees in administrative law a vehicle for political progress and welcomes the 'administrative state'."[60]

"... the function of public law was first and foremost to provide the framework inside which the efficient operation of the public services could at all times be assured. Administrative law limited state

[56] Elliott *et al supra* no. 49 p480
[57] S. Craig, 'Judicial Review: How Much Is Too Much? A View of Eba, Cart and Mr (Pakistan) from the Asylum and Immigration Perspective', *Edinburgh Law Review*, 16/2 (2012)
[58] M. Elliot, 'Proportionality and Deference: The Importance Ofa Structured Approach', in C. F. Forsyth et al. (eds.), *Effective Judicial Review : A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010), 264-86.
[59] Loosely known as the Red Light Theory: Rawlings *et al supra* no. 50 p.23
[60] Ibid. p.31

action in two distinct ways: (a) through the notion that the state can act only in the public interest and for the public good; and (b) through the principle that they state must observe the law."[61]

Under this perspective of administrative law, adjudication would focus on legality rather than rights, "equality before the law", and "administrative liability".[62] This makes administrative law much more about the functioning of the state, as opposed only to the limitations of the state. This perspective allows us to think of solutions of accountability gaps in alternative ways- thinking to principles of good governance (transparency, consultation and public participation) to alternative dispute resolution without requiring access to the courts (whilst maintaining access to them).[63] It has been recently argued that administration has a legitimacy of its own, that is not dependent upon the legislature or the judiciary.[64] Within the evolution of a modern administrative law, the judiciary has arguably become more restrained vis-à-vis government.[65]

A further complexity is that administration is no longer a purely public law matter- with next steps agencies, and private companies doing the jobs of agencies, private law norms have entered the field of administration. This has led to a discussion on the public and private law divide, looking at how to control power, whether the framework should be private law (contracts and torts), or public law (legislation). Harlow and Rawlings have argued that this has led to "sterile jurisdictional disputes in which lawyers specialise", and that solutions offered by both public and private law in common should be sought out.[66] Importantly, they state that "power has never been the monopoly of the state or its institutions."[67] This mix of public and private in modern day administration has created a system of "governance" through a mixture of centralised administrative bureaucracy, but also of decentred regulation, and the development of new principles to guide this type of governance.

[61] Ibid. p.34
[62] Ibid. p.35
[63] Ibid. p.37
[64] M. Lewans, *Administrative Law and Judicial Deference* (Bloomsbury, 2017).
[65] Rawlings *et al supra* no. 50 p.44; see also Steve Foster, 'The Executive, the Courts and the Separation of Powers: R. (on the Application of Child Poverty Action Group) V Secretary of State for Work and Pensions [2012] Ewhc 2579 (Admin); [2012] A.C.D. 109 (Qbd (Admin))', *Coventry Law Journal*, 17/2 (2013/01/23 2012), 102-08.
[66] Rawlings *et al supra* no. 50 P.21
[67] Ibid.

In France, due to the recognition that the judicial power should not "… interfere with the acts of legislative and executive branches"[68] post revolution, there was no body to check the executive, except for parliament.[69] When Napoleon came to power he recognised the need for some sort of review of administrative decision making and to arbitrate on administrative disputes.[70] He set up the *Conseil d'Etat* in 1799,[71] which lead to "… the growth of a genuinely independent system of legal control over the exercise of administrative power."[72] This was done in two ways: Firstly, "the Conseil d'Etat plays an important role in the legislative process and acts as general and legal adviser to the government."[73] The French government must seek advice from the *Conseil d'Etat* for all draft legislation, and where they seek to make legislate under their own regulatory powers of article 37 (*décret reglementaire*).[74] If the government ignores the advice, the judicial section of the *Conseil d'Etat*, (if the legislation under article 37 passes against advice of the *Conseil d'Etat* in its advisory capacity) may find it illegal if a challenge comes before it.[75] This role, along with its adjudicative function is intended to lend both policy and legal perspectives to the activities of government.[76]

The second way was through the creation of "… special tribunals within the executive branch to review administrative action."[77] The review of administrative action is not considered "judicial" in the common law sense of the word, because of the way in which it is institutionalised:

"*... it educates a corps of career executive branch agents at national civil service schools; trains them both at school and in the field in the principles of proper administrative [behaviour]; and then charges them with reviewing the acts of other civil servants on the basis of their adherence to those principles*."[78]

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[68] M. De S. O. L'e Lasser, *Judicial Transformations : The Rights Revolution in the Courts of Europe* (Oxford ; New York: Oxford University Press, 2009). p.31
[69] P, Cane, *Administrative Tribunals and Adjudication* (Oxford: Hart, 2009). p. 86
[70] P.L. Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s', *Yale Law Journal,* /May (2004), 1341-414.p.1374
[71] Cane, *supra* no. 64 p. 87
[72] Lindseth, *supra* no. 65 p.1374
[73] Cane, *Administrative Tribunals and Adjudication*. p.89
[74] Gar Yein Ng, *Quality of Judicial Organisation and Checks and Balances* (Antwerp: Intersentia, 2007).pp. 207-08
[75] Ibid p, 207-208.
[76] Cane, *supra* no.64, p.89
[77] Lasser, *supra* no. 63 p.32
[78] Ibid. p.33

Accordingly,

"*The separate French system of administrative justice was designed as a kind of 'commitment mechanism' ... to ensure that those empowered to adjudicate administrative disputes would adhere to the policy goals of the state and to the "general interest," even as they also enforced basic principles of justice on behalf of particular individuals*."[79]

However, if one considers the principles that have grown out of the jurisprudence of *Conseil d'Etat* since its inception, it can be considered to exercise judicial power. This was recognised when the *Conseil Constitutionnel* ruled that administration is a separate and independent body, not subject to the interference from government or legislature;[80] they also ruled that administrative jurisdiction (*Conseil d'Etat*) would be able to rule on the merits of the administrative cases brought before it.[81]

This independence, however, is only protected in the *Conseil d'Etat's* function of reviewing executive action, as opposed to legislation.[82] Even then, it is unclear whether this extended to independent regulators (be they statutorily created or other types).

The *Conseil d'Etat* has been described as a "safety valve"[83] which ultimately could be open and shut as the circumstances dictated. The Conseil has opened and closed the valve depending on whether France's legislature was able to control government-[84] and this varied from the period of the two World Wars.[85] However, during World War One (WWI) and the post-war period, the *Conseil d'Etat* took a step back from actively controlling government action, going as far as to say that they considered "…the question of the permissible extent of legislative delegation as political and constitutional, and thus beyond its limited legal competence to consider."[86]

[79] Lindseth *supra* no.65 P.1374
[80] Décision no. 80-119DC- *Loi portant validation d'acte adminisrtatifs*, Conseil Constitutionnel, 22 July 1980
[81] Décision no. 86-224 DC- *Loi transférant à la jurisdiction judiciaire le conetiuex de decision du Conseil de la concurrence*, Conseil Constitutionnel, 23 Januar 1987 para15
[82] Lasser, *supra* no.63 p.33 & 60
[83] Lindseth, no.65 p.1375
[84] Ibid. p.1375-1376
[85] Ibid. p. 1376
[86] Ibid. p.1377

The jurisprudence after the war did not extend the scope of powers of the *Conseil d'Etat*. They still continued to develop their jurisprudence along the lines of "… the proper exercise of governmental powers."[87] It is generally considered successful in this because of "… the balance it has managed to strike between independence and 'expertise'."[88] The expertise here refers to the type of training that judges of the *Conseil* receive as administrators, rather than any legal training. This gives them "… knowledge and experience of the workings of the executive branch of government."[89] This gives decisions of the adjudicatory section of the *Conseil d'Etat* legitimacy in the eyes of the government official,[90] who has faith that the judge understands and can balance well the "social objectives" of implementation and individual interests.[91] This system arguably tilts in favour of social objectives of government policy as opposed to individual rights.[92]

Further indication of judicialization occurred as late as 1987, when a law created the *Cour d'Appel Administratif* in order to help reduce the backlog of cases to the *Conseil d'Etat*.[93] There are however other administrative jurisdictions that do not belong to the administrative courts, but are under the purview of the *Conseil d'Etat*, such as *Cour de Compte* (court of accounts).[94] This gives the *Conseil d'Etat* oversight over the various administrative court instances to ensure legal certainty and uniform application of law and general principles. This means that the *Conseil d'Etat* also has experience with reviewing the exercise of different types of executive power. There is also the *Tribunal Administratif*, which acts as a first instance court of appeal against administrative decision making. Some cases may be heard on appeal directly to the *Cour d'Appel Administratif* and others go directly to the *Conseil d'Etat*.

[87] Lasser *supra* no.63 p.72p.201
[88] Cane, *Administrative Tribunals and Adjudication*. p.88
[89] Ibid. pp. 88-89; see also Gerdy Jurgens and Frank Van Ommeren, 'The Public-Private Divide in English and Dutch Law: A Multifunctional and Context-Dependant Divide', *Cambridge Law Journal*, 71/1 (2012/04/10 2012), 172-99. P.175
[90] Cane, *supra* no. 64 p.89
[91] Ibid. p.12 & 89
[92] Ibid. p. 89
[93] Ng, *Quality of Judicial Organisation and Checks and Balances*. p. 222
[94] Ibid.p. 222

Administrative courts "exercise '*juridiction*'… and they are characterised by the fact that the principle of *res judicata* applies to their decisions".[95] Outside of this system, there is another institute which conducts non-judicial administrative adjudication, called "*commissions*- that perform specialised administrative adjudication in areas such as immigration… [and] are somewhat analogous to specialist tribunals in the UK."[96] However, instead of being considered as judicial review, they can be considered more to be merits reviewers as the "stand in the shoes of the original decision-maker and that review the merits of the original decision."[97] Their decisions can be externally reviewed by the administrative courts, which may only decide a case in cassation.[98]

It is not within the scope of this article to go deeply in the workings of administrative courts in France, but merely to point out that, in the separation of powers, the French have created an institution separate from the ordinary judiciary yet independent from government, and competent to pass judgment in its review of administrative decisions, on the basis of principles of justice and administrative expertise. It has had an important role to play in checking government, and therefore this should possibly extend to regulatory authorities, especially those set up by legislation.

One of the oddities of this field is that whilst the nature of government in both England and France has been moving towards regulatory governance, and much of what was formerly nationalised monopolies became privatised, the tools developed under judicial review have become more sophisticated in terms of holding government to account, but without obviously applying to regulatory governance.

2.1 Judicial Scrutiny of Regulation[99]

[95] Cane, *supra* no.64 p. 205
[96] Ibid. p. 205
[97] Ibid. p. 205
[98] Ibid. p. 205
[99] Scrutiny can include judicial review, European law review, and even scrutiny through private law adjudication. These three will be discussed in this section.

There are a number of arguments against intensive judicial scrutiny of regulation.[100] Tapia *et al* discuss reviewing courts on a scale, from those with expertise to generalist courts, and argue that where generalist courts have been set up to scrutinise regulations, that they should adopt "a deferential standard of review... in relation to ... expert decisions."[101] Reviewing courts will scrutinise according to the scope allowed in legislation (either appellate-i.e. merit based or judicial review-normally procedural but rarely merit based). "The level of specialization affects the standards of judicial review and the extent of the bodies' discretion."[102] Specialisation has three specific features: expertise, experience, and "object-specificity": "the specific aim of introducing logical coherence to and protecting (at least one or some of) the objectives of one part of the legal system."[103] The argument therefore is that where tribunals or courts are specialised, and even specifically set up to scrutinise regulators, that they will have the specialisation to scrutinise the substance of the decision (nondeferential approach).[104] On the other hand, Tapia et al have also argued that generalist courts will have predictable outcomes for any regulator based on the legislation. As such the regulators will know the probability of a decision being overturned.[105] It's arguably harder to predict decisions when a specialist court is dealing with the decision, as they have greater discretion to revise or reverse a decision.[106]

[100] J Arancibia, Judicial review of commercial regulation (Oxford University Press 2011) p.15; see also Rawlings, Rawlings, Richard (2010), 'Changed Conditions, Old Truths: Judicial Review in a Regulatory Laboratory', in D. Oliver, T. Prosser, and R. Rawlings (eds.), The regulatory state: constitutional implications (Oxford University Press, USA), 283- 305, pp.283-4; and Lewans, *supra* no.59.
[101] J. Tapia and S. Montt, 'Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust', in D. Daniel Sokol and Ioannis Lianos (eds.), *The Global Limits of Competition Law* (Stanford University Press, 2012), 141-57. P.142
[102] Ibid. p143
[103] Ibid. p143
[104] Ibid. p.145
[105] Ibid. p.145
[106] Ibid. p.146

Aranciaba argues that courts take a deferential approach to make sure that judicial review can operate without disrupting the 'economic sphere' within which a regulator operates.[107] He argues that this is "…a context-sensitive approach which enjoys systemic coherence, by requiring the courts to review impugned decisions in a manner which is consistent with, rather an affront to, the principles of good administration and market performance."[108] This supports Rawlings' argument that principles of good governance can act as a source of unwritten constitution for the courts.[109] This is also coherent with the idea that public policy will be considered as equally weighted with individual rights. From this perspective, courts should arguably take on a more polycentric view (the regulators' and legislators' perspective alongside the stakeholders' views and individual rights).*[110]*

Therefore, any deferential stance is arguably based on "an underlying reliance on the positive attributes of the executive's decision-making paradigm (scientific expertise) and a clear response to the negative norms of the decision-making method naturally associated with the judiciary (adjudicatory fairness)."[111] The legitimacy to defer is therefore based on a separation of functions argument.[112] These are on factors of expertise and how that helps regulators respond to a fast changing market environment;[113] conversely, judges also feel the need to defer in order not to make decisions which will negatively impact the market; [114] the fact that regulatory procedures for dispute resolution are informal, speedier and more efficient and participatory than courts; [115]

[107] Arancibia *supra* no. 95 p.15; see also Patrick Bishop, 'Salmon Fishing in the Severn: Judicial Deference to Regulatory Judgments Based on Scientific Assessments', *Environmental Law Review*, /19 (2017/09/12 2017), 201-09. P.207 on deference to expertise; and Tapia and Montt, 'Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust'. P.146
[108] Arancibia, *supra* no. 95 p.16-17.
[109] Rawlings, *supra* no. 95 p.284.
[110] Arancibia *supra* no 95 pp.16-17.
[111] Ibid p.17.
[112] Ibid p.18; see also J. A. Grant, '*Reason and authority in administrative law*' Cambridge Law Journal 76, 2017, 507
[113] Arancibia *supra* no. 95 p.18.
[114] Ibid p20; see also A. Shleifer, *The failure of judges and the rise of regulators* (MIT Press 2012) p.12.
[115] Arancibia *supra* no. 95 p.21-22.

and lastly, that courts replacing their decisions with those of regulators would be against the will of Parliament. [116]

Another related legitimacy argument against intense judicial review of regulators is that of effectiveness, whereby they cannot make effective decisions with judges looking over their shoulders.[117] They also do not wish to risk "tactical litigation" which would slow down the business of the regulator,[118] and this would also lead to uncertainty in the market.[119] Moreover, it is not as simple as deferring due to expertise or even the separation of powers. Rawlings argues that the fluidity of regulatory practices makes judicial review difficult to apply.[120] Whilst it is important to recognise the constitutional role of courts in maintaining the rule of law,[121] judicial review has a limited impact[122]

This discussion takes place in other areas of law dealing with regulators as well, including European law and private law. For the countries being studied here, the single market has brought forth a number of new tools for courts, including preliminary rulings (allowing domestic courts to refer questions of statutory interpretation to the Court of Justice of the European Union), and the application of proportionality test (especially in English law). Furthermore, EU law has had a hugely significant impact on competition law, even though jurisprudence from the EU is also quite deferential.[123]

Under the European Convention on Human Rights (Convention), article 6 guarantees a fair trial where rights are affected by government decision making, as well as the peaceful enjoyment

[116] Ibid p.22-23; see also Asimow *et al supra* no.2 on the limitations of judicial review
[117] Arancibia *supra* 95 p.25.
[118] Ibid p.28.
[119] Ibid pp.29-31; see also Rawlings, *supra* no. 95 pp.286-7.
[120] Rawlings *supra* no.95 p.284.
[121] Ibid p.286; see also S. Nason, *Reconstructing judicial review* (Bloomsbury Publishing 2016).
[122] Rawlings, *supra* no. 95 p.286.
[123] Ibid p.296. Whilst the United Kingdom has left the EU, this does not mean that courts have automatically stopped using the tools they have developed during that time of membership.

of possessions under article 1 of the First Protocol of the Convention.[124] These rights have been extended to corporate actors (and others under regulatory regimes), which means that regulators should face the same legal limits as classical administration under the law (legality, proportionality etc).[125] Importantly though, "the European Court of Human Rights suggests that the intensity of the protection afforded to entities active in the commercial area must be carefully assessed and framed in such a way as to avoid irremediably hampering the effectiveness of these regulatory structures."[126] Whether viewed as deference or margin of appreciation to the regulator, this does show that the Court will enforce rights, but will balance against the public interest that the regulation represents.[127] Furthermore, given that some regulatory procedures are criminal in nature (especially in terms of investigation and the possible sanctions), criminal procedure rights have also been extended to those subject to such regulatory processes, such as the right to silence, or the right against self-incrimination.[128] The European view, under the Convention, does follow a state centric view, as it looks to control the exercise of state power, whether through interpretation of the law, or procedural controls.

There has also been a discussion in the field of tort law and the impact of court cases on regulatory practices. A special issue from 2018 of the European Journal of Risk Regulation discusses the role of tort law in risk regulation.[129] As with administrative law and even European law, the focus is on the legitimacy of courts using their powers in civil litigation to regulatory

[124] C. Harlow and R. Rawlings, *Law and Administration* (4 edn., Law in Context; Cambridge: Cambridge University Press, 2021). p388
[125] A. Andreangeli, 'Competition Law and Human Rights: Striking a Balance between Business Freedom and Regulatory Intervention', *The Global Limits of Competition Law* (Stanford University Press, 2012), 22-36.
[126] Ibid. pp24-25
[127] C. Scott, 'Regulatory Governance and the Challenge of Constitutionalism', in D. Oliver, T. Prosser, and R. Rawlings (eds.), *The Regulatory State: Constitutional Implications* (Oxford University Press, USA, 2010), 15-33, R. Rawlings, *supra* no. 95, pp.299-300.
[128] Andreangeli, *supra* no.122 p.25
[129] E. R. De Jong et al., 'Judge-Made Risk Regulation and Tort Law: An Introduction', *European Journal of Risk Regulation*, 9/1 (2018), 6-13.

effect.[130] The use of tort law litigation can have impact on regulation in three ways. Firstly, precedent can impact non-litigants in the same sector/industry as one of the parties; secondly, there could be "side effects that may "alter the behaviour and/or risk policies of private actors and public authorities"; and thirdly, there may be impact on "non-legal interests of litigants and third parties."[131] This effect has been seen, for example, in class actions on environmental harms. One of the problems highlighted with using tort law in this way is the (occasional) information asymmetry between judges and regulators. This relates to the legitimacy of the knowledge claims of the courts, and reliance on experts.[132]

Finally, there is an issue of legitimacy from a separation of powers perspective. The argument here is that the basis for using tort law in the regulatory state is its role in reparation on the basis of 'personal responsibility' rather than any focus on regulatory impact.[133] Part of the legitimacy for viewing courts as semi-regulators is that

"…courts not only see themselves as civil litigators (the traditional view), but as part of the political decision-making process (the public life conception of civil adjudication). Both constitutional and civil (procedural) law principles may be interpreted in an activist manner or with restraint, thus resulting in a broad or a restrictive interpretation respectively."[134]

Regulation sits (comfortably) within a polycentric field of governance in the private and the public exercise of power, creating rules, executing those rules, and judging where those rules have been broken and taking appropriate action. Regulation is part of society.[135] Courts and law on the other hand are something state centric and apart. "As against the unduly simplistic equation

[130] Ibid. p.7
[131] Ibid. p.8
[132] Ibid. p11
[133] Ibid. p11
[134] Ibid. p.12
[135] J. Black, 'Critical reflections on regulation' in *Crime and Regulation* (Routledge 2017)

of 'judicial supervision equals judicial review', the trick is to mix and match public and private law doctrines better to reflect the mixing of public and private power."[136] Ultimately, I would argue that a balance is needed to ensure the rights are upheld in a polycentric environment, but also that regulators and market actors are held to account for breaking the law, both constitutional and competition.[137]

2.2 Review of Regulatory Authorities in England

There are two types of review of regulatory authorities in England: statutory review (including appeal) through specialised tribunals and the more traditional judicial review.

Harlow and Rawlings discussed a line of key cases of judicial review of regulators, with the starting point that courts embarked on this route with a deferential position. Even though regulatory bodies (especially statutory ones) are subject to judicial review, "... judges stressed the breadth of the statutory discretion, declining to become involved in detailed questions of fact."[138] The first case that they discuss is that of *South Yorkshire Transport v Monopolies and Mergers Commission*,[139] which shows that regulators are subject to judicial review, but also to the limitations of that review, where any decision of irrationality will be very rare.[140] This leads onto the *Datafin* discussion,[141] which involved a request to review the decision of a Self-Regulatory Organisation (SRO). Whilst the Court of Appeal identified a public duty in the exercise of its powers and therefore that judicial review would extend to it, at the same time, it also stated that it would give a wide margin of appreciation to the SRO in "interpreting its own rules..." and that the courts should "limit public law remedies."[142] This left the field in a bit of disarray, and ultimately led to the courts asking "whether 'the government would have assumed the powers being exercised "but for" self-

[136] Rawlings, *supra* no. 95 p.301.; see also Harlow and Rawlings, *Law and Administration*. [2021] p448
[137] E. Jordao and S. Rose-Ackerman, '*Judicial Review Of Executive Policymaking In Advanced Democracies: Beyond Rights Review*' 66 Administrative Law Review 1, p.5.
[138] Harlow *et al, supra* no. 121 pp384 & 387
[139] [1993] 1 WLR 23
[140] Harlow *et al, supra* no.121. [2021] pp385-6
[141] *R. v Panel of Takeovers and Mergers, ex p. Datafin plc* [1987] QB 815
[142] Harlow *et al, supra* no.121 p.390

regulation."[143] They then discuss the *Aga Khan*[144] case. In this case, a horse had been disqualified from racing for failing a doping test by the Jockey Club. The courts refused jurisdiction and argued that it was contractual relationship between the Jockey Club and its members.[145] Following from the *Aga Khan* case, they discuss the *Bradley* case,[146] where the court did extend a sort of judicial scrutiny to the Jockey Club, but only on procedural issues, which allowed the court to eventually dismiss the challenge.[147] This confirms the courts traditional perspective on the role of courts vis-a-vis regulators. In the last case of this line of cases, Harlow et al also discuss the case of *Npower Direct ltd v Gas and Electricity Markets Authority and Competition Markets Authority*,[148] where Npower claimed that the regulator was disproportionate in its action, but which the court was inclined to give the regulator a lot of leeway on proportionality issues.[149] Overall, Harlow et al do present the picture of a deferential court in relation to judicial review of regulators.

Literature in England and Wales has focused on the relationship between the Superior Courts of Record and the tribunal system on issues of judicial review of regulators.[150] However, the discussion that follows applies to the supervisory jurisdiction of the courts, not only over tribunals, but also regulatory authorities, as tribunals form part of the regulatory environment.[151] From a judicial review perspective, the courts have, over time, developed a number of strategies to test for questions of law and their interpretation by the tribunals and agencies.[152]

In the first place, up until the twentieth century, the court created a test of jurisdiction between the tribunals (and agencies) and the courts. The tribunal or agency had to decide if a

[143] Ibid. p.390
[144] *R v Jockey Club Disciplinary Committee, ex p. Aga Khan* [1993] 1 WLR 909
[145] Harlow and Rawlings, *Law and Administration*. [2021] p391
[146] *Bradley v Jockey Club* [2004] EWHC 2164
[147] Harlow *et al, supra* no.121 p391
[148] [2018] EWHC 35756 (Admin)
[149] Harlow *et al, supra* no.121 [2021] p393
[150] P Craig, '23. Judicial review of questions of law: a comparative perspective' in *Comparative Administrative Law* (2018).
[151] *R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* (Supreme Court) para 59. See also Tapia and Montt, 'Judicial Scrutiny and Competition Authorities: The Institutional Limits of Antitrust'.
[152] Craig, *supra* no. 147 p.389.

decision fell within the scope of a statute, which was a legal question. If the court considered the tribunal to be "erroneous…then the tribunal's conclusion was a nullity. If the issue was classified as non-jurisdictional then the legal interpretation was for the administrative authority, unless there was an error of law on the face of the record."[153] This was a somewhat *ad hoc* and inconsistent approach. This uncertainty continued until the *Anisminic* case,[154] which allowed the courts to substitute tribunal judgments which showed an error in law. This broadened judicial review to allow courts not only to intervene where tribunals (and agencies) had no jurisdiction, but where the tribunal had misinterpreted a statute (according to the court), failed to take into account relevant considerations, or had even "asked the wrong question".[155]

Recent jurisprudence has been more deferential, however. The case of *Cart*,[156] the Supreme Court had held that whilst judicial review of tribunal decisions was important, some deference to tribunal expertise was important. The Supreme Court developed a new test that set out the current relationship between the Courts and Tribunals: "the claimant must show that the case raised some important point of principle or practice, or that there was some other compelling reason for the ordinary court to undertake judicial review."[157] This was affirmed by the case in *Jones*,[158] which has given greater deference to the Upper Tribunal's interpretation of statute.[159] Through this modern jurisprudence, the courts have recognised that there is no arguable reason why statutory interpretation by tribunals and regulatory authorities would be inferior to that of the courts.[160]

[153] Ibid p.390
[154] *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862.
[155] Craig, *supra* no. 147 p.391. See also *R v Hull University Visitor, ex parte Page* [1993] AC 682.
[156] *R (Cart) v Upper Tribunal* [2011] UKSC 28; *Eba v Advocate General for Scotland* [2011] UKSC 29.
[157] Craig, *supra* no. 147 p.392.
[158] *R (Jones) v First-tier Tribunal* [2013] UKSC 19.
[159] Craig, *supra* no.147 pp.392-393.
[160] Ibid p.393.

Deference is different from giving up jurisdiction altogether. In the recent case of *R. v Investigatory Powers Tribunal and Others*,[161] Carnworth LJ that underlined that it was not possible under English law, for a tribunal to be created with unlimited scope as to its own powers, without the possibility of judicial review of those powers.[162] Where the legislator has attempted to exclude judicial review, the courts have responded with narrow interpretation of such clauses, and have reiterated their role in maintaining "the rule of law by providing a means of correcting legal error" (procedural or substantive).[163] Even then, judicial review through the Wednesbury principle of unreasonableness is a deferring approach, as the courts will only declare a decision *ultra vires* if it is deemed to be so unreasonable that no one in their right minds would make it. This comes again from a conservative view of the separation of powers, which postulates that judges should not review merits of decisions, but only legality.[164]

2.2.1. Institutional Design of Accountability of Regulatory Authorities: Accountability or expertise?

When looking at the design of regulatory authorities and their accountability, the question needs to be answered "…whether regulatory agency decisions should be reviewed by specialist bodies or generalist courts"?[165] The "…former model ('experts reviewing experts') often assumes an intensive substantive review while the latter (conventional judicial review) generally focuses on procedural aspects of agency decision-making."[166]

[161] *R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22.
[162] Ibid para. 36-37.
[163] Ibid para 46; A. Eliasson, R. Chiarella and S. Ahmad, '*Ousting the Ouster Clause*?' 22 Judicial Review 263 para 56.
[164] Arancibia *supra* no.95 pp.23-24.
[165] A Psygkas, '*The 'Double Helix' of Process and Substance Review before the UK Competition Appeal Tribunal: A Model Case or a Cautionary Tale for Specialist Courts?*' Comparative Administrative Law (2nd edn, Edward Elgar 2017) p.462.
[166] Ibid p.462.

As discussed above, in standard English judicial review, the courts police the scope of legislation, though this is quite deferential. Proportionality, has to some extent, altered this state of affairs to allow courts to deal more with substance and merits.[167] For the longest time, there was a system whereby the courts focused on procedure and form, and the agencies (centralised or not) focused on the merits of their decisions.[168] A further complication is added when you have double the jurisdiction of reviewing bodies against agencies.

There is an argument that one of the merits of having specialised tribunals is that they are more efficient, however this is empirically difficult to corroborate.[169] On the other hand, it has been argued that such specialised tribunals risk developing tunnel vision (also hard to corroborate), but hybrid tribunals have less of a risk as judges sit on these panels, and follow the relevant case law of the Superior Courts.[170]

In conclusion, England has opted for expert accountability over legal accountability, in spite of the possibility of judicial review on the merits.

2.2.2 Decentering of judicial review: Tribunals

The basic structure of appeals against regulatory authorities only differs from normal judicial review in so far as the majority of appeals on facts will go to a tribunal. Public law issues are generally argued before the courts within the judicial review process.[171] Even though judicial review is historically "ground in the 'ancient and inherent supervisory jurisdiction of the court,'"[172] public law is not within the exclusive purview of judicial review in the High Court. The Upper Tribunal may consider public law issues under certain circumstances, in the same way as the High

[167] Ibid p.464.
[168] Ibid p.465.
[169] Ibid p.467.
[170] Ibid p.467.
[171] Harlow et al, supra no.121 p823.
[172] S. Daly, 'Public Law in the Tax Tribunals and the Case for Reform' British Tax Review 94 p.95.

Court, where it is satisfied that it would be 'just and convenient' to do so, or where it has been "statutorily conferred".[173]

Whilst the tribunals may defer to parliament in terms of legislation,[174] they do follow the procedural rights and the principles of the rule of law, as set out by the European Court of Human Rights. Under the Human Rights Act, the tribunals may also return legislation back to parliament where it breaches the Act.[175]

From this, with or without judicial review jurisdiction, it is clear that justice has been decentred away from the courts towards tribunals, creating a combined system of accountability, based not only on law but also on expertise, creating trust in a polycentric environment of regulatory governance.

2.2.3 Statutory Interpretation and the Supreme Court

Even though there has been a recent recognition by the courts that their interpretation of the law is not the only legitimate one, does not mean to say that they do not take their powers of review in ensuring uniform application of the law seriously. In a number of cases, the Supreme Court demonstrated that they apply the normal rules of statutory interpretation to the powers of the Financial Conduct Authority (Authority), be it their own interpretation of the law, or their application of executive powers under statute.

In a 2015 case, the Supreme Court had to look at whether the Authority had a statutory "right to impose a freezing order without going to court and without any occasion arising on which

[173] Ibid p.95.
[174] J. Peacock, 'The" Margin of Appreciation" Afforded in the Tax Tribunals: Is There Any Limit to Judicial Deference?', *British Tax Review*, /4 (2017), 404-17.p. 405.
[175] Ibid p.414.

a cross-undertaking would be required of it."[176] The Court here gave an interpretation to the powers of the Authority

"that public authorities should be able to enforce the law without being inhibited by the fear of cross-claims and of exposing financially the resources allocated by the state for their functions, apply with particular force to any open- ended cross-undertaking in respect of third party loss."[177]

As there was no discussion of a cross-undertaking in the legislation, the court also stated that liability of public authorities would only occur where the courts could establish misfeasance in public office or a breach of the Human Rights Act.[178]

In the case of *Asset Land Investment*,[179] a case in which the Authority had to decide on whether a scheme was a land-banking scheme under statute, the Court stated that the "… appeal raises the general question whether the FCA's understanding of the law is correct, and specifically whether the law was correctly applied to the facts of the present case."[sic][180] The court took a deferential approach to the Authority's interpretation and held that on issues of fact, the Supreme Court would not substitute its own judgment for that of the lower courts.[181] It ultimately held that the Authority's understanding of the law was correct.

2.3 Review of Regulatory Authorities in France

[176] *The Financial Services Authority (a company limited by guarantee) (Respondent) v Sinaloa Gold plc and others (Respondents) and Barclays Bank plc (Appellant)* [2013] UKSC 11 para 11.
[177] Ibid para 35.
[178] Ibid para 37.
[179] *Asset Land Investment Plc and another (Appellants) v The Financial Conduct Authority (Respondent)* [2016] UKSC 17
[180] Ibid para. 12.
[181] Ibid para 102.

In France, as in England, regulatory authorities lack a general definition in administrative law, and the *Conseil d'Etat's* (Council of State) initial treatment of them was not as an agency as such, as "agencies are not independent, but simply autonomous."[182] They are autonomous in that their responsibilities are structured within a political framework rather than legal, they are not independent within traditional administrative structures, and the executive maintains a significant role, even though regulatory authorities might have their own legal personality. As such, regulatory authorities exercise a qualified power.[183]

The organic growth of regulatory authorities in France has caused an acknowledged problem of the lack of accountability and legitimacy in this area, especially for democratic legitimacy and indeed public budgets.[184] Even though there is a requirement that these bodies should be re-evaluated frequently in the political sphere, they also do not fit within the standard constitutional framework, which requires the legislature, executive and judiciary to follow a specific set of constitutional principles when acting.[185] These rules are not designed to allow these institutions to act quickly (unless in an emergency) without consideration of these principles.

A common reference is needed between regulatory authorities and traditional administration, from a constitutional perspective.[186] It is unclear what the Agency position is within the scope of public administration (not just in France), but also in terms of classical constitutional law. There is a supposition that the exercise of public law powers is attended by representation as well as control.[187]

[182] Sauvé *supra* no. 3 p.3
[183] Ibid pp.3-4.
[184] Ibid pp. 6-7. See also Rose-Ackerman and Perroud, 'Policymaking and Public Law in France: Public Participation, Agency Independence, and Impact Assessment', (p.273
[185] Sauvé, *supra* no.3 p.7.
[186] Ibid p.8,
[187] Ibid p.8,

This is problematic, mostly from a judicial perspective, as it creates a vacuum in the exercise of public power and therefore a lack of judicial control.[188] Such a growth in power requires judicial control, as autonomy in the exercise of public power should not equate to the lack of judicial control, and the rule of law has a superior value constitutionally.[189] The question now is how competent has the judiciary become in reviewing regulatory authorities, and how intense is their review (or deference)?

2.3.1 Scope of Judicial Review?

Whilst there has been an expansion of the administrative jurisdiction, Agency cases go to both the ordinary jurisdiction as well as the administrative law jurisdiction for review on a statutory basis.[190] In order for the jurisprudence between them not to diverge, the *Tribunal des Conflits* plays an important role in reducing uncertainty in the law in this area.[191] Even though there has been silence in the law regarding the status of regulatory authorities in judicial review, there is a recognition from a constitutional perspective that, under the principle of the rule of law, there should be judicial control of regulatory authorities' powers.[192] When the *Conseil Constitutionnel* received the legislation to set up regulatory authorities in France, they rejected it on the basis that it was impossible for any judge to grant an injunction against regulatory authority decisions, which went against the constitutional rights of defence.[193] Not only do rights of defence need protecting, but the problem of regulatory capture affects how regulatory authorities decide. However, this is also rarely a basis for judicial annulling of regulatory decisions.[194]

[188] Decoopman *supra* no. 22 p.211
[189] Ibid p.212.; see also Schmitz, 'Le droit souples, les autorités administratives indépendantes et le juge administratif. De la doctrine au prétoire' Revue française de droit administratif (RFDA) p.1092. [Soft law, independent administrative agencies, and the administrative judge. The doctrine of the courtroom].
[190] Decoopman *supra* no. 22 p.214; see also Conseil d'Etat, *Le Juge Administratif Et Les Autorites De Regulation Economique* (2016) p.2. [The Administrative Judge and the Economic Regulatory Authorities]
[191] Decoopman *supra* no. 22 pp.212-3.
[192] Ibid p.213.
[193] Conseil d'Etat, Le Juge Administratif Et Les Autorites De Regulation Economique p.17.
[194] Decoopman *supra* no. 21 p.227.; see also Conseil d'Etat *supra* no.212 (2016) p.4

Early research shows that deference has been the basis of any annulling judgments by either court.[195] This is part of the balancing act that all courts (French and English) have to maintain: guarantee the independence of regulatory authorities whilst ensuring that they comply with the rule of law.[196] There are two sources for the rule of law in France to control the exercise of public power: the *Conseil Constitutionnel* and the Convention. Article 6 of the Convention and the *Conseil Constitutionnel* both require the right to a fair trial against any sanctions.[197] The *Conseil Constitutionnel* has required any legislation giving jurisdiction to the ordinary courts the power to conduct a rigorous proportionality test that verify the necessity of any sanctions.[198] Deference has appeared where decisions by regulatory authorities do not go as far as sanctions, but the problem is that regulatory authorities do have a control function that affects rights beyond sanctioning. As such, judges need to be able to review all decisions.[199] Going back to deference, earlier research shows a general reluctance on the part of both jurisdictions in France to step on the regulators' toes.[200]

2.3.2 Double jurisdiction

Due to this situation of having double jurisdiction of review, there is no one unified theory of regulatory authorities or regulation, and there is an entanglement between the jurisdictions. There is the one advantage of control by the *Cour de Cassation* which provides harmonisation for its own lower courts, and which sits with the *Conseil d'Etat* when the *Tribunal des Conflits* presides over regulatory cases.[201] The main issue with granting jurisdiction to the ordinary courts is that

[195] Decoopman *supra* no. 21 p.226.
[196] Ibid.p.220.
[197] See also Conseil d'Etat *supra* no. 212 p.13.
[198] Decoopman *supra* no. 21 p.221-2.
[199] Ibid p.223.
[200] Ibid p.226.
[201] Ibid pp.215-217.

they can only deal with illegality of decision making where damages are incurred as a result of those decisions. This is a limitation in scope that may not be able to be dealt with in the administrative law courts.[202] This is not a vastly different experience from England, where jurisdiction has been split between the courts (general jurisdiction) tribunals (specialised administrative or regulatory jurisdiction) with the Supreme Court at the apex to deal with divergences in the law. In the 1990s, the *Conseil d'Etat* did not extend the principle of reasoning in state decisions to regulatory authorities' decisions, even though the ordinary judge extended the principle to non-sanctioning decisions.[203]

Whilst certain regulatory authorities fall under the jurisdiction of the ordinary judge, economic regulatory authorities fall under the jurisdiction of the *Conseil d'Etat*.[204] Regulatory authorities in economic issues have the power to enact secondary legislation within their statutory framework and compatibly with the French constitution. The *Conseil d'Etat* has the role of controlling these rules, but it is unclear where the scope lies in regards to other acts or decisions by regulatory bodies.[205] Like the ordinary jurisdiction, the *Conseil d'Etat* applies the test of proportionality to decisions, and can likewise decide whether a decision falls under 'sanctions' in practice.[206]

Similar to the ordinary judge, the administrative judge can also determine damages caused by regulatory authorities (based on principles of tort law). The *Conseil d'Etat* can also look into no-fault liability if regulatory intervention was abnormal or special and caused damages. This means

[202] Ibid p.219.
[203] Ibid p.229.
[204] Conseil d'Etat, *supra* no.212 p.2.
[205] Ibid p.3.
[206] Ibid p.6.

that the administrative court also has overlapping jurisdiction with the ordinary courts to decide damages.[207]

However, in the end, both are required to abide by the constitutional rules laid out by the *Conseil Constitutionnel* and the Convention as set out above though they represent different jurisdictions.

2.3.3 Conseil d'Etat and Judicial Review of Regulatory Authorities

The Conseil d'Etat has "developed a line of case law aimed at ensuring that administrative actions do not breach peoples' freedoms. Applied to commercial activities it meant that the judge protected private dealings and commerce using general principles of the law."[208] Applying the principles and rules laid out by the *Conseil Constitutionnel* and the Convention, the administrative judge controls various aspects of Agency decisions, especially through what the English would call the '*ultra vires'* test but also the proportionality test as well as that of equality before the law.[209] The scope of this includes regulatory decisions (including merits), the collection of information that regulatory authorities carry out to fulfil their aims, and procedural rules.[210] The *Conseil d'Etat* may use different instruments when dealing with regulatory cases, such as conducting investigations, bringing in external expertise or a technical opinion. The *Conseil d'Etat* may also defer to part of the decision but not another part or may alter the effects of its own decisions upon the Agency's act.[211]

Over time, the *Conseil d'Etat* has also developed how article 6 of the Convention applies to regulatory cases, for instance, the principle of impartiality should be applied by all

[207] Ibid p.10.
[208] Perroud. *supra* no.17 p5-6
[209] Ibid. p8
[210] Conseil d'Etat, *supra* no.212 p.2. p.11.
[211] Ibid pp.12-13.

administrative authorities, including regulatory authorities.[212] Furthermore, in exercising powers of sanctions, regulatory authorities should respect the principles in article 6 of the Convention on fair trial rights in exercising those powers, but also in respective parties' rights to defence, including using a lawyer of their choice, equality before the courts, and the principle of adversarialism.[213] This is especially important in relation to perceptions of regulatory capture and conflicts of interest, so that decisions can be seen to be fairly made.[214]

Within the rights of defence under article 6, parties have a right to protect business secrets.[215] It is incumbent on the regulatory authorities to provide access to non-confidential versions of documents when a party exercises their defence rights, especially in disclosure of evidence that may be critical to their case.[216] The *Conseil d'Etat* has also applied article 6 to regulatory authorities' powers of control and investigation in light of the right to private life, especially in light of search and seizure powers.[217] Furthermore, in France, as in England, there is no direct right to free trade set out in the constitution, yet "no doubt that the freedom of commerce is just an emanation of other rights and liberties, such as the right of property,"[218] which is also a right set out in the ECHR as discussed earlier in this paper. This implies appropriate safeguards, and judicial review of scope and purpose of exercising such powers through proportionality.[219]

2.3.4 Soft Law and Agency Decision Making

[212] Ibid p.14.
[213] Ibid p.15.
[214] Ibid p.16.
[215] Ibid p.18.
[216] Ibid p.19.
[217] Ibid pp.19-20.
[218] Perroud, *supra* no.17 p6
[219] Conseil d'Etat *supra* no.212 p.2. (Conseil d'Etat Le Juge Administratif Et Les Autorites De Regulation Economique (2016)) p.20.

Initially, the *Conseil d'Etat* was reluctant to include the use of soft law instruments by regulatory authorities within the scope of judicial review.[220] Eventually, the *Conseil d'Etat* started to use terminology recognising that the use of soft law instruments have an impact on rights, and therefore should fall under the scope of review in order to grant access to justice to those affected by such decision making.[221] However, there is caution in the language of the *Conseil d'Etat* (possibly a result of deference), and this is recognised by the poor definitions applied.[222] However it is a big step for the *Conseil d'Etat* to recognise this, as it takes away the focus from soft law as a source of law and moves on to the effects of decision making under that rubric.[223]

Prior to this, the French viewed soft law (*droit souple*) as a challenge to the courts on the issue of their legitimacy.[224] This is not a new concept in law, also in France, where they have seen it applied in international law, especially as part of EU law.[225] It is also a commonly used principle in private law, but has been transferred over to be applied by the *Conseil d'Etat* in relation to regulatory power.[226] This is an important principle to apply in support of democracy, as it supports the transparency of decision making by regulatory authorities.[227] The main problems associated with applying judicial review to soft law can be narrowed down to those of legal uncertainty. Firstly, the law lacks precision (*'droit flou'*- fluid law); secondly, where there are no sanctions applied it becomes very loose (*'droit flou'*); and thirdly, it can be exercised without imposing obligations (*'droit doux'*).[228] This makes it difficult for the court to see the effects of decisions

[220] Schmitz *supra* no. 208 p.1087.
[221] Ibid p.1087.
[222] Ibid p.1088.
[223] Ibid p.1087-88; see also V. Delval, '*Le juge, le droit souple et le régulateur : bilan et prospective*' (France) May 2017 Revue Procédures. [The judge, soft law, and the regulator: assessment and Prospective]
[224] Schmitz *supra* no. 208 p.1089 paras 1-5.
[225] Ibid p.1089.
[226] Ibid p.1089.
[227] Delval *supra* 242 para 13.
[228] Schmitz *supra* no. 208 p.1089.

based on soft law. However, they have responded by recognising soft law as having effect on rights and obligations (and complementary to hard law) and therefore reviewable. They have called this: "legalisation of complex institutional relationships".[229] This has seen the *Conseil d'Etat* adapt to the various and changing tools of the various regulatory authorities under their purview.[230]

The *Conseil d'Etat* looks at three criteria on soft law: the "object of the law" when making decisions; the "degree of formalisation and structure similar to hard law", and whether the decision has "created rights and obligations on parties or changed the judicial order."[231] In the application of sanctions by regulatory authorities, the *Conseil d'Etat* "… are equally concerned by the exercise of both executive and judicial powers by regulators."[232] This is a separation of powers issue that concerns not only the French, but also the English.

To counter this uncertain situation, the *Conseil d'Etat* has developed a gradient between hard and soft law. In the first degree, there is soft law, which is not recognised as hard law in terms of generating rights and obligations; in the second degree, between hard and soft law, there are guidelines, instruments and frameworks developed by regulatory authorities, and parties need to justify acting in a way that is contrary to them; lastly, the third degree, "constitutes right and obligations of conformity, composed either of soft law instruments to which the hard law confers an obligatory scope, or of traditional rights in hard law"[233]

Two cases were important in the recognition that soft law should fall under the scope of judicial review: *Fairvesta*[234] and *Numericable*,[235] where the *Conseil d'Etat* focused on the effects

[229] ibid p.1090.
[230] Ibid p.1090.
[231] Ibid p.1090.
[232] Ibid p. 1090.
[233] Ibid p. 1091.
[234] CE, 21 mars 2016, n° 368082, 368083, 368084, *Société Fairvesta International GmbH et autres*.
[235] CE, 21 mars 2016, n° 390023, *Société NC Numericable*.

of decisions under soft law.[236] However, Delval has been critical that their approach can be quite subjective, leaving yet more uncertainty in the way that judicial review is conducted.[237] It is arguable that it is quite difficult to determine the judicial treatment of soft law related to the test of whether an regulatory authority's decision "affects" parties or not, especially for instruments such as recommendations.[238]

In a report by the *Conseil d'Etat* in relation to soft law, they set out criteria for the legal analysis of soft law according to: usefulness, effectiveness, recognition and legitimacy from stakeholders, guarantees of fundamental rights, conformity to public interests, and the formulation of guidelines in the exercise of soft law for public authorities.[239] On the elaboration of new instruments by regulatory authorities, the *Conseil d'Etat* will look at transparency and consultation processes relating to procedures of decision making; and the actual competence of the regulatory authority to create new instruments. It also looks at the wording of any new instrument to determine whether they are binding (rules of best practices, codes of conduct and decisions) or not (recommendations and charters). There have been long standing requirements that regulatory authorities publish the creation and application of new instruments, as part of the enforcement of principles of good governance.[240] These criteria and rules allow the *Conseil d'Etat* to control the application of these instruments through principles of legality.[241] As such, the *Conseil d'Etat* has developed a wide scope for judicial review of soft law instruments for economic regulators.[242] They have also developed flexibility in judicial control for flexible soft law instruments under the aegis of legality, including a requirement for reasoning for decision making (recalling that the

[236] Schmitz *supra* no. 208 p.1092-3.
[237] Delval *supra* no. 242 para 6.
[238] Ibid para 8.
[239] Schmitz *supra* no. 208 p.1093.
[240] Le décret n° 2008-1281 du 8 décembre 2008.
[241] Schmitz *supra* no. 208 p.1093-4.
[242] Ibid pp.1094-5.

ordinary judge imposed this earlier than the administrative judge) and has moved beyond traditional modes of judicial review.[243]

However, they have also afforded a wide margin of appreciation (i.e. deference) with regards to regulatory competence.[244] Delval examines the intensity of control that depends on the level of the instrument and decision.[245] He argues that uncertainties remain following from the *Fairvesta* case, and that the *Conseil d'Etat* maintains a "restrained judicial review", especially deferring to the expertise of the regulatory authority. He gives an example of this through the case of *FFSA*,[246] where the *Conseil d'Etat* did not register any notable effects of the decision to invite a professional body to adopt a specific practice as no new rules or instruments had been created. Delval is critical of this as the *Conseil d'Etat* ignored the practical impact of this "invitation" and "only examined the legal impact" and the "lack of binding effect."[247]

This approach reflects the rationalisation and normalisation of the review of the exercise of soft law powers in the administrative courts and creates access to justice for parties affected by these decisions.[248] The approach could also be a positive reinforcement for democratic values by the judiciary, forcing regulatory authorities to be more inclusive in decision making and helping to avoid regulatory capture.

2.4 Comparison

There are a number of factors to take into account when considering judicial power vis-à-vis regulatory authority in the English legal context, such as deference (including relative institutional

[243] Ibid p.1095.
[244] Ibid pp.1095-6.
[245] Delval *supra* no. 242 "*En voulant distinguer le rôle du juge de celui de l'autorité de régulation, le Conseil d'État ne préjuge pas de l'intensité du contrôle, normal ou restreint, qu'il exercera sur les actes qui lui seront déférés*." para 9.
[246] *CE 20 juin 2016, FFSA,* n° 384297 at ibid para. 12.
[247] Ibid para 12.
[248] Schmitz *supra* no. 208 pp.1096-7.

competence and expertise), statutory and judicial review powers, access to justice, and the role of tribunals (as part of the regulatory system of governance). The design of the current administrative law system, to remove issues from the judiciary (High Court) to the tribunals appears to be based on efficiency of administration, reducing the cost of access to justice, and the belief that building in a multidisciplinary panel to adjudicate such cases (including a judge) will allay fears of restriction to access to justice and an independent and impartial tribunal. Does this take power from the courts relating to judicial review? Probably not, given the strict rules of standing in applying for judicial review. It is arguable that it extends access to justice- which is a broader concept than judicial review.

Whilst the courts and tribunals find a balance of powers between them, in terms of deference and the exercise of judicial review, it is quite clear that (even with ouster clauses) the judiciary maintains its role in judicial and statutory review of regulatory authorities in the same way as they would for any administrative authority. What becomes clear in looking at their power of review, is that this power may never have been particularly or even consistently non-deferential. The balance of powers between them is just that- constantly shifting depending on the needs of the parties and the resources of the courts. The use of tribunals has not put a dent in this power and can be argued in fact that the use of tribunals has increase the reach of judicial power in the context of efficient administration in the English legal system. Whilst the tribunal system is an imperfect form of judicial scrutiny, it is developing.

Judicial review by regular courts has been deliberately designed out of regulatory oversight. However, as organisations exercising state-like powers, regulatory authorities cannot be excluded entirely from the purview of judicial review or scrutiny. It is simply understood to be an

impractical method of accountability in a system of regulatory governance that has to respond quickly and broadly to a fast-moving market.

France on the other hand has taken the more methodical path to identifying the type of power exercised by regulators, and how to control it constitutionally and through administrative courts. France, unlike England, has not set up a plethora of specialised tribunals to handle appeals or reviews, and allows a role to both its ordinary and administrative jurisdiction to review regulatory authorities.

However, constitutional principles developed by the *Conseil Constitutionnel* as well as administrative law principles developed by the *Conseil d'Etat* do have some influence over how regulatory authorities are expected to behave. As the research has shown, both the ordinary and administrative jurisdictions will protect rights in balance with the independence and effectiveness of the regulator. As in England, the ordinary jurisdiction is limited in terms of granting remedies for damages, which is not to say that it cannot have an effect on regulatory practices (as discussed earlier), but it is not its primary function. The administrative jurisdiction, as with England, reviews the exercise of power by regulatory authorities on the basis of administrative law principles, but has some overlap function with ordinary courts in that it can sometimes decide on no-fault liability of regulatory intervention. It has overtime, extended the scope of review from secondary legislation to the use of soft law interventions by developing a legal framework thereby creating an avenue of review for parties affected by regulatory decision making.

3. Conclusions

England and France have very different approaches to both institutional design and judicial review of regulatory authorities. Design wise, the French have focused on the effective protection of rights with broad judicial input, whereas the English have focused on effective regulation with limited

judicial input. Both sets of judiciaries have had to grapple with issues of institutional competence and deference.

Earlier in this article, I stated that because of the shift from government to governance, one should see a commensurate shift in terms of judicial power to control the exercise of executive power through regulatory institutions, as a matter of legal constitutionalism. This is whether through judicial review, or through litigation in private law, and the principles of good governance. This relationship has depended very much on historical development and whether a legal system has placed trust in courts or regulatory expertise.

I argued at the start that it is very clear from institutional design around regulatory power that it is a complex picture. There is fragmentation in the legal constitution with influences from international norms. Furthermore, the political shift from centralised government to specialised and decentralised governance has created legitimacy issues that are not easily solved through institutional design.

The paradigm of the constitutions in both England and France is the rule of law and democracy. This threads its way through the jurisprudence of the courts of both countries be it through private or public law jurisdictions. Where governments have attempted to circumvent the courts through ouster clauses, or by limiting the scope of review by public law tribunals and shifting jurisdiction to the private court jurisdictions, the courts have responded with the techniques they have been trained for- to apply the rule of law and the expectations that regulatory authorities adhere to those principles. However, it has been shown that judicial review can only have a limited impact in the field of regulation, due to the nature of a fast-moving market, and the preference of stakeholders to act in coordination with regulators rather than through the courts.

This could be argued to have an impact on judicial restraint and deference. Yes, there are criticisms of the deferential approach taken in both countries, however it is a matter of the degree of deference and not of whether to have it at all. Moreover, in both countries, the courts have developed jurisprudence to protect the rights of parties within the statutory framework for the work of regulators. In France, the *Conseil Constitutionnel* has ensured that any legislative framework includes the legal protection of such rights, and in England, the Human Rights Act 1998 has force in both the courts and the tribunals. As such, although very different, both systems have found a foothold for review in legality and human rights.

Furthermore, the judiciary operates in the legal constitution, yet it should be recognised that the constitutional framework is woven into a broader (albeit imperfect) tapestry of accountabilities and principles of good governance in relation to the exercise of regulatory power, such as the requirement of consultations and transparency of decision making. The judge has oversight of this tapestry when considering whether or not to defer to the regulator. As such, it can also be argued that the court has a wider constitutional view than the expert views of the regulatory bodies on how liberties and the rule of law should and do operate.

Has the judicial role expanded with the expansion of regulation, through judicial review or even private law? It can be argued that access to justice has become “decentred” in England, but due to the way the French legal system has been designed over time, justice has been decentred away from the ordinary judiciary for quite some time. The judicial role itself, in terms of applying principles of the law to the exercise of public power, does not appear to have changed in England or France. The deference question has made judges hesitate and slowly develop jurisprudence to expand the scope of judicial review to protect rights and bring regulatory authorities under the control of the rule of law, but it hasn’t stopped them- the scope of judicial review, as it started off

limited in both countries, can be said to have developed to encompass regulatory decision making, but with a deferential approach.

To answer the question then, from government to governance, from judiciary to…? Given the lack of historical or broad impact of judicial review in regulatory law, it is important to recognise that there have been policies to expand access to justice, where stakeholders can challenge decision making of regulatory authorities. A useful way to look at it maybe from government to governance, *from judiciary to justice*. The judiciary cannot be said to hold a monopoly in giving access to justice in public law, in the same way that it cannot be said that governments hold the monopoly in executive decision making. I'm not even sure, at the end of the research for this piece, whether a constitutional democracy based on a separation of powers (written or unwritten) can be said to operate anymore in any country which governs so much by regulation.

However, in this day and age of political uncertainty and populism in decision making, it is comforting to know that the judiciaries have not altered their approach of applying principles of rule of law to executive power, no matter how changed that power is. They have just been slow in shifting their focus. After all, the questions of deference and legitimacy of public power are not particularly new questions, even for those offering access to decentred justice.