

Principles of Administrative Law

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PREFACE

Administrative law is an exciting topic, in particular for those with an interest in how the law seeks to control the exercise of the enormous powers of the modern state. In the development of the law generally, modern administrative law is a recent, very largely post-Second World War, phenomenon. In legal education, it has grown over the past 20 years from being a component within established constitutional law courses to being a subject in its own right. Its relationship with constitutional law, however, must not be forgotten. The principles and theories received in your study of constitutional law will inform your study of administrative law. Administrative law is also exciting because of its continuous development. Just as modern administrative law was very largely a response to the development of the welfare state, so recent government initiatives such as the privatisation of the great public corporations and the proposed adoption of the European Convention on Human Rights will demand further judicial responses.

The aim of this text is to provide a comprehensive and accessible review of the law as it has developed from both the national and the European perspective.

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*David Stott and Alexandra Felix
Anglia Law School
August 1997*

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TABLE OF ABBREVIATIONS

HA 1980	Highways Act 1980
HA 1985	Housing Act 1985
HA 1996	Housing Act 1996
CJA 1988	Criminal Justice Act 1988
CJA 1967	Criminal Justice Act 1967
CYPA 1933	Children and Young Persons Act 1933
LGA 1972	Local Government Act 1972
SCA 1981	Supreme Court Act 1981
RSC	Rules of the Supreme Court
PA 1964	Police Act 1964
PCA 1967	Parliamentary Commission Act 1967
TIA 1992	Tribunals and Inquiries Act 1992
TIA 1958	Tribunals and Inquiries Act 1958
ECA 1972	European Community Act 1972
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
FC Act 1950	Foreign Compensation Act

THE NATURE AND PURPOSE OF ADMINISTRATIVE LAW

1.1 Introduction

In 1983, Mrs Thatcher, as Minister for the Civil Service, banned trade union membership at the Government Communications Headquarters in Cheltenham. She consulted neither the union itself nor its membership. In 1986, Norfolk County Council adopted a route for a by-pass. As a consequence, a house previously valued at some £400,000 was blighted and rendered valueless. The Council refused to purchase the house on the basis that its acquisition was not necessary for the construction of the by-pass. The Secretary of State for Transport approved the by-pass scheme. In 1988, the Home Secretary directed the IBA and the BBC not to broadcast words spoken by members of 'proscribed' organisations, membership of which was outlawed under the anti-terrorist legislation. In 1992, in a criminal prosecution of three directors of Matrix Churchill for allegedly illegal exports to Iraq, government ministers signed so-called 'public interest immunity' certificates to prevent the disclosure of vital information to the defence. In 1994, the Home Secretary, Michael Howard, set the minimum period to be served by the 10 year old killers of Jamie Bulger at 15 years. In so doing, he refused to follow the recommendations of the trial judge and the Lord Chief Justice of eight and 10 years respectively. In 1995, the same Home Secretary refused entry to the United Kingdom to the Reverend Moon, the founder and leader of the Unification Church, on the ground that such exclusion was 'conducive to the public good'. The minister gave no reasons to support this decision. In 1994, members of the armed forces were discharged solely on the basis of their sexual orientation in accordance with the policy of the Ministry of Defence that homosexuality was incompatible with service in the armed forces.

Each of these decisions affected what would normally be regarded as fundamental rights or freedoms – freedom of association; property rights; freedom of expression; the right to a fair public trial; the right to liberty, subject to a sentence imposed by a court of law; freedom of movement; and freedom from discrimination on grounds of sexuality. Each involved an exercise of power conferred by law – either by statute or prerogative. The question in each case was whether the decision-maker had failed to act according to law in the sense of either having positively overstepped the mark of his or her legal authority or having negatively failed to exercise a power when the law intended it to be exercised.

You will be reviewing each of these decisions in greater depth in future chapters. One of them – that taken in the *Matrix Churchill* case – became the

subject of an Inquiry ('The Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions') under the chairmanship of Sir Richard Scott (see below, p 225). One – the blighted house – became the subject of a complaint to the Parliamentary Commissioner for Administration (the Ombudsman) of maladministration by a central government department. The sequel to this complaint was a challenge before the courts of the Ombudsman's finding that there had been no maladministration (see *R v Parliamentary Commissioner for Administration ex parte Balchin* (1996), below, p 225). The remainder were the subjects of legal challenges before the courts at the national level. Three (*CCSU, Brind* and *Lustig-Prean*) were also challenged at the international level before the machinery of the European Convention on Human Rights. (See *Council of Civil Service Unions v Minister for the Civil Service* (1985), below, p 10; *R v Secretary of State for the Home Department ex parte Brind* (1991), below, p 112; *R v Secretary of State for the Home Department ex parte Venables and Thompson* (1997), below, p 16; *R v Secretary of State for the Home Department ex parte Moon* (1995), below, p 140; *R v Ministry of Defence ex parte Smith* (1995); *R v Admiralty Board of the Defence Council ex parte Lustig-Prean*, below, p 109.)

These issues should give you an idea of what administrative law is about – the legal regulation of exercises of governmental power.

Although administrative law, by its very nature, is concerned with ensuring that public decision-makers act within the law and are, on this basis, accountable before the law, its development is due largely to a desire on the part of the courts to redress the balance of power and to safeguard the rights and interests of citizens. It is arguable that, as effective government accountability to Parliament has diminished, so the courts have stepped in to redress the balance of power. Administrative law is concerned also to ensure that an element of fairness operates in public decision-making and generally to ensure good administration. This is not only to the advantage of the individual citizen. It is to the advantage of government itself. If government is perceived as being accountable for its decisions, whether before an elected legislature and/or before an independent judicial system, the greater the likelihood that the status quo will be maintained. Good government serves to perpetuate itself. Bad government serves to incite revolt.

The purpose of this chapter is to introduce you in broad terms to what administrative law is and the function it fulfils within the constitutional framework of the United Kingdom. Later chapters will add a greater depth to some of the issues you will be introduced to here. Some, if not all, of the principles and concepts dealt with in the latter part of this chapter you will have dealt with in your study of constitutional law. They are included within this chapter to assist you in making the necessary links.

1.2 Definition of administrative law

Administrative law is part of the branch of law commonly referred to as public law, ie the law which regulates the relationship between the citizen and the state and which involves the exercise of state power. Public law is to be contrasted with private law, ie the law which regulates the relationship between individuals, such as the law of contract and tort.

As suggested above, administrative law may be broadly defined as the law which regulates the exercise of power conferred under the law upon governmental bodies.

In the context of administrative law, however, the term 'governmental' is not restricted, as the above examples might suggest, to central government in the form of the executive (the Prime Minister and ministers) and central government departments, although these are clearly included within the term. In this context 'governmental' refers to all public bodies invested with power under the law and so includes, for example, local authorities, the police and public corporations as well as central government. Indeed, a body may be defined as a public body and, as such, be subject to the principles of administrative law, even though it was not established by, and did not derive its powers from, government (see Chapter 6).

Challenges to the legality of governmental decisions may be made by a citizen. 'Citizen' here refers not only to the individual; government decisions may also affect individuals collectively in the form of, for example, trade unions or pressure groups. Such collectives may also take advantage of administrative law in challenging the decisions of government. However, administrative law is not confined to regulating the relationship between the citizen and the state. It also serves to allow challenges by one arm of government to the legality of acts by another arm; in particular, challenges by local government to the legality of actions of central government or vice versa. As such, administrative law may be perceived as a weapon in the hands of the power holders themselves to ensure that each centre of power acts within the legal limits of its authority. Indeed, Bridges, Meszaros and Sunkin (*Judicial Review in Perspective*, 1995, Cavendish Publishing) conclude that:

Judicial review is often depicted as a weapon in the hands of the citizen to be used against the over-mighty powers of central government, and it certainly has performed this role in a number of recent, high profile cases. Our data suggests, however, that over the past decade it has been used more often as a weapon to further limit the autonomy of local government rather than as a constraint on the power of the central state.

The legal regulation of governmental power is to be distinguished from the political control of governmental power. The latter forms the basis of the study of constitutional law. However, as will be seen, political control may impact upon legal regulation.

1.3 Judicial review of administrative action

Whereas administrative law is a generic term encompassing all aspects of the legal regulation of governmental power, judicial review of administrative action refers to the particular jurisdiction of the courts to ensure that a governmental (public) decision-maker acts within the law. The exercise of legal power may often involve the exercise of a discretion to choose between alternative courses of action or, indeed, whether or not to act at all. The essence of discretion is, however, that it is contained within legal limits. A power not contained within such limits would be arbitrary. The principles of judicial review serve to set legal limits to the exercise of discretionary powers.

Such power is most frequently conferred on members of central or local government; for example, the power to compulsorily acquire property, to grant or refuse planning permission, to grant or refuse state benefits, to allow or disallow entry to the United Kingdom, to declare a state of national emergency. It may also be conferred on others, for example, the power given to the police to arrest on reasonable grounds (Police and Criminal Evidence Act 1984), that given to the Metropolitan Police Commissioner to control public processions (Public Order Act 1986) or the power of the Crown Prosecution Service to institute criminal prosecutions.

When Parliament confers power upon a public body by way of statute it will, in the drafting and passing of the statute, normally have set limits to the power given. One would expect the courts to engage in the process of defining the limits of the power as expressed by Parliament. This is no more than fulfilling their function of statutory interpretation. However, the courts have also developed their own standards for the exercise of power asserting that Parliament, in conferring the power, must have *intended* that it be exercised (or not be exercised) in a particular way, for example, *reasonably* and *fairly*.

If a public body acts beyond the legal limits (express or implied) of its power, it is said to be acting *ultra vires*. An *ultra vires* act may be declared void and of no effect by the courts.

In *R v Boundary Commission ex parte Foot* (1983), Lord Donaldson MR quoted Sir Winston Churchill's statement: 'that is something up with which we will not put.' This statement encapsulates the central question of judicial review of administrative action – to what extent must the judges 'put up with' governmental decisions and just how far can they go in order to uphold challenges to their validity? In theory, the judges cannot overturn governmental decisions simply on the basis that they disagree with them. The judges themselves must act within the bounds of *their* legal powers. They must also be aware of constitutional theory and, in particular, take care not to usurp their authority and so create an imbalance of power in their own favour.

This review jurisdiction is considered in detail in Chapters 3–5.

1.4 Powers and duties

So far, we have spoken in terms of a discretionary *power*. However, the law may also expressly impose *duties* which it requires to be exercised. For example, s 65 of the Housing Act (HA) 1985 imposed a duty on local authorities to provide housing for the homeless. A failure to fulfil that duty could be redressed by way of an order of *mandamus* (which specifically requires the fulfilment of a public duty). A decision made in exercise of the duty could be challenged by way of *certiorari* (which quashes the decision). (It should be noted that this duty under the HA 1985 has, in fact, now been replaced by a duty in s 193 of the Housing Act (HA) 1996. Because of the large number of applications for *certiorari* generated under the earlier legislation, the HA 1996 also introduced a right of internal review of a decision and a right of appeal on a point of law to the county court.)

The line between a power itself and a duty may also, on occasions, be blurred. It might be thought that a power is always permissive of the power-holder exercising the power one way or another – a power to act or not to act. However, the creation of a power may in certain circumstances give rise to a duty to act in a particular way:

But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person on whom the power is reposed, to exercise that power when called upon to do so (*per* Lord Cairns LC in *Julius v Bishop of Oxford* (1880)).

Padfield v Minister of Agriculture, Fisheries and Food (1968) is a prime illustration of this. Here, a complaint about the operation of a milk marketing scheme could be referred to a Committee of Investigation 'if the minister in any case so directs'. The minister, in the exercise of this discretion, refused to refer a complaint. On a challenge to the minister's refusal, the House of Lords held that the minister's discretion was not absolute, despite the subjectivity of the language used in the statute. Their Lordships held that the minister *must* (ie he was under a duty to) exercise his power to refer if the complaint was genuine and substantial. Otherwise he could thwart the policy of the Act.

In *R v Secretary of State for the Home Department ex parte Fire Brigades Union* (1995), a Criminal Injuries Compensation Scheme introduced under prerogative power in 1964 was given statutory footing under provisions contained in the Criminal Justice Act (CJA) 1988. The CJA 1988 provided that these provisions were to come into force 'on such a day as the Secretary of State may ... appoint'. In 1993, however, the minister indicated that he would not be activating the provisions but instead intended to introduce a scheme under prerogative power by which awards would be made according to a fixed tariff. This alternative scheme was less favourable to potential claimants. The applicant, whose

members were likely claimants for compensation, argued that, by refusing to bring the statutory provisions into force, the minister had breached his duty under the CJA 1988 and had also abused his prerogative power. Finding in favour of the applicant, both the Court of Appeal and the House of Lords (by a 3 to 2 majority) held that, although the minister was not under a legally enforceable duty to bring the statutory provisions into force at any particular time, the Act did impose upon him a continuing obligation to review whether the provisions should be brought into effect. The minister could not, therefore, bind himself not to exercise his discretion. The alternative scheme he had introduced was inconsistent with the statutory provisions and was unlawful. In the Court of Appeal, it was Sir Thomas Bingham's opinion that the effect of the statutory provisions 'was to impose a legal duty on the Secretary of State to bring the provisions into force as soon as he might properly judge it to be appropriate to do so. In making that judgment he would be entitled to have regard to all relevant factors. These would plainly include the time needed to make preparations and prepare subordinate legislation'. A further relevant factor would be the escalating cost of the scheme and such a factor could justify delaying implementation. However, the Parliamentary intention that the statutory scheme be introduced at some stage in the future could not be disregarded. In the House of Lords, Lord Browne-Wilkinson asserted that it did not follow that, because the minister was not under any duty to bring the provisions into effect, he had an absolute and unfettered discretion whether or not to do so. The plain intention of Parliament was that the minister's power was to be exercised so as to bring the provisions into force when appropriate. The minister was 'under a clear duty to keep under consideration from time to time the question whether or not to bring the sections ... into force ... he cannot lawfully surrender or release [that] power ... so as to purport to exclude its future exercise ...'.

In *R v Derby Justices ex parte Kooner* (1971), the justices refused to order legal aid for representation by counsel in committal proceedings for murder. Section 74(2) of the Criminal Justice Act (CJA) 1967 gave the court a discretion to allow such representation where it was of the opinion that the case was unusually grave or difficult. *Mandamus* was granted to direct representation by counsel. In the circumstances (the nature of the offence and the existence of a practice of allowing representation by counsel in such cases), representation was obligatory. In *Ottley v Morris (Inspector of Taxes)* (1979), the tax commissioners refused to adjourn an appeal against an assessment to income tax. At the hearing, the Crown alleged fraud. The commissioners found the taxpayer guilty. On an appeal (not review here) based on a breach of natural justice, the court held that, although adjournment was *prima facie* within the discretion of the commissioners as this was an allegation of fraud, the taxpayer's evidence was paramount and must be heard.

These cases suggest, therefore, that a power can be transformed into a duty, given the existence of particular circumstances. It might be argued, however,

that they are merely examples of discretion being exercised (in each case negatively) *ultra vires* – acting for an improper purpose and thwarting the object of the Act (*Padfield* and *Fire Brigades Union*), acting unreasonably and failing to fulfil a legitimate expectation based on practice (*Kooner*) and a simple breach of procedural fairness (*Ottley*). (You may wish to review this comment once you have read Chapters 3–5.)

1.5 The public/private dichotomy

So far, in referring to the legal regulation of governmental power, we have used such terms as ‘public decision-makers’, ‘public bodies’, ‘governmental bodies’. These terms have been used interchangeably. The power of judicial review enables the courts to control the exercise of power by decision-makers in the *public* sphere only. As stated by Lord Diplock in *CCSU v Minister for the Civil Service* (1985) (though *cf* HWR Wade [1985] 101 LQR 153):

The subject matter of every judicial review is a decision made by some person or body of persons whom I will call the ‘decision-maker’ or else a refusal by him to make such a decision.

For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers ...

If the decision-maker is not a public body, an application for judicial review will not lie and an action in private law, if available, must be pursued instead. The distinction between a public and a private body can be difficult to discern and will be an issue in any particular case for the court to decide. The court will look to the source of the decision-maker’s power (and, indeed, how the decision-maker itself was created). If that power is derived from the state through statute or the prerogative (or, indeed, the decision-maker itself was created by statute or through an exercise of prerogative power) then the decision-maker will almost certainly be a public body. So, for example, government departments, public corporations, government agencies, local authorities and tribunals are all public bodies; they derive their powers and/or their very existence from the state via statute or the prerogative. The National Health Service, for example, was created by and derives its powers from numerous statutes (in particular, the National Health Service Act 1946 and the National Health Service (Amendment) Act 1986). The foundation for the modern system of local government was laid by the Municipal Corporations Act 1835 with the modern structure and powers of local government being contained in the Local Government Act 1972 as amended.

The public status of the great nationalised industries and services was clear. They were established by, and derived their powers from, statute. With the post

1979 climate of denationalisation the courts were confronted with the question of whether and, if so, in what circumstances the newly 'privatised' utilities such as gas, electricity, water and telecommunications remained public bodies and, as such, their actions subject to judicial review. The courts, however, perceived this policy as amounting to 'the privatisation of the business of government' (per Hoffman LJ in *R v Disciplinary Committee of the Jockey Club ex parte The Aga Khan* (1993)). The functions of the newly privatised industries remained 'governmental' in nature and, indeed, they continued to derive their existence and power from statute – the de-nationalising legislation itself. Further, government itself did not completely relinquish control. In some instances, it established watchdog bodies such as OFWAT (water), OFTEL (telecommunications) and OFGAS. Ministers also retained a certain amount of policy control (see, for example, s 47(3) of the Telecommunications Act 1984; s 39(2) of the Gas Act 1986). Quite apart from subjection to the principles of administrative law, whether a body is a 'public' or 'state' body will also determine whether it is bound by directly effective EC directives (which bind only the state and not private individuals/organisations). Both the national courts and the European Court of Justice have been influenced in determining whether a privatised body is a public or state body by the degree of control which remains vested in the state (see, in particular, *Foster v British Gas* (1991) and *Griffin v South West Water Services* (1995)). This issue is addressed further in Chapter 10.

In similar vein, the Conservative governments between the years 1979–96 vigorously pursued a policy of requiring the 'contracting out' of services by public authorities, in particular local authorities. This was seen as part of the drive towards competition and cost effectiveness in the provision of public services. It is suggested, however, that the principles of administrative law will continue to regulate such exercises of power. It would be unacceptable for a public body to diminish the public law remedies available to the citizen by engaging in the contracting out process. The only question which remains is which body will be liable in public law – the body contracting out or the body accepting the contract. It is suggested that the body contracting out remains so liable; it should not be allowed to escape pre-existing liability simply by engaging in the contracting out process. However, Craig (*Administrative Law*, 3rd edn, 1994, Sweet and Maxwell) suggests that there are precedents for the alternative approach:

The courts have shown themselves willing to apply public law principles in circumstances where a private undertaking is performing a regulatory role with the backing, directly or indirectly, of the state. If this is so then it is difficult to see why these principles should not also be potentially applicable in the context of contracting out.

So, in determining the public status of a body, the courts will look in the first instance to the source of the power. However, the source of the power alone is not conclusive but rather the nature of the decision itself. Consequently, a self-

regulatory body established within a particular field of commercial activity has been held to be a public body and so subject to judicial review. Further, the fact that power is being exercised by a public body will also not necessarily mean that the decision is reviewable in public law. For example, a contract entered into by a public authority or a tort committed by a public authority will be within the realm of private law.

The extent to which public authorities are liable in private law is dealt with in Chapter 12. The public/private distinction is dealt with in more detail in Chapter 6.

1.6 The source of power

We have already noted that the source of the power in the hands of a public body will, as a norm, be statute. It is clear that the exercise of a power derived from statute is reviewable. However, government continues to derive power from the common law prerogative. At one time prerogative power was vested exclusively in the Crown, and some prerogatives still remain in the monarch's personal domain. However, with the establishment of the constitutional monarchy, many of these powers have been transferred into the hands of ministers. These prerogative powers are not written down as are statutes and so their limits may not be as clearly identifiable. The central issue for present purposes is the extent to which the exercise of a prerogative power is reviewable by the courts.

It is now clear that it is not the *source* of the power which determines whether the courts can exercise their supervisory role. It is the *nature* of the power which determines whether the courts can entertain a challenge to an exercise of power. So, for example, it is now clear that, in addition to determining whether a particular prerogative power claimed by government exists and the extent of the power (see *Attorney General v De Keyser's Royal Hotel* (1920); see also *Burmah Oil Co v Lord Advocate* (1965) where the House of Lords held that the prerogative power to destroy property to prevent it falling into the hands of the enemy during wartime did not take away the rights of the property owners to the payment of compensation) the courts can also challenge the *exercise* of a power derived from the prerogative by reference to principles of reasonableness and fairness.

In *R v Criminal Injuries Compensation Board ex parte Lain* (1967), the courts demonstrated a willingness to review the actions of a tribunal established under the prerogative. This principle was confirmed by the Court of Appeal in *R v Home Secretary and Criminal Injuries Compensation Board ex parte P* (1995) where the Board's rejection of claims from victims of sexual abuse within the family was challenged on the grounds that it was arbitrary, irrational and unfair. (The challenge failed on the merits.)

In *Laker Airways v Department of Trade* (1977), the Secretary of State for Trade of a newly formed government tried to effect a revocation of a licence granted by the Civil Aviation Authority to Laker Airways to operate the Skytrain service between London and New York. The minister also withdrew the designation of Laker Airways under the Bermuda Agreement between the UK and the US for the London-New York route. The minister's purpose was to protect British Airways, then a state-owned airline. On a challenge by Laker, one of the minister's arguments was that the withdrawal of designation was a prerogative act in the sphere of international relations and, as such, not open to judicial review. In the Court of Appeal, Lawton and Ormrod LJ overcame this objection by concluding that the prerogative power claimed had, in fact, been superseded by statute. Parliament had intended that the Civil Aviation Act 1971 should govern civil aviation rights. Lord Denning MR, however, was of the view that the courts could review an exercise of prerogative power:

The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity ... The law does not interfere with the proper exercise of the discretion ... but it can set limits by defining the bounds of the activity: and it can intervene *if the discretion is exercised improperly or mistakenly*.

In either case, the Secretary of State could not render a licence to operate ineffective by the indirect means of designation.

In *CCSU v Minister for the Civil Service* (1985), Mrs Thatcher as Minister for the Civil Service, acting under article 4 of the Civil Service Order in Council 1982 made under the prerogative, gave an instruction that the terms and conditions of service of staff at the Government Communications Headquarters (GCHQ) be varied to prohibit trade union membership. This action was taken without consultation despite a well-established practice to the contrary. A trade union and six employees sought judicial review. Although the Court of Appeal and the House of Lords denied the availability of review on grounds of national security (rendering the decision non-reviewable ie non-justiciable), it was held that the executive action was not immune from review merely because it was carried out under a common law or prerogative, as opposed to a statutory, power. Whether the exercise of power was subject to review was not dependant on its source but on its subject matter. As stated by Lord Fraser:

... whatever their source, powers which are defined, either by reference to their object or by reference to procedure for their exercise, or in some other way, and whether the definition is expressed or implied, are ... normally subject to judicial control to ensure that they are not exceeded. By 'normally' I mean provided that considerations of national security do not require otherwise.

However, although it was clear that decisions taken under prerogative were in principle subject to review, it was also accepted that certain prerogative powers, for example, those relating to the making of treaties, may be non-justiciable. As stated by Lord Roskill:

It must, I think, depend upon the subject matter of the prerogative power ... Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review ... the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers ... are not ... susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process.

Not all powers relating to the making of treaties fall into the non-justiciable arena as witnessed by *Laker Airways* (above). In both *Blackburn v AG* (1971) and *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* (1994), challenges to the treaty-making power were not rejected as non-justiciable. See also in the context of the exercise of prerogative powers in foreign affairs (though not in the context of treaties) *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Everett* (1989) where a decision not to issue a passport, an administrative decision which affected individual rights and which was unlikely to have foreign policy implications, was held to be subject to review (though the court exercised its discretion not to award a remedy).

The ability of the courts to subject the exercise of a prerogative power to review has also been raised in the context of the prerogative of mercy. In *Hanratty v Lord Butler of Saffron Walden* (1971) the parents of James Hanratty, hanged in 1962, brought an action against the then Home Secretary for failing to consider properly new material presented to him after conviction but before sentence was carried out. At that point in time, the courts declined to intervene. As stated by Lord Denning, then Master of the Rolls:

The high prerogative of mercy was exercised by the monarch on the advice of one of her principal secretaries of state who took full responsibility and advised her with the greatest conscience and care. The law would not inquire into the manner in which that prerogative was exercised. The reason was plain – to enable the Home Secretary to exercise his great responsibility without fear of influence from any quarter or of actions brought thereafter complaining that he did not do it right. It was part of the public policy which protected judges and advocates from actions being brought against them for things done in the course of their office.

However, more recently in *R v Secretary of State for the Home Department ex parte Bentley* (1994), on an application for review of the Home Secretary's refusal to recommend a free pardon for Derek Bentley who had been hanged in 1953 for the murder of a policeman, the court held that, although the formulation of criteria for the exercise of the prerogative of mercy may not be justiciable as being 'entirely a matter of policy', the Home Secretary's failure to recognise that the prerogative of mercy was capable of being exercised in many different circumstances was reviewable. He had failed to consider the form of pardon which might be appropriate – a posthumous conditional pardon, recognising that the death sentence should have been commuted. The minister should consider his decision afresh. The jurisdiction of the court could not be ousted 'merely by

invoking the word 'prerogative' ... The question is simply whether the nature and subject matter of the decision is amenable to the judicial process ... some aspects of the exercise of the Royal Prerogative are amenable ...' (*per* Watkins LJ). In so finding, Lord Roskill's assertion in *CCSU* that the prerogative of mercy fell into the non-justiciable category was regarded as *obiter*.

Most recently, however, in *Reckley v Minister of Public Safety and Immigration (No 2)* (1996), the Privy Council distinguished *Bentley*, which it considered was 'concerned with an exceptional situation', and found that the prerogative of mercy in relation to death sentences under the Constitution of the Bahamas was not amenable to judicial review (provided the procedures required under the constitution itself had been followed, which they had). Despite attempts by counsel for the applicant to invoke the principle of review of prerogative power, Lord Goff approved the statement of Lord Diplock in *de Freitas v Benny* (1976) that 'Mercy is not the subject of legal rights. It begins where legal rights end'. The Privy Council did not, in fact, state reasons for its view that the situation in *Bentley* was exceptional, though presumably they considered it to be so because there the Home Secretary was found to have misunderstood the relevant law – he had failed to appreciate that a pardon could take a variety of forms.

It might be asked why it has ever been doubted that an exercise of the prerogative is subject to judicial review. Two reasons in particular might be suggested. Firstly, all prerogative power was originally in the hands of the monarch and the monarch could not be sued in his or her own courts. To maintain such an approach today would, however, 'savour ... the archaism of past centuries' (*per* Lord Roskill in *CCSU*). Secondly, the origins of judicial review stem from the *ultra vires* principle. Whereas one can easily see the relationship of *ultra vires* to an exercise of power derived from a statute which sets limits to such power, the association is not so clear in the context of prerogative power. As stated by Neill LJ in *Ex parte P*:

Many of the decisions made by the executive will be in pursuance of a power conferred by statute. In such cases the court will be able to examine the impugned decision in the light of its interpretation of the enabling power ... The court will then be in a position to consider such questions as: Was the action taken *intra vires*? Was a fair procedure followed before the action was taken?

In the present case, however, the decisions as to the scope and terms of the various schemes were taken under prerogative or analogous powers. There is therefore no clear framework, as there is where a power is conferred by statute, by which the legality of the provisions in the same scheme can be judged.

Judicial review is no longer, however, rooted in a strict concept of *ultra vires* (see below, p 44).

It is now incontrovertible that exercises of certain prerogative powers are justiciable. There remains some difficulty in formulating a precise list of these

prerogatives which will have to be decided 'on a case by case basis' (*per* Watkins LJ in *Bentley*).

The remainder of this chapter will review the constitutional concepts (in particular, the supremacy of Parliament, the separation/balance of power and the rule of law) and related principles which underpin judicial review of administrative action. In conclusion, we will consider the relationship between law and politics which is so central to a study of administrative law. These principles and concepts and the law and politics debate should be borne in mind when reading the following chapters on *ultra vires* and natural justice/fairness.

1.7 The role of the courts

The primary constitutional function of the courts in the United Kingdom in this context is to interpret legislation. Parliament is the supreme law-making authority. It can make or unmake any law whatsoever. It has even been observed that the United Kingdom Parliament could make it an offence for a French person to smoke in the streets of Paris.

It is not the judicial function in the UK to challenge the validity of legislation. The words of Lord Campbell in *Edinburgh & Dalkeith Railway v Wauchope* (1842) are still frequently quoted:

All that a court of justice can do is to look to the Parliamentary roll: if from that it should appear that a Bill has passed both Houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, or into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses [the 'enrolled act' rule].

Similarly, in *Lee v Bude & Torrington Railway* (1871) Willes J stated:

If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but, so long as it exists as law, the courts are bound to obey it.

More recent judicial pronouncements confirm the currency of this approach. In *Pickin v British Railways Board* (1974), in a challenge to a private Act of Parliament which, it was alleged, had been secured by misleading the House of Commons, Lord Reid was of the view that: 'For a century or more both Parliament and the courts have been careful not to act so as to cause conflict between them.' Lord Morris echoed the words of judges spoken more than a century earlier:

It is the function of the courts to administer the laws which Parliament has enacted ... When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the Statute Book at all.

It made no difference that a private Act of Parliament was being impugned.

Such statements asserting the primacy of Parliament did not pass entirely without an alternative view being expressed. In *Dr Bonham's Case* (1610) Coke CJ had asserted that:

In many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void.

Rather more recently, in *Oppenheimer v Cattermole* (1976) the House of Lords was of the view that a Nazi law which deprived German Jews resident abroad of their nationality and confiscated their property to be 'so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all'.

The traditional theoretical position, however, is well-established and serves to distinguish the United Kingdom courts from, for example, the United States' Supreme Court which has assumed a function of ensuring that the United States' authorities act within what the Supreme Court interprets to be the demands of the written US constitution and Bill of Rights (see *Marbury v Madison* (1803)).

The debate over a Bill of Rights and/or written constitution for the United Kingdom, which would place a much increased power of control over the executive in the hands of the judiciary, has at times raged (see, for example, Zander, *A Bill of Rights* (3rd edn, 1985, Sweet and Maxwell), Lord Hailsham, *The Elective Dictatorship* (1976), Lord Lloyd, *Do We Need a Bill of Rights?* (1976) 39 MLR 121, Lord Scarman, *English Law – The New Dimension* (1974, Stevens); compare Griffiths, *The Politics of the Judiciary* (3rd edn, 1985, Fontana)). The newly elected Labour government has now committed itself to the incorporation of the European Convention on Human Rights into national law, although the nature and form such incorporation will take remains unclear. At this moment in time there is, however, with one exception, no higher form of law by reference to which the courts may challenge an Act of Parliament. The one arguable exception to this is the law emanating from the EC – and then arguably only because the United Kingdom Parliament stated in the European Communities Act 1972 that this must be given precedence over national law. This, in theory, leaves it open to the UK to pass legislation explicitly stated to override European law and to withdraw from the EC altogether (see *Macarthys Ltd v Smith* (1981) and see Chapter 10). It is clear that judicial review lies against primary legislation which is challenged by reference to Community law (see *R v Secretary of State for Transport ex parte Factortame* (1991) and *Equal Opportunities Commission v Secretary of State for Employment* (1994)). The European Convention on Human Rights is an international treaty (quite separate from the EC treaties) which cannot *per se* be enforced in the national courts (though it can be used as an aid to the interpretation of a statutory provision which is ambiguous). To date, all

attempts to have the Convention embodied in an Act of Parliament, so rendering it enforceable *per se* in the domestic courts, have failed. However, certain principles of the European Convention may be enforceable through the 'back door' of EC law as representing general principles of law (see *Nold (Firma J) v Commission* (1974)). (On the European Convention see further Chapter 11.)

1.8 The balance of power

In the United Kingdom, there is no strict separation of powers. In particular, we have a Parliamentary executive, ie a system in which ministers (the most important of whom form the main political policy-making body, the Cabinet) are drawn from one of the Houses of Parliament, predominantly the House of Commons as this is the elected body and therefore deemed to be representative. By constitutional convention, of course, the Prime Minister in the United Kingdom must be drawn from the House of Commons (hence the renunciation by Alexander Douglas Home in 1963 of his hereditary peerage to enable him to succeed Harold Macmillan).

This absence of a separation of powers is again very much the product of the absence of a written constitution, a primary function of which is to identify the organs of government, their powers and their relationships *inter se*. So, for example, the United States constitution defines the executive (the President), the legislature (the House of Representatives and the Senate, forming Congress) and the judicial body entrusted with the task of upholding the constitution (the Supreme Court). It also establishes the membership of the organs of government, their functions and relationship.

In the United Kingdom, it is claimed that, rather than a strict separation, a delicate balance of power is maintained. Some would argue, however, that the balance of power, at least within Parliament, has shifted too much in favour of the executive, despite the relatively recent (1979) introduction of the 'new' Select Committee system.

The role of the courts in the context of judicial review must be considered as an essential feature of this balance of power. Wade and Forsyth (*Administrative Law*, 7th edn, 1994, Oxford University Press) describe the courts as being 'a kind of legal antidote to the unqualified sovereignty of Parliament, redressing the balance of forces in the constitution'. To a large extent this is true. Parliament and the executive will normally accept the consequences of the decisions of the courts. However, Parliament (and the executive on the assumption that it will be able to persuade the majority party within Parliament) might have the final say by securing the passing of legislation to effectively overturn the decision of the courts. This might even be done with retrospective effect as when the War Damage Act 1965 was passed to negate the effects of the decision of the House of Lords in the *Burma Oil* case (above). (Although this action on the part of government was strongly criticised by JUSTICE (the British branch

of the International Commission of Jurists) as constituting a serious infringement of the rule of law (see below, pp 22–23) by which was understood the supremacy of the courts and the overriding need to respect the decisions of the judiciary.)

It might be argued that, as the back-benchers within Parliament have become less effective in controlling the actions of the executive, so the courts have displayed a greater willingness to intervene to prevent excessive concentration of power and so protect the citizen from abuse of power. Indeed, a member of the House of Lords has recently made such an assertion in *R v Secretary of State for the Home Department ex parte Fire Brigades Union* (1995) where Lord Mustill stated:

It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain ... The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, not only to verify that the powers asserted accord with the substantive law created by Parliament, but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently ... Parliament has its own special means of ensuring that the executive ... performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country. In recent years, however ... these specifically Parliamentary remedies [have] ... been perceived as falling short, and sometimes well short, of what was needed ... To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground ...

In the *Fire Brigades Union* case itself (see above, pp 5–6) Lord Mustill dissented and considered that the court should not intervene. To do so would ‘push to the very boundaries of the distinction between court and Parliament’.

In recent months, however, the judiciary and the executive have been locked in combat both inside and outside the courts of law. The judges have upheld a series of important challenges to governmental decision-making inside the courts. One of the prime areas of conflict has been that of sentencing powers. The courts, understandably, regard this area as being very much within the judicial domain and will jealously guard such powers from what they perceive as being excessive executive interference.

In *R v Secretary of State for the Home Department ex parte Venables and Thompson* (1997), Michael Howard, the Home Secretary, acting under statutory power (s 35 of the Criminal Justice Act 1991), set a tariff of 15 years as the minimum to be served by the applicants who, at the age of 10, had murdered the two year old James Bulger. (The tariff period sets the minimum sentence to be served before the Parole Board can express a view on release. It does not establish a date for release. The full sentence for murder is (for children) detention

at Her Majesty's pleasure (under s 53 of the Children and Young Persons Act (CYPA) 1933) and (for adults) a mandatory life sentence.) The minister's decision letter stated that he had had regard to the public concern about the case, which was evidenced by public petitions and other correspondence. (This referred, in particular, to a petition signed by some 278,300 people, with some 4,000 letters in support, urging that the boys be detained for life; a petition signed by 6,000 people requesting a minimum period of 25 years; and over 20,000 coupons, cut out of a newspaper (*The Sun*), with 1,000 letters, demanding a life tariff.) The trial judge (Morland J) had recommended eight years as being the length of detention necessary to meet the requirements of retribution and general deterrence for the offence (the 'penal element' of the tariff). Had the offence been committed by adults, he would have recommended 18 years. The Lord Chief Justice, Lord Taylor, had recommended 10 years. He agreed with Morland J that a much lesser tariff should apply than in the case of an adult. Only 33 of the letters received from the public had agreed with the judiciary or asked for a lower tariff.

In a challenge to the Home Secretary's decision, the Divisional Court held that the Home Secretary had acted unlawfully. Here again the relationship between a power and a duty (see above, p 5–7) was influential. The court considered that a sentence of detention during Her Majesty's pleasure under the CYPA 1933 created not only a power but a duty on the part of the Secretary of State to keep the question of detention under review throughout the period of detention. The Criminal Justice Act 1991 had not affected this and the practice of the Home Secretary, as expressed in a Policy Statement of 1993, that, like adults serving mandatory life sentences, young offenders must serve an identified penal element in their sentence before release could be considered was unlawful.

On appeal, whilst agreeing with the conclusion that the Home Secretary had acted unlawfully, the majority of the Court of Appeal disagreed with the reasoning of the Divisional Court, preferring to base its decision on a failure by the Home Secretary to conduct himself fairly (only Lord Woolf MR agreed also with the reasoning of the Divisional Court). The Home Secretary had failed to disclose all the material on which his decision was based (including the trial judge's summary of the facts and the view he had taken of them and a supplementary psychiatric report on one of the defendants), had failed to take into account all relevant considerations (including the trial papers and the trial judge's summing up) and had taken into account irrelevant considerations (including public petitions).

The House of Lords (Lord Lloyd dissenting) dismissed the Home Secretary's appeal. Again, the approach of the Divisional Court was rejected. However, Lord Goff was of the opinion that the Home Secretary had taken into account the irrelevant consideration of the public clamour which had been directed towards the decision in the particular case. He commented:

That there was public concern about this terrible case, there can be no doubt. Any humane person must have felt ... horror that two boys as young as the two respondents should have perpetrated such a brutal crime ... But events such as this tend to provoke a desire for revenge ... This elemental feeling is perhaps natural, though in today's society there is a tendency for it to be whipped up and exploited by the media. When this happens, it can degenerate into something less acceptable. Little credit can be given to favourable responses that the two respondents should 'rot in jail' for the rest of their lives, especially when it is borne in mind that those who responded may well have been unaware that, even after the penal element in their sentences had been served, their release would not be automatic but would be the subject of very careful consideration

...

Whilst it would be legitimate for a sentencing authority to take into account public concern of a general nature, for example the prevalence of certain types of offence, to take into account public clamour that a particular offender be singled out for severe punishment was not.

Lord Browne-Wilkinson preferred to base his opinion on the adoption of an unlawful policy by the minister. He noted that the question was not whether the court agreed that the 15 year tariff was appropriate, but whether the Home Secretary had acted lawfully. The inflexible policy adopted precluded the minister from having regard to the welfare of the children as required by s 44 of the CYP A 1933. The policy:

... totally exclude[d] from consideration during the tariff period factors [ie their progress and development] necessary to determine whether release from detention would be in the interests of the welfare of the applicants. Such welfare is *one* of the key factors which the Secretary of State has to take into account in deciding from time to time how long the applicant should be detained. This does not mean that in relation to children detained during Her Majesty's pleasure any policy based on a tariff would be unlawful. But any such tariff policy would have to be sufficiently flexible to enable the Secretary of State to take into account the progress of the child and his development. In relation to children, the factors of retribution, deterrence and risk are not the only relevant factors: the welfare of the child is also another relevant factor.

In his dissenting opinion, Lord Lloyd did not agree that the minister's decision was so far beyond what was reasonable as to point inevitably to a wrong approach. Apart from the children's welfare, he had also been entitled to have regard to other factors, especially the need to maintain confidence in the criminal justice system. In this context, he could not see why the minister should not take account of genuine public concern, demonstrated by the petitions and letters, over a particular case. It was not possible to distinguish between public concern directed at penal policy in general and that directed to a particular case. Further, Parliament had entrusted the Home Secretary with the task of maintaining confidence in the criminal justice system and it was not for the courts to tell him how to perform that task.

Lord Steyn, in finding that the Home Secretary had been wrong to give weight to the public clamour, made a direct comment that: 'In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function'. He commented further:

Parliament entrusted the underlying statutory power ... to the Home Secretary. But the power to fix a tariff is nevertheless equivalent to a judge's sentencing power. Parliament must be assumed to have entrusted the power to the Home Secretary on the supposition that, like a sentencing judge, [he] would not act contrary to fundamental principles governing the administration of justice. Plainly a sentencing judge must ignore a newspaper campaign designed to encourage him to increase a particular sentence. It would be an abdication of the rule of law for a judge to take into account such matters.

A further recent decision of the House of Lords, *R v Secretary of State for the Home Department ex parte Pierson* (1997), has called into question whether a Home Secretary has the power to increase a tariff already set by himself or by a predecessor. Their Lordships (by a majority of 3 to 2), allowing an appeal from the Court of Appeal, were of the opinion that Michael Howard exceeded his powers when, on the grounds of meeting requirements of retribution and deterrence, he increased the tariff that John Pierson, a double murderer, must serve before being eligible for consideration for parole from 15 to 20 years. (Pierson had, in fact, been one of the successful applicants in *ex parte Doody* (1994) below, p 139.) The decision has implications for other prisoners who have been given a whole life tariff, including Myra Hindley (one of the 'Moors murderers', with Ian Brady), Peter Sutcliffe (the 'Yorkshire Ripper') and Denis Neilson (the 'Muswell Hill murderer'). (However, even though a Home Secretary may not now be able to increase a tariff once set and communicated, he or she still retains the ultimate power to refuse a recommendation for release from the Parole Board.)

Outside the courts also the judiciary and executive have come into conflict over sentencing policy. Senior members of the judiciary have publicly criticised proposed policies on the punishment of offenders who repeat serious offences, including offences against the person and drugs offences, as embodied in the 1997 Crimes Bill. They perceive such policies as themselves impinging upon their own discretion in determining appropriate sentences for the commission of offences. They assert that here they are best placed to deal with offenders on a case by case basis and that the executive is invading the judicial function. With the recent appointment of Lord Woolf, a judge who has contributed much to the recent development of administrative law, to the post of Master of the Rolls, it is not unlikely that this battle will intensify.

The extent to which the courts do, or should, use their powers of judicial review as a vehicle for substituting their own decisions for those of the body upon whom the decision-making power was conferred (in particular, members of the executive) is a perennial focus for debate. Some may perceive the judi-

ciary as redressing an imbalance of power in favour of the executive within Parliament. One school of thought, however, argues that the judiciary cannot be trusted to safeguard the many valid interests and values in today's society, and that they have overstepped the boundary in their application of the concept of reasonableness to endorse their own values. Proponents of this school point out that the judiciary are unelected, unrepresentative and largely unaccountable. The executive may not be trustworthy either, but it is to be preferred that power be exercised by an executive within Parliament which is at least ultimately accountable through the electorate.

A leading proponent of this school of thought is Professor Griffith (see *The Politics of the Judiciary*, 3rd edn, 1985, Fontana) who claims that the senior judges 'have by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the public interest'. Professor Griffith quotes analyses of the backgrounds of senior members of the judiciary which establish that they predominantly share public school and Oxbridge educations – although he also points out that, with the expansion of university education since the 1960s, some successful barristers without public school or Oxbridge educations will join the ranks of the judiciary. Professor Griffith quotes statistics from the Lord Chancellor's Department that in 1991 of 550 judges (from the Law Lords to the Circuit bench) one was black while 17 were women. He asserts that the rules developed by the courts themselves are sufficiently flexible to allow a facade of objective decision-making which masks real subjectivity: 'Each of the three possible bases of judicial review – illegality, irrationality, procedural impropriety – is sufficiently imprecise to enable judges to jump with the cat in any direction they choose.' He reviews the growth of interventionism by the judiciary and, albeit it might be argued selectively, assesses their performance in judicial decision-making. He concludes:

Judges are concerned to preserve and to protect the existing order. This does not mean that no judges are capable of moving with the times, of adjusting to changed circumstances. But their function in our society is to do so belatedly. Law and order, the established distribution of power both public and private, the conventional and agreed view amongst those who exercise political and economic power, the fears and prejudices of the middle and upper classes, these are the forces which the judges are expected to uphold and do uphold.

In the societies of our world today judges do not stand out as protectors of liberty, of the rights of man, of the underprivileged ... Only occasionally has the power of the supreme judiciary been exercised in the positive assertion of fundamental values.

It is on this basis also that Professor Griffith opposes the incorporation of the European Convention on Human Rights into English law (see Chapter 11). Such incorporation would, in his view, confer too great a power upon the judiciary.

This is essentially a question of who is to be trusted more to protect individuals and groups within society – the executive within Parliament or the judges.

Professor Griffith's view, of course, does not by any means go unchallenged. Simon Lee (himself an Oxford graduate) in *Judging the Judges* (1988, Faber) accuses Griffith of 'merely saying that he disagrees with the decisions'. He gets the impression that Griffith 'would almost always decide the opposite way, against property, stability, the Conservative party, etc'. On the other hand, Lee also rejects the philosophy that the judges are merely applying pre-existing, if sometimes latent, legal principles. The judges are being creative and, in so doing, they are influenced by a variety of factors:

... it is unfair to blame them on the class argument ... it is utopian to believe that the judges are merely teasing out principles latent in the law ... it is the height of naivety to suppose that the judges are value-neutral discoverers of the law.

1.9 Review/appeal

The declared function of the courts in the context of judicial review is one of *review* rather than *appeal*. That is, the courts are here concerned with the correctness of the decision *in law*. They are not concerned with whether the decision is good *on the merits*, ie whether they agree with it. As asserted by Lord Brightman in *Chief Constable of North Wales v Evans* (1982), the judges are concerned 'not with the decision but with the decision-making process'.

It is in the realm of challenges based on the principle of reasonableness that the distinction between legality and merits is most blurred. As noted by Professor HWR Wade (*Administrative Law*, 7th edn, 1994, Oxford University Press, at p 399):

The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts *ultra vires*. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.

The statute itself may confer a right of appeal on the individual affected by the decision made. This right of appeal operates independently of the right of review, and must normally be exercised before the courts will consider exercising their powers of judicial review. If Parliament has provided for a specific remedy then the intention of Parliament in providing that remedy must be fulfilled before resort is had to the courts' powers of review.

Some commentators (see in particular Griffiths, *The Politics of the Judiciary*,

above) would argue, however, that in exercising their powers of review, the judges do not confine themselves objectively to a consideration of the legality of decision-making. The principles of legality themselves provide the judges with enormous flexibility. It is their value judgment which determines, for example, whether the decision-maker has taken irrelevant considerations into account, failed to take relevant considerations into account, or been unduly influenced by ulterior motives. In making their value judgments, are we to expect or believe that the judges will not be influenced by their own views of whether a particular decision is right or wrong? Especially so when many of the cases brought before the judges are rooted in issues of political ideology.

The highly charged political nature of many of these decisions also serves to explain why it is these cases which now end up before the courts. In its modern day origins, the development of administrative law has been explained as a response by the courts to the increasing intervention by the state in the everyday lives of the individual. However, most of the cases you will study in this context will not involve isolated challenges by the individual to exercises of state power. They will involve challenges by groups of one political persuasion to the decisions of groups of an opposing political persuasion. Recourse to judicial review has also become something of a weapon in attempts to delay the implementation of particular decisions. In the context of a challenge to the decision of a government coming to the end of its political life, delay can be as effective as a successful challenge.

1.10 The rule of law

The 'rule of law' is an ephemeral phrase which is used to mean a variety of things according to the context in which it is being used. It may be used to mean that people must act according to the law, ie that the law is supreme and must be obeyed. In this context it is used to suggest that citizens must act lawfully and, should they want to effect change, they must operate through the normal democratic processes. In particular, this use of the 'rule of law' denies any legitimacy to acts of terrorism. In the context of administrative law, the principle also requires that government acts according to law.

The rule of law also demands that the law itself fulfils minimum standards. It is this concept with which we are concerned in the context of judicial review where the 'rule of law' assumes meanings encompassing principles of accountability, equality, the absence of arbitrariness and the presence of fairness in decision-making.

Dicey, writing in 1885, identified the rule of law as one of two features which have at all times since the Norman Conquest characterised the political institutions of England, the other of these features being the omnipotence or undisputed supremacy of the central government (see AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, Macmillan,

at pp 183–84). By ‘rule of law’ Dicey meant ‘the security given under the English constitution to the rights of individuals looked at from various points of view’. He identified the rule of law, as a characteristic of the English constitution, as including at least three distinct though kindred concepts:

- ‘It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.’

In this context, Dicey noted the case of *Entick v Carrington* (1765) (see below, p 25).

- ‘... not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.’

‘It means, again, equality before the law, or the equal subjection of all classes to the ordinary law administered by the ordinary law courts ...’

Dicey was anxious to draw a comparison with the French system of *droit administratif* and *tribunaux administratifs* whereby complaints against the actions of the administration are dealt with by specially constituted courts. This system (which he appears to have misunderstood) he perceived as being weighted in favour of the administration.

- ‘... the constitution is pervaded by the rule of law on the ground that the general principles of the constitution ... are with us the result of judicial decisions ... Our constitution, in short, is a judge made constitution ... There is ... an absence of those declarations or definitions of rights so dear to foreign constitutionalists.’

This difference was noted by Dicey to be one of form. However, he perceived the advantage of the English model to be that it ensured that where a right existed it was accompanied by a remedy – *ubi ius ibi remedium*.

Yet another meaning given to the rule of law is that laws should be prospective, open, clear and stable (see Raz, ‘The Rule of Law and its Virtue’ (1977) 93 LQR 195).

The principles of accountability and the absence of wide discretionary power on the part of government are of particular significance in administrative law.

1.11 The principle of accountability

The principle of accountability requires that there must exist forums in which decision-makers may be called to account to justify their actions. Such accountability may be political or legal. A minister should be accountable to Parliament at the political level to justify, for example, that decisions taken are in the best interests of the nation. The principles of judicial review enable the courts to call decision-makers to account for the legal propriety of their decision-making. The distinction was clearly made by Sir John Donaldson MR in *R v HM Treasury ex parte Smedley* (1985), where the applicant challenged an undertaking specified in a draft Order in Council (designating as a Community treaty within s 1(2) of the European Communities Act 1972, a treaty providing extra funds to the Community) laid before Parliament to make payments to the EC to finance a supplementary budget:

... it would clearly be a breach of the constitutional conventions for this court ... to express a view, let alone take any action, concerning the decision to lay this draft Order in Council before Parliament or concerning the wisdom or otherwise of Parliament approving that draft. Equally ... there can be no possible constitutional objection to Parliament debating this draft merely because this court is seized of [a] complaint. The exercise upon which Parliament would be engaged and that upon which we are engaged are essentially different.

On occasions, these principles have become confused. Ministers have tried to argue that their political accountability to Parliament precludes accountability to the courts.

In *Liversidge v Anderson* (1942), the answerability of the Home Secretary to Parliament was one of the influences which convinced the House of Lords to decline to challenge a decision taken during the Second World War to intern without trial a person whom the minister believed to be of hostile origin or associations. Fortunately, the courts do not now normally accept such an argument to preclude their powers of review (see *Congreve v Home Office* (1976)).

However, accountability to Parliament in the sense of ministerial regulations being subject to formal Parliamentary approval remains an important factor considered by the courts in determining the justiciability of decisions (see on justiciability generally, Chapter 3, and on Parliamentary approval in particular, *Nottinghamshire County Council v Secretary of State for the Environment* (1986). *Liversidge v Anderson* itself must be regarded as a very special, and not representative, war-time decision. It was described as 'a very peculiar decision' by Lord Reid in *Ridge v Baldwin* (1964) and also repudiated by the House of Lords in *R v IRC ex parte Rossminster* (1980) (see below, p 26).

1.11.1 Discretionary versus arbitrary power

There is an essential distinction between arbitrariness and the exercise of discretion. An arbitrary power is one which is open-ended, not subject to identifiable limits and, therefore, not capable of being controlled by the courts. Such a power was evident in *R v Secretary of State for Social Services ex parte Stitt* (1990), where the Court of Appeal accepted that Parliament had conferred an unfettered power upon the minister, albeit that this was regarded as ‘an unwelcome feature of a dominant executive in a basically two-party democracy’. By comparison, the essence of a discretion is that it is limited and, therefore, its exercise is subject to control, ie ensuring that the discretion is exercised within the legal parameters set for its exercise.

As noted above, Dicey illustrated the operation of his first meaning by reference to the case of *Entick v Carrington* (1765).

Entick v Carrington (1765)

Here, the Earl of Halifax, Secretary of State, issued a warrant to search for Entick, mentioned in the warrant as being the author, or one concerned in the writing of, weekly seditious papers entitled ‘The Monitor’ or ‘British Freeholder’ and, having found him, to seize his books and papers. Four King’s messengers entered Entick’s house, apprehended him, conducted a search of the premises for some four hours and seized papers. Entick sued the King’s messengers for trespass. In their defence, the messengers relied upon the warrant as authority. In response to this assertion, counsel for the plaintiff retorted:

... ransacking a man’s secret drawers and boxes to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff’s books and papers without exception, and carry them before Lord Halifax; what? has a Secretary of State a right to see all a man’s private letters of correspondence, family concerns, trade and business? This would be monstrous indeed; and if it were lawful, no man could endure to live in this country.

Lord Camden CJ, agreeing with counsel, made his now famous statement that:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ...

An argument of state necessity put forward by counsel for the defence was unreservedly rejected by Lord Camden in the following terms:

It is then said that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards ... with respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take note of any such distinctions.

Arguably, however, the spirit of *Entick v Carrington* has not entirely withstood the test of time and the ascendancy of Parliament within the constitutional power struggle (see *Ex parte Stitt* above). Two cases where important civil liberties issues were at stake – police powers of entry and search of premises and seizure of goods and the invasion of a person’s privacy by way of telephone tapping (both broad issues central to the case of *Entick v Carrington* itself) – perhaps serve to illustrate this. One of these cases – *R v IRC ex parte Rossminster* (1980) – involved the exercise of statutory powers; the other – *Malone v Metropolitan Police Commissioner* (1979) – involved the exercise of a power (to tap telephones) conferred arguably by neither statute nor the common law, but considered to be lawful by the court since the law did not actually prohibit such conduct.

***Ex parte Rossminster* (1980)**

In *Rossminster*, search warrants issued under s 20 of the Taxes Management Act 1970 authorised officers of the Inland Revenue to enter premises and to seize ‘any things whatsoever’ reasonably believed to be evidence of an offence ‘involving any form of fraud’ in connection with tax. The warrants simply repeated the wording of the Act and did not specify any particular offence(s). Acting under the authority of the warrants, the applicants’ business premises and homes were searched and documents of all kinds, from bank statements to children’s school reports, were seized. The validity of the warrants was challenged on the basis that they did not specify what offence was suspected – they were, in effect, general warrants so abhorred in *Entick v Carrington*.

In the Court of Appeal, Lord Denning described the execution of the warrants as ‘a military style operation’ involving some 70 officers of the Inland Revenue in their war against tax frauds. The warrants were held to be invalid for their lack of particularity. Lord Denning asserted the role of the courts as the guardians of individual liberties against abuse of power by the state:

... the legislation is drawn so widely that in some hands it might be an instrument of oppression. It may be said that ‘honest people need not fear: that it will never be used against them ... That is an attractive argument, but I would reject it. Once great power is granted, there is a danger of it being abused. Rather than risk such abuse, it is ... the duty of the courts so to construe the statute as to see that it encroaches as little as possible on the liberties of the people ...’

However, this decision was reversed by the House of Lords on the basis that the statute had been complied with and it did not explicitly require the suspected offence(s) to be particularised. Lord Wilberforce explained his reasoning as follows:

The courts have a duty to supervise, I would say critically, even jealously, the legality of any purported exercise of these powers. They are the guardians of the citizens’ right to privacy. But they must do so in the context of the times, ie of

increasing Parliamentary intervention, and of the modern power of judicial review. In my respectful opinion appeals to 18th century precedents of arbitrary action by Secretaries of State and references to general warrants (an apparent reference to *Entick v Carrington*) do nothing to throw light on the issue ... it is no part of [the courts'] duty, or power, to restrict or impede the working of legislation, even of unpopular legislation; to do so would be to weaken rather than to advance the democratic process.

Lord Wilberforce further justified this approach by reference to the safeguards built into the Act – the need for the approval of the Board of Inland Revenue, that a warrant was to be issued by a circuit judge and the use of phrases such as 'is satisfied' and 'has reasonable cause to believe' so preserving the courts' 'full powers of supervision of judicial and executive action'. The applicants could also proceed by way of an action in trespass (though this would lead only to damages and not a declaration as to the validity of the warrant and return of all the property seized).

Malone v MPC (1979)

In *Malone*, the plaintiff, an antiques dealer, was suspected by the police of handling stolen goods and was charged accordingly. In the course of the trial, it was revealed that the police had tapped the plaintiff's telephone on the authority of a warrant issued by the Home Secretary. The plaintiff was, in fact, acquitted of the alleged offence and instituted proceedings for a declaration that the practice of telephone tapping was unlawful as an infringement of his right to privacy, a trespass and a breach of Article 8 of the European Convention on Human Rights. The then Vice Chancellor, Sir Robert Megarry, whilst recognising that the practice of telephone tapping was 'a subject which cries out for legislation', nevertheless held that it required no authorisation by statute or common law and could be done 'simply because there is nothing to make it unlawful'. (Malone subsequently successfully challenged the practice of telephone tapping as it operated in the United Kingdom before the European Court of Human Rights (see *Malone v UK (1982)*). The government responded to that judgment by passing the Interception of Communications Act 1985. See *Malone v UK (1982)*.)

1.12 The discretionary nature of the remedies

Even if the court accepts that the decision challenged is within a justiciable field and that the decision was *ultra vires* or in breach of procedure, a remedy will not automatically follow. The maxim *ubi ius ibi remedium* does not apply with full force. The nature of the remedies in judicial review is discretionary. The court has, on occasions, declined a remedy on the ground that it disapproved of the moral standards of the applicant (see *Ward v Bradford Corporation (1971)*). In the *Everett* case (see above, p 11) the minister had failed in his duty of

communicating the reasons for his refusal to issue a passport and failed to hear representations to justify an exception to his normal policy. However, no remedy was awarded because, as the applicant had since received all information which the minister should have given and there were no exceptional circumstances to justify the issue of a passport, the applicant had suffered no injustice.

1.13 Law and politics

Administrative law is, by its nature, concerned with the regulation of state activity. The state is, by its nature, a political monolith. The modern state is highly interventionist; in particular in the regulation of the economy and the establishment of social norms. The subject matter of many of the challenges to exercises of state power are, therefore, of necessity rooted in differences between the protagonists' political ideologies. This is especially so where the challenger to state action is a pressure group which will itself owe its very existence to the promotion of a (often highly 'political') cause. It is clearly equally so where the challenger is itself part of the state and, *ipso facto*, political in its very origin and nature, the clearest example of this being conflicts between central and local government. (It must not be forgotten that administrative law is not merely a weapon in the armoury of those who wish to challenge the actions of central government departments of state. It can be used by the state itself to secure compliance with the law by others. Indeed, as will be seen in Chapter 2, this was the very reason for the origin of the prerogative writs, adopted by the courts to provide a remedy when exercising their supervisory jurisdiction, themselves.) The question of what the relationship between law and politics is or what the relationship should be has been the subject of considerable theoretical debate. This debate is by no means confined to the realm of administrative law but it has often taken centre stage in the arena of administrative law.

There has, for many years, existed a division of approaches to the very study of law itself. The 'black letter' school perceives law as a discrete set of rules to be interpreted in isolation from any economic, social or political context. Law is a discipline in its own right and is not to be confused with the economic, social or political sciences. The function of the lawyer is to determine what the law is and not to subject it to a critical examination within the broader context. The 'contextual' school, on the other hand, perceives the relationship between law and economic, social and political theory to be central to a study of the law. Indeed, the law itself will be a manifestation of governmental ideology – the law *is* an instrument of government. As stated by Harlow and Rawlings (below):

Behind every theory of administrative law there lies a theory of the state. Laski once said that constitutional law was unintelligible except as the expression of an economic system of which it was designed to serve as a rampart. By this he meant that the machinery of government is necessarily an expression of the

society in which it operates and that it is impossible to understand the one except in the context of the other. Both constitutional and administrative law are concerned with the machine of government. Laski's aphorism is applicable to the one just as it is to the other.

As such, the law is not merely a set of rules to be applied mechanistically. The impact within society generally should be a consideration in preferring one interpretation over another.

These approaches raise broad questions for administrative law. What is the role of the law? What is the function of the judiciary? Should the judges disregard the impact of their decisions, be it economic, social, cultural or political? If not, do the judges have the expertise to assess such impact? Who is to be entrusted with the ultimate power – government or the judiciary? This broad theoretical debate has been the subject of considerable commentary, some of which has been referred to (see above, pp 20–21). As a conclusion to this introductory chapter, we will review in brief the competing approaches to the relationship between government and law. Such approaches have been labelled 'red light' and 'green light' theories.

Red light and green light theories

This terminology was first used in the context of English administrative law by Harlow and Rawlings (*Law and Administration*, Weidenfeld and Nicolson) in 1984 in their evaluation of the objectives of administrative law. Essentially it is argued that red light theorists perceive the law operating as a *control* over the acts of government. The independence of the judiciary within the framework of the constitutional balance of powers is stressed. As asserted by Barker (*Political Ideas in Modern Britain*, 1978):

Judicial theory has not constituted a major part of political ideas in Britain. The law has been considered to be a world neutrally detached from the contests of political ideas and argument. Particular judgments may have had recognisable political consequences which have been applauded or resisted, but the general character of the judicial system and the general assumptions of law have been little considered in debate about the political character and goals of the nation.

Red light theorists view the world of law as 'apolitical, neutral and independent of the world of government, politics and administration'. Such theorists support the notion that state intervention should be limited to the traditional fields of defence, security, criminal law and public order. They advocate that administrative law should aim to *curb* or *control* the state. Their themes include 'suspicion of the growing power of the administration, emphasis on 'control' and 'ancient liberties' which are being eroded and the fear that government will 'run amok'. The greatest exponent of this tradition would be Dicey himself (*An Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, Macmillan) with his emphasis upon the rule of law as a mechanism for the control of state power and the protection of the individual.

Red light theories perceive the prevailing tradition of English administrative law as positivist, ie focusing on law as a system of rules and downplaying the link between law and morality, as opposed to realist, ie seeing law in action or law as it functions within society.

On the other hand, green light theorists support ideas of collectivism and the corporate state acting in an interventionist way to improve the well being of the community. They advocate 'an alternative tradition in which the use of executive power to provide services for the benefit of the community [is] entirely legitimate and the function of the courts in checking executive action [is] a questionable activity'. However:

... we do not wish to imply that green light theory favours unrestricted or arbitrary action by the state. While red light theory was indissolubly linked to the model of the balanced constitution, green light theory finds the 'model of government' more congenial. Red light theorists look first to the law courts for control of the executive; green light theorists are inclined to pin their hopes on the political process.

The green light theories, then, are *administration centred* with the function of administrative law being not to control interventionism on the part of the state but to facilitate government action. The role of the courts, themselves perceived as being an obstacle to progress as well as unrepresentative and undemocratic, is minimised. Their role is to assist the efficient operation of the administration. Proponents of this school of thought include Laski, Robson, Jennings and Griffith.

There is no doubt that the development of English administrative law in general – and the approach of the courts in the exercise of their supervisory jurisdiction of judicial review in particular – has emphasised the red light approach. The law is perceived as a control mechanism to prevent unlawful use of power by the power-holder. This brings us back to the central issue of judicial review – that the judicial power to review unlawful acts must not be confused to become a power to review misuses of power, that perception being dictated not by principles of legality but by the judges' own views of what the 'right' decision should be. If the real decision-maker is, in fact, the judiciary, we are left with the question *sed quis custodiet ipsos custodes?* ('but who judges the judges themselves?').

THE NATURE AND PURPOSE OF ADMINISTRATIVE LAW

Definition of administrative law

Administrative law is part of public law. It regulates the exercise of power conferred upon public bodies. Challenges to such exercises of power may be made by citizens (individually or collectively) or by one organ of state against another (eg by central government against local government or *vice versa*).

Judicial review of administrative action

This refers to the particular jurisdiction of the courts (exercised in the first instance in the Divisional Court of the Queen's Bench) to ensure that public decision-makers act within their legal powers. If a public body acts beyond the powers conferred, it is said to be acting *ultra vires*.

Powers and duties

The law may confer a power and/or impose a duty on a public body. However, a power may itself give rise to a duty to act in a particular way. This is illustrated by *Padfield v Minister of Agriculture* (1968) where the context of the statute required the minister to refer a complaint to a committee of investigation.

The public/private dichotomy

Public law only serves to regulate the conduct of decision-makers in the *public* sphere. If the decision-maker is not a public body, judicial review will not be available. Instead, an action in private law must be pursued. In deciding whether a body is a 'public' body for this purpose, the courts will consider both the *source* and the *nature* of the power being exercised.

The source of power

The source of power conferred on a public body will normally be statute. However, power may also be derived from the prerogative. It was confirmed by the House of Lords in *CCSU v Minister for the Civil Service* (1985) that power derived from the prerogative is also reviewable. It was not the *source* but the

nature of the power which was determinative. However, the *nature* of many prerogative powers (eg the making of treaties) will be such that they will not be subject to judicial review.

The role of the courts

The primary constitutional function of the courts is to interpret legislation (though they also have a recognised developmental role through the common law). The courts cannot challenge the validity of legislation (except in the context of EC law). However, through the exercise of powers of judicial review, the courts are ensuring that government does not exceed or abuse its powers. The concept of separation – or balance – of powers is relevant here. The courts, in theory, should not substitute their own decision on the merits of a case for that of the body on whom the power was conferred. Their powers are of review and not of appeal. On the other hand, they should ensure that decision-makers operate within the rule of law, ie that decisions taken are within the power conferred and are not simply arbitrary, and that the decision-makers themselves are not above the law. Public bodies should be accountable before the law for their decisions.

Law and politics

The relationship between law and politics is central in administrative law. Some theorists – commonly referred to as ‘red light’ theorists – argue that the law should operate as a *control* over the acts of government and emphasise the independence of the judiciary within the balance of powers. On the other hand, the so-called ‘green light’ theorists support collectivism and state intervention. They perceive the role of the law as being to facilitate government action. The courts’ powers of judicial review are very much within ‘red light’ theory.

THE HISTORY AND DEVELOPMENT OF ADMINISTRATIVE LAW

2.1 History

Judicial intervention to control the excesses of governmental power is not a new phenomenon. In *Rookes v Withers* (1598), Coke CJ asserted that the exercise of discretionary power was subject to control:

... although the words of the commission [of sewers] give authority to the commissioners to act according to their discretion, their proceedings ought nevertheless to be limited and bound within the rule of reason and law, for discretion is a science ... and they are not to act according to their wills and private affections.

In *Baggs Case* (1615), the unlawful expulsion of a freeman from his borough by local officials was declared unlawful. Before the Revolution of 1688 the courts stepped in, on occasions, to control even the prerogative powers of the monarch. In *Prohibitions del Roy* (1607), personal adjudication by the King was outlawed in both civil and criminal actions; it was also asserted that the King did not have a power of arrest. The claim that 'the judges are but the delegates of the King, and that the King may take what causes he shall please to determine ... this was clear in divinity, that such authority belongs to the King by the word of God in the Scripture' was rejected. The court retorted:

... the King in his own person cannot adjudge any case, either criminal ... or betwixt party and party ... but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England ...

In *Dr Bonham's Case* (1610), Coke CJ even went so far as to assert that an Act of Parliament might be subject to judicial scrutiny:

... when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an act to be void.

This suggestion that an Act of Parliament could be challenged by reference to some higher form of law, however, remained undeveloped. Instead, the courts in the United Kingdom developed the principle of Parliamentary Supremacy. Judicial review itself, in theory, endorses this principle in its assertion that, in reviewing the legality of executive action, the courts discern and uphold Parliamentary intentions through statutory interpretation.

In *The Case of Proclamations* (1611), the power of the King to create new offences was outlawed – the King could not by proclamation prohibit new buildings in and around London:

... the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.

In order to achieve such control over the actions of government, the courts adapted the so-called 'prerogative writs', in particular:

- *prohibition* (which lay to prevent the commission of an unlawful act or its continuation);
- *mandamus* (which lay to compel the fulfilment of a public duty); and
- *certiorari* (which lay to quash a decision taken in excess of the legal power conferred or in contravention of procedural requirements).

However, as noted by Wade (*Administrative Law*, 7th edn, 1994, Oxford University Press) 'it was on the constitutional rather than on the administrative plane, and notably on the battlefields of civil war, that the issues between the Crown and its subjects were fought out'.

The Bill of Rights 1688 established the 'constitutional monarchy' – a monarchy which was no longer absolute but which was now subject to law – and the beginnings of Parliamentary government. In particular, the powers of the monarch to suspend and dispense with laws, to raise taxation and maintain a standing army were removed. Similarly, the Act of Settlement 1700 assured judicial independence and security by giving judges security of tenure during good behaviour, making them no longer dismissible at the pleasure of the monarch but only upon an address of both Houses of Parliament and making their salaries a permanent charge on the Consolidated Fund.

However, the subjection of the monarch to Parliament did not remove the need for judicial control of executive power. As noted by Baker (*An Introduction to English Legal History*, 3rd edn, 1990, Butterworths): 'Once the Crown had been painfully brought under the law, it was Parliament which began its own democratic form of despotism.'

The form this despotism took was the conferment of wide discretionary powers on ministers and officials and the creation of numerous statutory bodies upon which Parliament also conferred wide discretionary powers. At the same time, Parliament attempted to protect the exercise of such powers from judicial review. While Dicey (*An Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, Macmillan) asserted in 1885 that 'The words "administrative law" ... are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation', in 1888, Maitland (*A Constitutional History of England*, 1908, Cambridge University Press) was able to state 'We are becoming a much governed nation'.

In *Cooper v Wandsworth Board of Works* (1863), in a challenge to the legality of its demolition of a house, the Board of Works claimed an arbitrary, uncontrollable power. This was denied by the Court of Common Pleas. Erle CJ concluded that 'although the words of the statute, taken in their literal sense,

without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognised, that no man is to be deprived of his property without his having an opportunity of being heard'.

However, the rapid growth of the modern state – and hence administrative law – is largely a 20th century phenomenon. Such growth was graphically described in the 1981 'Review of English Administrative Law' by JUSTICE and All Souls College Oxford:

In 1900, government interfered hardly at all in the way people ran their daily lives; and it provided virtually no social services. Today quite the reverse is true. The state has assumed an ever increasing range of responsibilities ... through nationalisation it controls most of the basic industries and the goods and services they supply. It runs a comprehensive system of social services providing benefits from just before the cradle ... to the grave ... and in between it provides education, a health service, sickness benefits, unemployment benefits and old age pensions.

The state also seeks to control much of the environment in which we live ...

This enormous growth ... can be illustrated in a number of ways. First, there has been a vast increase in public expenditure. In 1970, it was £100 million, 9% of the gross national product and £3 per head of the population. A hundred years later it was £20,000 million, 43% of the gross national product and £400 per head of the population. Today it is over £52,000 million, 42% of the gross domestic product and about £1,000 per head of the population.

Secondly, there has also been a massive increase in the number of those employed to administer our affairs. In 1900, there were 50,000 civil servants employed by central government; in 1980, there were 548,600 non-industrial civil servants. If to that is added about 600,000 officials in local government and about 100,000 who administer the health service, there are some 1.25 million officials without including administrators in such bodies as the water and sewerage authorities and the nationalised industries.

Thirdly, there has been a spate of increasingly complex Acts of Parliament and regulations flowing from the government machine. Thus, in 1900, Acts of Parliament covered 198 pages of the Statute Book; in 1935, 1,515 pages; in 1975, 2,800 pages. As for regulations, there were comparatively few before the First World War; in 1947 statutory instruments covered 2,678 pages; in 1975, 8,442 pages.

With the growth of government intervention in citizens' lives – in particular the advent of the welfare state – came the realisation that the exercise of governmental power itself was in need of regulation. Unfortunately, alongside this development came two World Wars. This was not an ideal climate for the development of judicial control of governmental power and the relish of the state for the acquisition of new powers went largely uncontrolled. As stated by Lord Reid in *Ridge v Baldwin* (1964):

It seems to me to be a reasonable and almost inevitable inference from the circumstances in which Defence Regulations were made and from their subject matter that, at least in many cases, the intention must have been to exclude the principles of natural justice. War-time secrecy alone would often require that, and the need for speed and general pressure of work were other factors. But it was not to be expected that anyone would state in so many words that a temporary abandonment of the rules ... was one of the sacrifices which war conditions required ...

It is, therefore, possible to identify periods of judicial restraint in the control of governmental power but also periods of judicial interventionism. There will always be exceptions to the trend, however, in either of these periods. It must be remembered that administrative law is very judge-orientated and not all judges will follow the current flow.

2.2 Judicial restraint

The inter-war period was, then, a period of judicial restraint with the courts displaying a reluctance to control the acts of government despite increasing state regulation.

In *Local Government Board v Arlidge* (1915), a borough council declared a house unfit for human habitation. On appeal to the Local Government Board, a local inquiry was held. The House of Lords failed to subject statutory inquiries to the rules of natural justice. Viscount Haldane LC justified judicial non-intervention in the following terms:

In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial ... When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently.

This increase in uncontrollable governmental power led the Lord Chief Justice, Lord Hewart, in 1929 to write of 'The New Despotism' and to a Committee on Ministers' Powers (the Donoughmore Committee) being set up and reporting in 1932. However, little of the latter's report was implemented and the judiciary remained largely dormant.

Perhaps the most notorious case of all was that of *Liversidge v Sir John Anderson* (1942). The Secretary of State had power under the Defence (General) Regulations 1939 to make an order to intern if 'he has reasonable cause to believe any person to be of hostile origin or associations'. On a challenge to the exercise of the power, the House of Lords (Lord Atkin dissenting) – despite the objective nature of the wording of the power – refused to control such exercise

by reference to whether the decision was reasonable. The Secretary of State could not be required to justify his action by giving the grounds of his belief. According to Lord Maugham, this was 'so clearly a matter for executive discretion and nothing else' he could not 'believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law'. The one proviso was that the decision must be taken 'in good faith'.

In his dissenting judgment, Lord Atkin noted that the order for internment was made by a member of the executive, not a judicial officer, it was not made after any inquiry as to facts to which the subject was party, it could not be reversed on appeal, and there was no time limit for which the detention might last. He described the subjective meaning contended for as 'fantastic'. The words 'if a man has' could not mean 'if a man thinks he has'. ("If A has a broken ankle" does not mean and cannot mean "if A thinks that he has a broken ankle".) He described his fellow judges as being 'more executive minded than the executive' and lamented their failure to protect the applicant:

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.

In *Racecourse Betting Control Board v Secretary for Air* (1944), the appellant's property was requisitioned by the minister under emergency powers. The Board challenged an award of compensation by the General Claims Tribunal which was established under the Compensation (Defence) Act 1939. The Court of Appeal denied jurisdiction to quash a decision of a special tribunal for error of law on the face of the record (ie a mistake of law which appeared in the very record of the proceedings of the tribunal itself).

In both *Nakkuda Ali v Jayaratne* (1951) and *R v Metropolitan Police Commissioner ex parte Parker* (1953), the Judicial Committee of the Privy Council and the Divisional Court respectively refused to review decisions to revoke licences, despite the fact that the effect of revocation in each of these cases was to severely affect the applicant's livelihood. The courts were of the view that a clear distinction was to be drawn between a judicial and an executive power and between a right and a privilege. Only a decision which was judicial or quasi judicial in nature and which affected a right was subject to judicial review. Unfortunately for the applicants, the grant and revocation of a licence fell into the category of an executive decision affecting a privilege.

In *Nakkuda Ali*, the Controller of Textiles revoked a textile dealer's licence under Defence Regulations which empowered him to do so if he had 'reasonable grounds to believe' that the holder was 'unfit to be allowed to continue as

a dealer'. Lord Radcliffe rejected the subjective interpretation given to the words 'reasonable grounds to believe' in *Liversidge v Anderson*, explaining that interpretation by reference to the context and circumstances of that case. There was no general principle that the words 'if AB has reasonable cause to believe' were capable of meaning 'if AB honestly thinks that he has reasonable cause to believe'. Such words were to be read rather as 'intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power' and 'as imposing a condition that there must in fact exist such reasonable grounds' before the power could be validly exercised. However, the remedy of *certiorari* did not lie as the Controller was not *determining a question affecting rights*. A licence involved the exercise of a *privilege* and not the conferment of a right. Further, the decision was not 'judicial' in nature but 'executive' and the court had no controlling jurisdiction by reference to *certiorari*.

In *Ex parte Parker*, the applicant who, it was alleged, had allowed his cab to be used by prostitutes, argued that there had been a breach of natural justice in the revocation of his cab-driver's licence. Again the court concluded that *certiorari* did not lie as neither the Commissioner nor, in the circumstances, a committee to which the Commissioner had referred the case, were acting 'judicially'. The Commissioner was merely exercising disciplinary power.

In *Robinson v Minister of Town and Country Planning* (1947), the minister confirmed a compulsory purchase order made by a local authority over houses in an area which had suffered war damage. He had power to do so if 'satisfied that it is requisite, for the purpose of dealing with extensive war damage' that the area should be redeveloped as a whole. A challenge to the exercise of the discretion on the ground that there was no evidence on which the minister could be so satisfied in respect of certain of the properties acquired was rejected by the Court of Appeal. Lord Greene MR stated:

The words 'requisite' and 'satisfactorily' clearly indicate that the question is one of opinion and policy, matters which are peculiarly for the Minister himself to decide. No objective test is possible.

In *Franklin v Minister of Town and Country Planning* (1948), the minister addressed a meeting called to consider a proposal for the designation of Stevenage as a new town. The minister's speech was interrupted with jeers and boos and cries of 'dictator' and 'Gestapo'. On 1 August 1946, the New Towns Act received the royal assent. On 3 August 1946, the minister prepared the draft Stevenage New Town (Designation) Order which was duly published. After a public inquiry, the minister made the order which the applicant challenged on the basis, *inter alia*, that the minister was biased. The House of Lords rejected the challenge. Lord Thankerton stated:

... I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance ... is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial

office, or those who are commonly regarded as holding a quasi judicial office, such as an arbitrator.

It had not been established that the minister had ‘forejudged any genuine consideration of the objections or that he had not genuinely considered the objections’.

In *Smith v East Elloe RDC* (1956), a compulsory purchase order was challenged on the ground of bad faith some six years after it had been made and confirmed. In the meantime, the property purchased had been demolished and new properties erected on the site. The Acquisition of Land (Authorisation Procedure) Act 1946 provided that a person aggrieved by a compulsory purchase order might make an application to challenge within six weeks of its making or confirmation. The House of Lords concluded that challenge outside this six week period was not permissible on any ground – even that of bad faith. Viscount Simonds stated:

... I think that anyone bred in the tradition of the law is likely to regard with little sympathy provisions for ousting the jurisdiction of the court ... But it is our plain duty to give the words of an Act their proper meaning ... What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make.

In *Duncan v Cammell Laird & Co Ltd* (1942), the First Lord of the Admiralty directed that a claim of crown privilege be entered to prevent the disclosure of documents in a civil action brought after the sinking of a submarine during trials. The House of Lords, upholding the claim of privilege, determined that a claim made by a minister or permanent secretary in proper form was conclusive and not subject to challenge.

2.3 Judicial interventionism

There were, of course, exceptional cases where the courts were not prepared to allow acts of bodies established by government to go completely unchallenged.

In *R v Northumberland Compensation Appeal Tribunal ex parte Shaw* (1952), the Court of Appeal asserted jurisdiction to quash by *certiorari* the decision of a statutory tribunal for error on the face of the record.

As a consequence of the passing of the National Health Service Act 1946, the applicant lost his employment as clerk to a hospital board. He appealed from an award of compensation to a tribunal established by National Health Service Regulations. The tribunal, misconstruing the regulations, set out the qualifying period for compensation as being the applicant’s period of service with the hospital board. In fact, the whole of his period in local government service should have been considered. The Court of Appeal asserted jurisdiction on the basis of error of law on the face of the record. Denning LJ stated:

... the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law ... When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which belongs to it. It is only exercising a jurisdiction which it has always had.

It was not until the 1960s, however, that the judiciary really started to assert its authority to challenge governmental decision-making through a series of landmark decisions of the House of Lords. In particular:

- *Ridge v Baldwin* (1964) in which their Lordships re-defined the situations to which the rules of natural justice would apply from a narrow concept of purely 'judicial' decisions to include any decision which affected individual rights (see below, pp 126–27);
- *Padfield v Minister of Agriculture, Fisheries and Food* (1968) where a discretion conferred in wide subjective terms upon a minister was held to impose a duty to act in accordance with the policy and objects of the statute which conferred the power (see below, pp 96–97);
- *Conway v Rimmer* (1968) where the court asserted a residual power to inspect documents for which 'crown privilege' (so preventing their disclosure to the other party) was claimed (see below, p 215); and
- *Anisminic v Foreign Compensation Commission* (1969) where the court declined to give effect to a clause which, on the face of it, was a clear attempt to exclude any power of judicial review (see below, pp 203–04).

Even then, in one of these landmark cases – *Ridge v Baldwin* – Lord Reid could assert that 'We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it'.

The courts thus established their ascendancy as guardians of the rule of law which itself demanded the absence of arbitrary, uncontrollable, power. The importance of administrative law is immediately apparent. It operates as a control mechanism over the machinery of state power. It ensures that government acts within the law. The courts have to a large extent shaped that law by themselves developing the principles of control – which we now commonly refer to as the principles of *ultra vires* and natural justice/fairness. However, the balance is a delicate one to maintain. Just as the executive has in the past been accused of operating as a dictatorship, so there must be clearly defined limits to the extent of the judicial power. The answer to the question posed at the conclusion of Chapter 1 – *sed quis custodiet ipsos custodes?* – would seem to be very much in terms of self restraint by the judges. However, should the judges overstep the mark then, just as they stepped in to redress one imbalance of power, so another arm of government might be persuaded to intervene to redress a judicial imbalance.

THE HISTORY AND DEVELOPMENT OF ADMINISTRATIVE LAW

History

Modern administrative law – in particular the power of judicial review – is very largely a post-World War II phenomenon. It grew up alongside the development of the welfare state and increasing government intervention in peoples' lives. Judicial intervention to control excesses of governmental power can, however, be traced far back to, for example, *Rookes v Wither* (1598) and *Baggs' Case* (1611). In *Dr Bonham's Case* (1610), it was even suggested that an Act of Parliament might be subject to judicial scrutiny. In the 17th century, however, the courts developed the principle of Parliamentary supremacy and rejected the notion that primary legislation *per se* could be challenged.

In developing the principles of judicial review to control actions of the administration, the courts needed also to provide appropriate remedies. They utilised here the so-called *prerogative writs* of *certiorari* (to quash a decision), prohibition (to prevent unlawful actions) and *mandamus* (to compel the fulfilment of a public duty). These were the *public law* remedies. The courts also imported the *private law* remedies of injunction, declaration and damages.

Development

The post-war years witnessed a period of judicial restraint in controlling the acts of government. In the 1960s, however, there were many examples of judicial interventionism with the landmark decisions of the House of Lords, in particular, in *Ridge v Baldwin* (1964), *Padfield v Minister of Agriculture* (1968), *Conway v Rimmer* (1968) and *Anisminic v Foreign Compensation Commission* (1969).

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION I – PREREQUISITES TO REVIEW

3.1 Introduction

Judicial review of administrative/executive decision-making forms the core of the study of modern administrative law. Judicial review is a growth area. Much of the early research in this area was conducted by Maurice Sunkin at Essex University (see (1987) 50 MLR 432 and (1991) PL 490). From 544 applications for judicial review being commenced in 1981, the number had risen in 1995 to 3,604 (Le Sueur and Sunkin, *Public Law*, 1997, Longman) with the most common sources of complaint being local authority decisions on homelessness and Home Office decisions on immigration. As Bridges, Meszaros and Sunkin point out, however (*Judicial Review in Perspective*, 1995, Cavendish Publishing), the number of such applications ‘is tiny by contrast to the scale of administrative decision making’. Le Sueur and Sunkin themselves note that in 1994 there were 447 applications for review involving homelessness out of some 170,000 people whose applications were rejected and, in the absence of a right of appeal under the Housing Act 1985, these failed applications represented the potential pool for judicial review applications. (As noted in Chapter 1, a right of appeal is now provided under the Housing Act 1996.) Compared with the number of cases heard by tribunals (see Chapter 9) some of which actually determine hundreds of thousands of cases each year, the supervisory jurisdiction of the courts by way of judicial review would appear, purely in terms of numbers, to be relatively unimportant. However, it is suggested that the relative importance of the power of judicial review is not to be gauged simply by reference to numbers. Numbers are clearly of practical significance. However, in terms of the fundamental theory of balance of power within the constitution, the power of judicial review is central (see Chapter 1). Indeed, one of the established standard texts on administrative law (Cane, *An Introduction to Administrative Law*, 3rd edn, 1996, Oxford University Press) is almost entirely devoted to a study of judicial review (with a mere 12 pages on tribunals).

To assist their judicial supervision, the courts themselves developed the so-called principles of *ultra vires* and natural justice/fairness. *Ultra vires* was itself sub-classified into:

- substantive *ultra vires*, ie doing the wrong thing;
- procedural *ultra vires*, ie doing something in the wrong way; and
- abuse of power, ie acting unreasonably.

It has been suggested that the use of the term *ultra vires* to cover all of the above sub-classifications is no longer appropriate. *Ultra vires* was rooted in the idea of whether a particular body had *jurisdiction*, ie whether it was acting within the four corners of its powers. Those four corners might be stated expressly by the donor of the power. Alternatively, they might be assumed from what the courts implied to have been the intentions of the donor of the power that the power be exercised reasonably and in accordance with principles of good administration. The power would normally be derived from statute which 'lends itself to the *ultra vires* approach'. However, other sources of power which it is now established are subject to judicial review (in particular that derived from the prerogative) do not lend themselves so readily to an *ultra vires* treatment. It is suggested, therefore, that judicial review has (with the exception of substantive *ultra vires*) 'moved on from the *ultra vires* rule to a concern for the protection of individuals, and for the control of *power*, rather than *powers*, or *vires*' (see further Dawn Oliver, 'Is the *Ultra Vires* Rule the Basis of Judicial Review?' (1987) PL 543). Lord Woolf has also questioned the appropriateness of the *ultra vires* tag (see 'Droit Public – English Style' (1995) PL 57). Lord Woolf questions how the principle can be applied to a non-exercise of power. In similar vein to Dawn Oliver, he identifies difficulties in using the principle in the context of non-statutory bodies and identifies a difficulty in the relationship between *ultra vires* (which normally renders a decision void) and the discretionary nature of the remedies in the realm of public law. More particularly he perceives the control of power by reference to the *assumed* intentions of Parliament to be 'a *fairy tale*':

Are we in administrative law still to rely on fairy tales? It is possible to justify the courts demanding fairness and reasonableness in the performance of a public duty by reading into a statute which contains no such requirement an implied requirement that any powers conferred are to be exercised fairly and reasonably and then to say if they are not so exercised the public body has exceeded its powers and so acted *ultra vires*. No statute of which I am aware expressly states that the powers which it confers, should be exercised unfairly or unreasonably. The statute may, however, although this was not appreciated at the time, unwittingly, by its express provision, achieve this result. Where this happens it is the duty of the court to remedy the defect in the statute by supplementing the statutory code.

I am far from sure whether in these circumstances the court is fulfilling an intention Parliament actually possessed or, by seeking to achieve fairness on this basis, indulging in a fondness for fairy tales.

Indeed, an alternative classification was offered by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (1985) of:

- illegality;
- irrationality;

- procedural impropriety: and, possibly
- proportionality.

The rules of natural justice may themselves be considered as part of procedural impropriety in that they are designed to ensure minimum standards of procedural fairness.

It is in the application of these principles – in particular, the concept of reasonableness – that there is the greatest potential for conflict between the executive and the judiciary. The judges declare an awareness of the constitutional limits on judicial intervention – that they must not overstep the boundary between the legality and the merits of decision-making. It is on this basis that the judiciary have shown themselves reticent to develop a principle of proportionality in English administrative law (see below, pp 111–15).

3.2 Prerequisites to judicial review

As stated in Chapter 1, it is no longer the source but the nature of the power which is determinative of the courts' ability to review executive decision-making. So, for example, the fact that a power is derived from the prerogative does not protect its exercise from judicial supervision – although, as noted by Lord Roskill in *CCSU* (1985), certain prerogative powers are, by their nature, not susceptible to review. The courts have themselves developed what might be called a concept of 'non-justiciability'. By this is meant that a decision is of such a nature that the courts consider it inappropriate for them to exercise their powers of review (see below, pp 46–50).

It is a prerequisite to the legal validity of a decision that the exercise of the discretion which leads to the decision is made by the person or body upon whom the discretion was conferred. The discretion cannot be delegated to an unauthorised third party or surrendered in the sense that the person given the discretion exercises it at someone else's dictation. Discretion cannot be surrendered. Similarly, a true exercise of discretion requires that cases are not necessarily determined by reference to a fixed policy. The decision-maker must keep an open mind and be prepared to consider if an exception to a general policy should be allowed.

As decision-makers most often derive their power from statute, it is also necessary to consider the presumptions of statutory interpretation used by the courts which are most relevant in the field of administrative decision-making.

This chapter will, therefore, review:

- those areas of decision-making to which the principle of non-justiciability might apply;

- surrender of discretion:
 - delegation;
 - acting under dictation;
 - the application of policy;
 - contract;
 - estoppel;
 - legitimate expectation;
- presumptions of statutory interpretation.

Chapter 4 will review the principles of substantive *ultra vires* and unreasonableness. Chapter 5 will review procedural impropriety and the principles of natural justice/fairness.

3.3 Non-justiciability

Although a decision may have been reached in breach of one or more of the principles enabling the courts to exercise their powers of review, the courts will nevertheless decline to do so if the decision is taken within an area which the courts themselves regard to be 'non-justiciable', ie not subject to their supervisory control because they are decisions of a particular nature which lie outside the judicial domain as being the preserve of another arm of government. Once again, the influence of the separation or balance of powers is evident. These so-called 'non-justiciable' areas include decisions relating to foreign affairs, defence and national security, certain aspects of police decision-making and certain aspects of decision-making within prisons, although prison decision-making has been opened up very much to judicial review since the decision of the House of Lords in *R v Board of Visitors of Hull Prison ex parte St Germain* (1979).

3.3.1 Foreign affairs, defence and national security

As noted above (p 9), the courts have declared the exercise of a power derived from the prerogative to be subject – in principle – to judicial review. It is not the source but the nature of the power which is determinative. However, it is clear that certain exercises of prerogative power are, by their nature, not subject to judicial review as being non-justiciable. As stated by Lord Scarman in the *CCSU* case itself:

If the subject matter in respect of which prerogative power is exercised is justiciable, that is to say *if it is matter upon which the court can adjudicate*, the exercise of the power is subject to review ...

Lord Diplock in *CCSU* suggested also that it would be difficult to challenge the exercise of a ministerial decision taken in the exercise of the prerogative since

such a decision 'will generally involve the application of government policy'. The judicial process was not adapted to dealing with competing policy considerations and the judges 'by their upbringing and experience' were ill-qualified to perform this balancing exercise.

The question is what issues are regarded by the courts as being non-justiciable and to what extent have exercises of prerogative power actually been opened up to judicial review. A clue is given by Lord Wilberforce in *Buttes Gas & Oil v Hammer* (1982), where he suggests that an answer to that question must depend 'upon an appreciation of the nature and limits of the judicial function'. In determining the issue of justiciability, the courts will be anxious not to step beyond the judicial boundary into the realm of the executive. In *CCSU*, Lord Roskill identified the following as falling into the non-justiciable category: the making of treaties, the defence of the realm, the prerogative of mercy (though see now *R v Secretary of State for the Home Department ex parte Bentley* (1994) (above, pp 11–12), the grant of honours, the dissolution of Parliament and the appointment of ministers, ie matters of high state policy and the personal prerogatives of the Crown.

3.3.2 The treaty-making power

The exercise of the treaty-making power falls within the non-justiciable category. In *Blackburn v Attorney General* (1971), the plaintiff sought declarations that, by signing the Treaty of Rome, the government would irreversibly surrender the sovereignty of the Crown in Parliament and so be acting in breach of the law. On appeal from Eveleigh J, who struck out the statements of claim as disclosing no cause of action, the Court of Appeal declared it had no power to impugn the treaty-making power. In any case, it could only interpret a law once enacted by Parliament. As stated by Lord Denning MR:

Even if a treaty is signed, it is elementary that these courts take no notice of treaties as such ... until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us ... The general principle applies to this treaty as to any other. The treaty-making power of this country rests not in the courts, but in the Crown; that is, Her Majesty acting upon the advice of her ministers ... Their action in so doing cannot be challenged or questioned in these courts.

However, in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* (1994), in a challenge to the Treaty on European Union (the Maastricht Treaty) on the basis, *inter alia*, that the treaty would transfer the prerogative power to conduct foreign and security policy without statutory authority, the court deliberated on the issue despite claims by counsel for the Secretary of State that the questions raised by it were not justiciable. In the end result, however, the court concluded that there was no transfer of prerogative power but rather an exercise of prerogative power. The application therefore failed on the merits.

3.3.3 The defence of the realm

The primary 'non-justiciable' field of decision-making in this context is that of national security. Lord Parker asserted in *The Zamora* (1916) that: 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.' *Liversidge v Anderson* (1942) itself provides an example of the influence of national security arguments. Despite Lord Reid's description of this case in *Ridge v Baldwin* (1964) as being 'a very peculiar decision' – and although it is often explained by reference to war-time conditions – it is likely that the courts would reach the same conclusion today via the route of justiciability. *Duncan v Cammell Laird & Co* (1942) (and, indeed, the more judicially assertive case of *Conway v Rimmer* (1968) in the field of Crown privilege/public interest immunity) (see Chapter 8) clearly displays the influence of national security justifications for the non-disclosure of information by the state in legal proceedings brought against it by an individual. It is well-established that the disposition of the armed forces is a subject beyond the realm of judicial review. In *Chandler v DPP* (1964), demonstrators in support of the Campaign for Nuclear Disarmament were prosecuted under s 1 of the Official Secrets Act 1911 with conspiring to enter a military airbase 'for a purpose prejudicial to the safety or interests of the state'. The demonstrators had been prevented from entering the airbase where they had intended to sit in front of aircraft so preventing them taking off. On appeal against conviction, the appellants argued that their purpose was not prejudicial to the state – that the humanitarian objective of nuclear disarmament was indeed beneficial to the state. The House of Lords asserted that it was for the Crown alone to decide on the disposition of the armed forces. Such decisions could not be challenged before the courts. The demonstrators' purpose to interfere with the disposition of the armed forces constituted an offence under s 1 and their motives were irrelevant. Lord Reid stated as follows:

Who, then, is to determine what is and what is not prejudicial to the safety and interests of the state? ... I do not subscribe to the view that the government or a minister must always or even as a general rule have the last word about that. But here we are dealing with a very special matter ... It is ... clear that the disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown and that no one can seek a legal remedy on the ground that such discretion has been wrongly exercised.

In *R v Secretary of State for Home Affairs ex parte Hosenball* (1977), the Court of Appeal refused to entertain a challenge, based on breach of the rules of natural justice (a failure to give the applicant details of the case against him), to a decision to deport an American journalist, taken by the minister ostensibly on

grounds of national security. Hosenball had contributed to an article, 'The Eavesdroppers', about government monitoring of communications which had been published in *Time Out*. At the time of the action, Hosenball was a reporter for the *Evening Standard* and not involved with security matters at all. The Court of Appeal declined to challenge the Home Secretary's exercise of discretion. Lord Denning MR asserted that the balance between the interests of national security and freedom of the individual was for the minister, not the courts. Striking a patriotic note, Lord Denning stated:

In some parts of the world national security has on occasions been used as an excuse for all sorts of infringements of individual liberty. But not in England.

He was of the opinion that 'when the state itself is endangered, our cherished freedoms may have to take second place' and further justified this by reference to the minister's answerability to Parliament (see above, p 24). The scope for abuse of power here is clear.

In the *CCSU* case itself, the spectre of national security – that prior consultation would have involved a risk of further disruption and have exposed vulnerable areas of GCHQ's operations – was raised on appeal as the reason for the withdrawal of the right to trade union membership without prior consultation of those affected. This was described by Lord Diplock himself as '*par excellence* a non-justiciable question'. National security was the responsibility of the executive upon which the executive must have the last word. As stated by Lord Scarman:

... where a question as to the interest of national security arises in judicial proceedings ... once ... the court is satisfied that the interest of national security is a relevant factor to be considered ... the court will accept the opinion of the Crown ... as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held.

It is to be noted, however, that, even in the context of national security, the courts are not abrogating their powers of supervision entirely. As noted by Lord Scarman, a mere assertion of national security may not in itself be adequate to preclude judicial review and the courts may demand evidence to support the claim. Further, the decision must not be so unreasonable that no reasonable body could have reached it. In *CCSU*, Lord Fraser asserted that, if challenged, the government was 'under an obligation to produce evidence that the decision was in fact based on national security'. In *CCSU* itself, their Lordships accepted that there was 'ample evidence' of a 'real risk' to national security. (This evidence consisted of the dangers of potential industrial action at GCHQ such as had occurred between 1979 and 1981.) It would appear that the evidential burden upon the State is easily satisfied. Also, unreasonableness in the sense required – a decision which no reasonable body could make – is extreme-

ly difficult to establish. In *R v Brixton Prison Governor ex parte Soblen* (1963), Soblen challenged the legality of a deportation order from the United Kingdom to the United States, where he had been convicted of espionage but from where he had subsequently escaped. The United States had requested Soblen's rendition by the United Kingdom and Soblen argued that the deportation order was effectively an extradition order in disguise. Extradition did not lie in the circumstances as the offence committed was of a political nature. Soblen's challenge, however, failed. The Court of Appeal asserted that, in order to challenge the deportation order successfully, Soblen had to establish that it was a 'sham'. This he could not do. The minister could reasonably conclude that Soblen's continued presence in the United Kingdom was not 'conducive to the public good' so enabling him to exercise his statutory power of deportation. Unfortunately for him, Soblen was a US national and so, once the legality of the deportation order was confirmed, he was put on a plane bound for the United States. He committed suicide en route.

In his attempt to establish that the deportation order was, in fact, an extradition order in disguise, Soblen's counsel sought to obtain discovery of communications between the governments of the USA and the UK. The Foreign Secretary claimed privilege for these and they were consequently withheld. (On Crown Privilege see further Chapter 8). (For a criticism of the *Soblen* case see O'Higgins, 'Disguised Extradition: The *Soblen* Case' (1964) 27 MLR 521.)

The requirement for evidence in support of the decision was reinforced in *R v Secretary of State for the Home Department ex parte Ruddock* (1987). Members of CND (Joan Ruddock, John Idris Cox and Mgr Bruce Kent, all of whom had occupied the position of chair of CND) sought judicial review of the practice of tapping their telephones. The alleged practice had been disclosed by Cathy Massiter, a former MI5 intelligence officer, in a TV programme 'MI5's Official Secrets'. The minister, as a matter of policy in the interests of national security, refused to confirm or deny the existence of a warrant. He then asserted that the court should decline jurisdiction because it would be detrimental to national security for the court to investigate, discuss and make findings on a warrant the existence of which the minister refused to confirm. The court, however, would not decline to exercise its supervisory jurisdiction merely because a minister said his policy was to maintain silence in the interests of national security. Cogent evidence of potential damage to national security caused by the trial of the issues would have to be adduced to justify a modification of the court's normal procedure. The evidence did not suggest that it would be harmful to national security for the court to consider the application. However, the application failed on the basis that the minister's decision that a warrant was justified under published criteria was not 'outrageous in its defiance of logic' (*per Taylor J*).

Although the reasoning of the House of Lords in the war-time decision of *Liversidge v Anderson* (1942) may appear to have been dishonoured, the same

result may well be reached today in the context of national security via the principle of justiciability. In *R v Secretary of State for the Home Department ex parte Cheblak* (1991) (a case very similar on the facts to *R v Secretary of State for the Home Department ex parte Hosenball*), during the Gulf War, the applicant, a Lebanese citizen, who had been resident in the United Kingdom for 15 years, was detained and a deportation order issued against him on the ground that his 'departure from the United Kingdom would be conducive to the public good for reasons of national security'. The applicant had a right to put his case before a panel of three advisers appointed by the Home Secretary but he alleged a breach of natural justice in that he did not know the charges levelled against him and so could not effectively prepare a defence. On the hearing of the application for judicial review, the minister stated that the applicant was an unacceptable security risk because of threats of terrorist action made by the Iraqi government against Western targets and the applicant's links with an unspecified organisation which the Home Secretary believed could take such terrorist action. The Home Office argued that further disclosure of details would not be in the public interest. Both the Divisional Court and the Court of Appeal rejected the application. A reason – national security – had been given for the minister's decision. Further explanation for that reason could not be demanded. All that could be required was that the minister act in good faith. Natural justice gave way to national security.

In *R v Secretary of State for the Home Department ex parte McQuillan* (1995), the applicant challenged an exclusion order made by the Home Secretary under the Prevention of Terrorism (Temporary Provisions) Act 1989 on the basis that the Secretary of State was satisfied that the applicant was or had been 'concerned in the commission, preparation or instigation of acts of terrorism'. He argued that he and his family were under threat of assassination by terrorists if obliged to stay in Northern Ireland. Sedley J held the decision to be non-justiciable on grounds of national security despite the human rights implications. Further, the court could not scrutinise evidence to establish the reasonableness of the minister's decision where the interests of national security prevented the giving of reasons for the decision.

National security, however, remains one of the few areas where the courts continue to display a reluctance to review governmental decision-making. In the context of the defence of the realm/disposition and control of the armed forces, the current willingness of the courts to review decisions is well illustrated by *R v Ministry of Defence ex parte Smith*; *R v Admiralty Board of the Defence Council ex parte Lustig-Prean* (1995). This was a challenge to the policy of the Ministry of Defence, made in exercise of the prerogative power, that service personnel known to be homosexual or who engage in homosexual activity were to be discharged from the armed forces. The policy applied irrespective of the individual's service record or character; indeed, all four applicants were said to have exemplary service records. The applicants had been discharged

because of their homosexual orientation. None had committed any offence under the criminal law. In the Divisional Court the Ministry of Defence contended that the issue was non-justiciable as it involved an exercise of prerogative power in the area of the defence of the realm. This was rejected. Such an exercise of the prerogative was justiciable in all except the rarest cases. As stated by Simon Brown LJ:

I have no hesitation in holding this challenge justiciable. To my mind only the rarest cases will today be ruled strictly beyond the court's purview – only cases involving national security properly so-called and where in addition the courts really do lack the expertise or material to form a judgment on the point at issue.

Nor was a test more favourable to the executive than the conventional *Wednesbury* approach (see below, pp 86–88) to be adopted. No parallel could be drawn with cases involving national economic policy (see below, p 58). In the Court of Appeal, the justiciability of the decision was accepted.

Despite the courts' acceptance of the justiciability of the issue, the application was dismissed on the merits. Although the court considered the minister's attitude as reflected in the ban not to be in tune with contemporary thinking, it could not be shown that the minister's decision was irrational or unreasonable and so unlawful. The court did consider that it would not be long before the policy would have to be reconsidered. Indeed, it was announced on 24 March 1997 that a new code of moral conduct which would effectively remove the ban was being drawn up for approval by the Army Board.

3.3.4 Law enforcement

The courts have shown an unwillingness to challenge policy decisions of the police as to the extent to which and the means by which the law should be enforced. However, police decisions do not enjoy absolute immunity from judicial supervision.

In *R v Metropolitan Police Commissioner ex parte Blackburn (No 1)* (1968), a policy decision was taken by the Metropolitan Police Commissioner not to enforce s 32(1)(a) of the Betting, Gaming and Lotteries Act 1963 in London. The applicant, a private citizen, complained that illegal gaming was being carried on and sought an order of *mandamus* to reverse the policy decision. The Divisional Court refused. On appeal to the Court of Appeal (meanwhile, the MPC had orally announced a new policy of enforcement), it was argued that the Commissioner's discretion to enforce/not to enforce the law was absolute. The Court of Appeal, however, stated that, in the enforcement of the law, while the Commissioner was not subject to the dictat of the Home Secretary or a police authority, nevertheless he owed a duty to the public to enforce the law and his discretion was not absolute. As stated by Lord Denning MR, while:

... no minister of the Crown can tell him [the Commissioner] that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone ... [nevertheless, it was] the duty of the Commissioner ... to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted ... But in all these things he is not the servant of anyone, save of the law itself.

However, there were certain decisions with which the law would not interfere:

Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner ... to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area ... He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £10 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.

Salmon LJ also asserted the judicial right to intervene in certain cases:

... if ... the chief officer ... were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of *mandamus* for the instruction to be withdrawn. Of course, the police have a wide discretion as to whether or not they will prosecute in any particular case ... however, the action I have postulated would be a clear breach of duty. It would be so improper that it could not amount to an exercise of discretion.

However, as the Commissioner had already taken the decision to reverse his policy, *mandamus* was not required.

In *R v Metropolitan Police Commissioner ex parte Blackburn (No 3)* (1973), the applicant sought to enforce the obscenity laws. In this case, however, there had been no declaration equivalent to that in *Blackburn (No 1)* and the court found that the Commissioner was doing what he could to enforce the law and that no more could reasonably be expected.

In *Kent v Metropolitan Police Commissioner* (1981), in the aftermath of the Brixton riots, the Metropolitan Police Commissioner, acting under s 3 of the Public Order Act 1936, with the consent of the Home Secretary, banned all public processions (except those traditionally held on 1 May and customary

religious processions) within the Metropolitan Police District (an area of 786 square miles) for 28 days. The ban caught, *inter alia*, a procession arranged by CND, a fair at Chislehurst, a carnival in Fulham and a march of students to Parliament to protest about cuts. The ban was challenged by CND's National Council of which Bruce Kent was then General Secretary. The Court of Appeal declined to challenge the Commissioner's exercise of discretion.

Lord Denning MR considered the matter to be 'for the judgment of the Commissioner himself. When he considers the climate of activity in this city – of completely unprovoked and unlawful attacks by hooligans and others – the Commissioner may well say, "There is such a risk of public disorder ... that a ban must be imposed". This court cannot say that he was at fault ...'. The court noted that a power to vary the order existed under s 9(3) of the Public Order Act 1936 and that the applicants ought to avail themselves of that procedure as provided by Parliament.

In *R v Chief Constable of Devon and Cornwall ex parte CEGB* (1982), the CEGB was considering possible sites for a nuclear power station. The Board was authorised by statute to enter and survey land. A path to a possible site was blocked by about 60 protesters. An injunction was granted to restrain the landowner from preventing entry. The survey commenced but was obstructed by protesters. Protesters left the site after injunctions were granted against them, only to be replaced by other objectors. The action of the objectors was a criminal offence under s 281(2) of the Town and Country Planning Act 1971. The Board wrote to the Chief Constable requesting assistance in enabling it to perform its statutory duty by preventing further disruption. The Chief Constable refused to remove the objectors as there was no actual or apprehended breach of the peace nor unlawful assembly. Indeed, police intervention was likely to lead to just such disturbances. The Board's application for judicial review by *mandamus* was dismissed. On appeal, the Court of Appeal refused to intervene even though it disagreed with the policy adopted. Lord Denning MR was of the view that '... the court would not interfere with his [the Chief Constable's] general discretion'. He stated:

... I would not give any orders to the Chief Constable or his men. It is of the first importance that the police should decide on their own responsibility what action should be taken in any particular situation ... The decision of the Chief Constable not to intervene in this case was a policy decision with which I think the courts should not interfere.

The reasoning of the court here can be distinguished from that in *Blackburn (No 1)*. The Chief Constable had weighed up the factors for and against police intervention. He had not simply taken a blanket decision not to enforce the law. Similarly, in the recent case of *R v Chief Constable of Sussex ex parte International Trader's Ferry Ltd* (1995), a livestock export company challenged the Chief Constable's decision to reduce policing to assist the transport of livestock through demonstrations at the port of Shoreham in Sussex. To the extent that

the challenge was mounted on the Chief Constable's duty to enforce the law, it failed. Although the Chief Constable could not abrogate his duty in a particular area, he was entitled to make policy decisions on the disposition of the resources available to him and he had not acted unreasonably in so doing.

In *R v Secretary of State for the Home Department ex parte Northumbria Police Authority* (1988), a Home Office circular stated that the Secretary of State could supply plastic baton rounds and CS gas from a central store to a Chief Constable without the approval of the local police authority. The validity of that part of the circular was challenged by the Northumbria Police Authority arguing that such a power was conferred exclusively on the authority itself under s 4(4) of the Police Act 1964 ('The police authority for any such area may ... provide and maintain such vehicles, apparatus, clothing and other equipment as may be required for police purposes of the area') and that the prerogative power to maintain the peace was subject thereto.

The Court of Appeal held that the minister was authorised by s 41 of the Police Act 1964 ('The Secretary of State may provide and maintain, or may contribute towards the provision or maintenance of, a police college, district police training centres, forensic science laboratories, wireless depots and such other organisations and services as he considers necessary and expedient for promoting the efficiency of the police') to so act if he considered it necessary or expedient for promoting the efficiency of the police. In any case, he had such a power under the prerogative which was not curtailed by s 4(4) which did not grant a monopoly power. Croom-Johnson LJ concluded:

It is common ground that the Chief Constable has complete operational control of his force. Neither the police authority nor the Home Secretary may give him any directions about that.

The responsibility of the police in the enforcement of the law and the apprehension of criminals was further considered in the context of tortious liability in *Hill v Chief Constable of West Yorkshire* (1989). Here, in an action by the mother of one of the victims of Peter Sutcliffe, the 'Yorkshire Ripper', it was held that there was no general duty of care owed to individual members of the public to identify and apprehend an unknown criminal. In any case, public policy dictated that an action for damages in negligence should not lie.

The courts will, however, readily intervene to ensure that police powers are not exceeded in their day to day execution. In *Lindley v Rutter* (1981), police officers were held to have acted outside the execution of their duty when they removed the brassiere of a woman arrested for being drunk and disorderly. A prosecution of the woman for assaulting the police officers in the execution of their duty failed. Donaldson LJ stated:

Police constables ... derive their authority from the law and only from the law. If they exceed that authority ... technically they cease to be acting in the execution of their duty and have no more rights than any other citizen.

Although the WPCs believed they were acting in accordance with standing orders from the Chief Constable, the action was not justified in the circumstances of the case in law. Legal justification would lie only if there was 'some evidence that young female drunks in general were liable to injure themselves with their brassieres or that the defendant has shown a peculiar disposition to do so'.

By contrast, in *Holgate-Mohammed v Duke* (1984), a challenge to the exercise of a power of arrest failed. The plaintiff had been arrested on reasonable suspicion that she had committed theft. There was, in fact, insufficient evidence with which to charge the plaintiff and the real reason for the arrest was to take her to the police station for questioning in the hope that further evidence would be forthcoming. In an action for false imprisonment, the plaintiff succeeded at first instance since, as the reason for the arrest had been to question at the police station rather than under caution at the plaintiff's home, the power of arrest had been improperly exercised. The House of Lords, however, while accepting that the exercise of such a discretion was capable of review, upheld the legality of the police conduct. Once it was established that grounds of arrest existed (here reasonable grounds to believe the commission of an arrestable offence under s 2(4) of the Criminal Law Act 1967) whether to exercise the power of arrest was a decision which lay with the constable.

It is clear, therefore, that the courts will exert their supervisory jurisdiction to control police decisions only in exceptional cases. A general distinction might be drawn between policy and operational decisions, with the courts being prepared to review certain policy decisions (eg a decision not to enforce a particular law at all) but leaving the day to day operational decisions beyond the scope of review (eg decisions whether or not to prosecute). In many instances, there will be other avenues of challenge to the day to day operational decisions (eg the reasonableness of an exercise of the police power of arrest can be challenged in a tortious action for false imprisonment). However, the distinction remains blurred. Clearly, the courts do not wish to intervene unduly in the exercise of powers relating to law enforcement but do wish to retain an ultimate supervisory control.

In similar vein, the courts have declined to review refusals by the Attorney General to institute a relator action (see below, pp 187–88) to enforce the law. In *AG ex rel McWhirter v Independent Broadcasting Authority* (1973), the Court of Appeal had suggested that, if the Attorney General refused leave in a proper case or his machinery worked too slowly, a member of the public could apply to the court for relief. However, in *Gouriet v Union of Post Office Workers* (1978), the House of Lords frustrated attempts by the Court of Appeal to open up such decisions to judicial review. A refusal by the Attorney General to act when post office workers were planning to boycott communications with South Africa was held to be within the exclusive domain of the Attorney General and not

subject to judicial review. However, *Gouriet* should be considered in the light of its very particular facts – an attempt to enforce the criminal law by reference to civil proceedings.

3.3.5 Prisons – operational decisions

Although the courts have, since the decision of the Court of Appeal in *R v Board of Visitors of Hull Prison ex parte St Germain* (1979), displayed a real commitment to the protection of prisoners' rights (see also *R v Secretary of State for the Home Department ex parte Tarrant* (1985)) they remain unwilling to challenge prison operational decisions. A clear distinction was made in *St Germain* between the disciplinary functions of a prison Board of Visitors and the disciplinary powers of the prison governor. The latter were not subject to review, a position maintained in *R v Deputy Governor of Camphill Prison ex parte King* (1985) but overturned in *Leech v Deputy Governor of Parkhurst Prison* (1988). Similarly, in *R v Secretary of State for the Home Department ex parte McAvooy* (1984), the court declined to review the Home Secretary's decision to move a prisoner to another prison on operational and security grounds despite argument that his lawyers would have to travel 60 miles to consult with him and his parents would be unable to visit due to their ill-health. Although the power could be reviewed if the minister had misdirected himself in law, it was undesirable, if not impossible, for the court to examine operational reasons and to examine security reasons could be dangerous.

A more detailed review of the principle of fairness will be found in Chapter 5.

3.3.6 Political judgments considered by Parliament

As noted above (p 24), the courts are not now prepared to decline their powers of review merely on an assertion of a minister's responsibility to Parliament (*cf Liversidge v Anderson* (1942) with *Congreve v Home Office* (1976)). However, if a decision involves a political judgment and, before it is to take effect, it is subject to Parliamentary approval, then it seems that the courts' powers of review will be limited to situations of *Wednesbury* unreasonableness (see below, p 88).

In *R v Boundary Commission for England ex parte Foot* (1983), a challenge to a decision of the Boundary Commission on the basis that it had failed to give effect to the principle of equal representation embodied in rule 5 of Schedule 2 to the House of Commons (Redistribution of Seats) Act 1949 ('The electorate of any constituency shall be as near the electoral quota as is practicable') failed. The Commission's report of recommendations, once made, was to be laid before Parliament by the minister with the draft of an Order in Council giving effect, with or without modifications, to the report. The Court of Appeal considered, *inter alia*, that the final decision was for Parliament. The recommendations of the Commission could be challenged for *Wednesbury* unreasonableness only. Sir John Donaldson MR stated:

[The Commission's] function and duty is limited to making advisory recommendations. Furthermore the commission's task is ancillary to something which is exclusively the responsibility of Parliament itself, namely, the final decision on parliamentary representation and constituency boundaries ... in some circumstances it would be wholly proper for the courts to consider whether the commission have ... misconstrued the instructions which they have been given by Parliament ...

In *Nottinghamshire County Council v Secretary of State for the Environment* (1986), the Secretary of State laid the Rate Support Grant Report (England) before Parliament pursuant to s 60 of the Local Government, Planning and Land Act 1980. The report, which was approved by resolution of the House, set expenditure targets for local authorities for 1985/86. If an authority exceeded its guidance expenditure, the minister was empowered to reduce the central government rate support block grant. The respondents argued that their expenditure targets were unfairly low and applied for judicial review of the minister's guidance on the ground that it was unlawful in that:

- (a) it was not 'framed by reference to principles applicable to all local authorities' as required by s 59(11A) of the 1980 Act; or
- (b) that the minister had exercised his power unreasonably in the sense that the guidance was disproportionately advantageous to a small group of authorities.

The applicants succeeded on point (a) in the Court of Appeal. However, on appeal to the House of Lords both points failed.

Lord Scarman identified the case as raising 'in an acute form the constitutional problem of the separation of powers between Parliament, the executive, and the courts'. He commented on the limits of judicial review:

We are in the field of public financial administration and we are being asked to review the exercise by the Secretary of State of an administrative discretion which inevitably requires a political judgment on his part and which cannot lead to action by him against a local authority unless that action is first approved by the House of Commons.

... I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of 'unreasonableness' to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers. Unless ... it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons.

Such an examination by a court would be justified only if a *prima facie* case were to be shown for holding that the Secretary of State had acted in bad faith, or for

an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses.

It would be necessary to find as a fact that the House of Commons had been misled ...

... if, as in this case, effect cannot be given to the Secretary of State's determination without the consent of the House of Commons and the House ... has consented, it is not open to the courts to intervene unless the minister and the House must have misconstrued the statute or the minister has ... deceived the House.

In *R v Secretary of State for the Environment ex parte Hammersmith and Fulham LBC* (1991), with the introduction of the community charge to replace rates, the Local Government Finance Act 1988 enabled the Secretary of State for the Environment to set a maximum which an authority's budget may not exceed, so limiting the level of community charge. This practice was commonly called 'capping'. The Secretary of State notified local authorities of their revenue support grant, calculated by reference to a standard spending assessment for each authority. Authorities were then to set their budgets, by reference to which community charges would be set, subject to the minister's power under s 100 of the Local Government Finance Act 1988 to designate authorities whose budgets were in his opinion excessive. He refused to disclose the principles he intended to adopt under s 100 for designating authorities. Twenty one such authorities were designated, 19 of which applied for review of the minister's decision on the basis that he had failed to have regard to the individual spending needs of each authority and that a legitimate expectation had been created that the s 100 power would be used only to reduce budgets higher than any sensible authority might set. The Divisional Court dismissed the application and appeals were dismissed by the Court of Appeal and, unanimously, by the House of Lords. Apart from finding that no ground of illegality could be sustained, it was also held that the minister's designation involved a political judgment subject to the approval of the House of Commons and, therefore, his actions were not open to challenge on grounds of irrationality short of bad faith, improper motive or manifest absurdity.

Similarly, in *R v Secretary of State for Trade and Industry ex parte Lonrho* (1989), the House of Lords declined to challenge a refusal by the minister to refer the acquisition of a majority of the share capital in the House of Fraser by the Al Fayed brothers to the Monopolies and Mergers Commission. The Fair Trading Act 1973 allowed a measure of control over commercial activity considered to be 'against the public interest'. Lord Keith, in the leading judgment, stated:

... whether or not a particular commercial activity is or is not 'in the public interest' is very much a matter of political judgment and the Act is structured to bring under direct parliamentary scrutiny any action proposed by the Secretary of State to interfere with commercial activity which he considers to be against

the public interest. The Secretary of State is only empowered to take action against a merger if the ... Commission has advised in a report laid before both Houses of Parliament that the merger is or may be against the public interest and the Secretary of State must act by a draft order laid before Parliament in accordance with the provisions of Schedule 9 to the Local Government Finance Act 1988. These provisions ensure that a decision which is essentially political in character will be brought to the attention of Parliament and subject to scrutiny and challenge therein, and the courts must be careful not to invade the political field and substitute their own judgment for that of the minister. The courts judge the lawfulness, not the wisdom, of the decision.

R v HM Treasury ex parte Smedley (1985) can usefully be compared with these decisions. Here the challenge was to a draft Order in Council approved by both Houses, on the basis that the Order was not authorised by reference to the statute which it was claimed authorised it – the European Communities Act 1972. The Court of Appeal held that it could properly consider subordinate legislation to determine whether it was *intra vires* the statute under which it was allegedly made.

3.4 Surrender of discretion

The decision-maker upon whom the discretion is conferred must also be the one to exercise the discretion. The exercise of the discretion may not:

- be sub-delegated to an unauthorised third party; nor
- effectively surrendered by being exercised at the instruction of a third party. To do so would be a surrender of the discretion itself.

3.4.1 Unlawful delegation – *delegatus non potest delegare*

The person upon whom the power is conferred must be the one to exercise the discretion. In *Allingham v Minister of Agriculture and Fisheries* (1948), a notice requiring farmers to grow sugar beet was unlawful because the designation of the fields in which it was to be grown had been delegated without authority by the agricultural committee to an officer. In *Barnard v National Dock Labour Board* (1953), the plaintiff dock workers successfully applied for declarations that their suspensions from work were unlawful on the basis that disciplinary functions which had been lawfully delegated by the National Dock Labour Board to local boards under the Dock Workers (Regulation of Employment) Order 1947, had then been unlawfully sub-delegated by the London Dock Labour Board to a port manager. Similar facts arose and a similar decision was given on the point of sub-delegation in *Vine v National Dock Labour Board* (1957). The judicial nature of the power was emphasised in each of these cases ('While an administrative function can often be delegated, a judicial function rarely can be' *per* Denning LJ – though this distinction is now rarely made).

It is accepted, however, that ministers cannot personally take decisions in all the instances where power is conferred upon them. These decisions may normally be taken by civil servants within their departments, the minister remaining politically responsible to Parliament (though ministers do not in practice accept responsibility, here meaning 'blame', for all decisions taken within their departments).

In *Carltona v Commissioner of Works* (1943), a challenge to the requisitioning of a factory by an assistant secretary in the name of the Commissioner of Works under the 1939 Defence Regulations failed. Lord Greene MR established the principle and the reasoning behind it:

In the administration of government in this country the functions which are given to ministers (and constitutionally and properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them ... It cannot be supposed that this regulation meant that, in every case, the minister in person should direct his mind to the matter.

Similarly, in *Local Government Board v Arlidge* (1915), Viscount Haldane LC explained the exception by reference to the principle of individual ministerial responsibility to Parliament:

The minister at the head of the Board is directly responsible to Parliament ... He is responsible for not only what he himself does but for all that is done in his department ...

Although each of these was a war-time decision it is clear that the exception operates in times of normality, as demonstrated by *R v Skinner* (1968), where the court held that approval by the Home Secretary of breath-testing devices under the Road Safety Act 1967 could be expressed by an assistant secretary in the police department of the Home Office. This was so even though approval by the Home Secretary was a precondition to a conviction under the breathalyser legislation and so had serious civil liberties implications and even though the approval was a once and for all decision and would not involve the minister in multiple decisions. Here, Widgery LJ explained that the relationship between the minister and his servant was in fact 'not strictly a matter of delegation; it is that the official acts as the minister himself and the official's decision is the minister's decision'. The same approach was adopted in *Re Golden Chemical Products Ltd* (1976), where a power given to the minister under the Companies Act 1967 to wind up a company in the public interest (so affecting both personal and property rights) was exercised by an official. A further case clearly involving individual freedom is that of *R v Secretary of State for the Home Department ex parte Doody* (1993), where a power to fix prisoners' tariff periods was validly exercised by a junior minister.

However, in *R v Governor of Brixton Prison ex parte Oladehinde* (1991), the House of Lords suggested that the minister's power to delegate within his or

her department may be subject to limits. There, although it was accepted that the Home Secretary's power to deport aliens under the Immigration Act 1971 could be exercised by immigration officers, for whom the Home Secretary was responsible, this was subject to the proviso that (*per* Lord Griffiths) 'they do not conflict with or embarrass them in the discharge of their specific statutory duties under the Act and that the decisions are suitable to their grading and experience'.

The *Carltona* principle applies only to central government. However, delegation by local government is provided for in s 101 of the Local Government Act 1972 which permits local authorities to arrange for the discharge of their functions by a sub-committee or an officer. This provision does not, however, authorise delegation to a single member (see *R v Secretary of State for the Environment ex parte Hillingdon LBC* (1986)).

The body to whom the power is delegated must act within the power delegated. It will be no defence that the person who delegated *could* have delegated more power, but did not do so (see *Blackpool Corporation v Locker* (1948)).

3.4.2 Acting under dictation

A further instance of surrender of discretion is where the person upon whom the power is conferred actually takes the decision but is effectively acting at another's dictation. Where discretion is vested in A, it must not be exercised at the discretion of B.

So, in *Lavender v Minister of Housing and Local Government* (1970), the minister dismissed an appeal against a refusal of planning permission. His decision letter stated that agricultural land should not be released for mineral working *unless the Minister of Agriculture was not opposed* to such working. The court considered that, by so doing, the minister 'had so fettered his own discretion ... that the decisive matter was not the exercise of his own discretion ... but the sustained objection of the Minister of Agriculture'.

In *Ellis v Dubowski* (1921), a local authority with powers to licence the showing of films decided that it would not allow the showing of any film not given a certificate by the British Board of Film Censors. This was an unlawful surrender of discretion. The authority would have been correct to take into account the BBFC's classification but not to automatically act in accordance with its decisions not to classify. See also *Roncarelli v Duplessis* (1959), where the Quebec Liquor Commission cancelled a liquor licence at the instigation of the Prime Minister of Quebec. In *R v Tower Hamlets LBC ex parte Khalique* (1994), the local authority was under a statutory duty to house the applicant. It provided temporary accommodation but refused to provide settled accommodation in accordance with a policy that applicants more than £500 in arrears were rendered 'non-active'. The policy had been formulated by a Homelessness Board. Sedley J found this to be an unauthorised delegation of discretion – in fact, to

an informal group which did not have the power to decide anything in the council's name. Even to take into account such a group's views would be to take into account an irrelevant consideration.

3.5 Policy

3.5.1 Self-created rules of policy

The exercise of a discretion can also effectively be abdicated by the adoption of a strict policy rule to be applied to each decision without more. Whilst it appears to be acceptable that decision-making is guided by a policy – indeed, this is often essential in the case of a power to be exercised on multiple occasions – there must be the flexibility for individual cases to be considered on their merits. Otherwise the decision becomes that of an automaton and the quality of discretion is lost. The line between acceptable policy principle and that of an unacceptable rule can, however, be a fine one to discern.

In *R v Port of London Authority ex parte Kynoch* (1919), Bankes LJ stated:

There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case ... if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule ... not to hear an application of a particular character by whomsoever made ...

In *British Oxygen v Board of Trade* (1971), the Board of Trade had a discretion under the Industrial Development Act 1966 to award investment grants for new plant. A rule of practice was established not to approve grants for individual items of less than £25. British Oxygen spent over £4 million over three years on the purchase of cylinders, each costing under £25, in which they kept the gases they manufactured. They applied for an investment grant on the basis of this expenditure and were refused. On a challenge by way of judicial review it was argued that the Board's exercise of power was unlawful as a rigid policy which did not permit individual cases to be considered on their merits. The court found that the Board's officers had, in fact, listened to the applicants and that there was no reason why the Board should not have a policy and apply it in this case. Lord Reid usefully stated the principle as follows:

The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' ... I do not think there is any great difference between a policy and a rule ... What the authority must not do is to refuse to listen at all. But a ministry or large authority may have had to deal already with a

multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided that the authority is always willing to listen to anyone with something new to say.

See also *R v Paddington and St Marylebone Rent Tribunal ex parte Bell London & Provincial Properties Ltd* (1949), where a local authority referred all tenancies in blocks of flats where two or more reductions in rent had already been made, even if the relevant tenants had not complained. Each case was to be considered on its merits and not be dealt with in such a non-selective, indiscriminate way.

The use of a policy principle to guide the decision is further illustrated by *Stringer v Ministry of Housing and Local Government* (1970), where the minister had a policy not to allow development which would interfere with the operation of the Jodrell Bank radio telescope. The minister rejected an appeal against a refusal of planning permission. Cooke J stated:

... a Minister charged with the duty of making individual administrative decisions in a fair and impartial manner may nevertheless have a general policy ... provided that the existence of that general policy does not preclude him from fairly judging all the issues which are relevant to each individual case ...

3.6 Keeping an open mind

All these cases are really concerned with the general principle that the decision-maker must keep an open mind and it was in these terms in which the issue was dealt with in *R v Secretary of State for the Environment ex parte Brent LBC* (1982). Here, the minister had exercised powers to reduce the rate support grant to the applicant in accordance with a previously stated policy to deal with overspending authorities. The minister had refused to meet representatives of the authority to discuss the policy. On an application for judicial review it was held that the minister had thereby fettered his discretion and breached the rules of natural justice. He should have been prepared to ascertain whether the authorities had anything new to say. Ackner LJ stated that the minister had 'clearly decided to turn a deaf ear to any and all representations to change the policy ...'. The minister was 'obliged to listen to any objector who showed that he might have something new to say ... he was obliged not to declare his unwillingness to listen ... to be entitled to be heard it was for the objector to show that he had, or might have, something new to say ...'.

There is also a difficulty here in the use of the word 'policy'. At one level, this can simply mean a rule to assist in decision-making. At another level, it can refer to government policy-making. In the latter sense, it would be unrealistic to expect a minister to make a decision in disregard of governmental policy. At the very least, such policy will be a relevant consideration. All that can realistically

be expected here is that the minister keeps an open mind and displays a willingness to listen to representations – in particular on the effects of the implementation of policy at a local level.

The decision in *Franklin v Minister of Town and Country Planning* (1948), where the minister had made up his mind that Stevenage was going to be designated the first new town under the New Towns Act 1948, recognises the influences of policy on ministerial decision-making. Prior to a public inquiry, the minister attended a meeting at which he declared to a hostile audience: 'It is no good your jeering: it is going to be done.' The minister's subsequent confirmation of the order was challenged. The House of Lords here found that all that was required of the minister was that he followed the procedure laid down by the Act. Apart from that, he could be as biased as he liked.

In *Bushell v Secretary of State for the Environment* (1981), objectors at a public inquiry wished to object to the need for a motorway. It was government policy that motorways be developed. At the public inquiry, the inspector allowed evidence on the need for a motorway but refused challenges by way of cross-examination on the methods used for predicting traffic flow. The House of Lords rejected a challenge to this refusal. The purpose of public inquiries was to enable local objections to the route of a particular motorway to be put, not to challenge government policy decisions *per se*. As stated by Lord Diplock:

To treat the minister in his decision-making capacity as someone separate and distinct from the department of government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intentions ... Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him ... the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being, he is the political head.

The influence of party policy/loyalty was also raised at the level of local councillors in *R v Waltham Forest LBC ex parte Baxter* (1988). The decision of certain councillors to vote on party lines in setting a rate and against their personal views was upheld on a challenge by local ratepayers. Party policy and loyalty were relevant factors to be taken into account by the councillors in reaching their decision, provided the councillors also considered other relevant factors and were not dominated by party policy.

3.7 Fettering discretion by contract

Just as a public authority cannot fetter the proper exercise of its discretion by adherence to a strict policy, so it cannot fetter such discretion by entering into a contract with obligations inconsistent with the lawful exercise of its discretion.

The *Amphitrite* case (*Rederiaktiebolaget 'Amphitrite' v The King* (1921)) is authority for the general proposition that the Crown cannot fetter its future executive action by contract:

- *Commissioner of Crown Land v Page* (1960): it was held that the grant of a lease by the Commissioners did not prevent the future requisition of the property by the Crown under war-time legislation.
- *Ayr Harbour Trustees v Oswald* (1883): it was held that, on the exercise of statutory powers of compulsory purchase, the trustees could not give an undertaking to the former owner that he would continue to have unobstructed access to the harbour from his remaining land. The trustees had a statutory power to build on the land acquired and could not fetter the exercise of this power which had to be exercised in the public interest.
- *Stringer v Minister of Housing and Local Government* (1970): it was held that a planning authority could not undertake by contract that it would not grant planning permission.
- *Dowty Boulton Paul v Wolverhampton Corporation* (1971): it was held that a firm could not argue an implied term in a contract with the corporation that the corporation would not in the future pass by-laws which would make the contract more onerous to fulfil.

The basis of the principle is that a public authority must exercise its powers in the public interest and so it cannot 'contract out' of this obligation. However, the principle cannot be argued simply to extract a public authority from contractual obligations which it no longer wishes to fulfil. So, in *Cory v London Corporation* (1951), where the corporation had granted a right to use the municipal airport for 99 years, it had no right to renege on this agreement after 35 years when it wished to use the land for the development of a housing estate. (See also *R v Hammersmith and Fulham LBC ex parte Beddowes* (1987).)

3.8 Fettering discretion by estoppel

If a public authority cannot fetter the lawful exercise of a discretion by entering into inconsistent contractual obligations, it stands to reason that it cannot normally be bound by mere advice, despite the established principle of estoppel, ie that where a person acts to his or her detriment in reliance upon another's statement or representation then that other is estopped from denying the truth of that statement or representation.

Estoppel cannot be invoked to legitimate illegal action by a public authority, to give an authority powers which it does not in law possess, or to prevent the performance of a legal duty.

In *Rhyl UDC v Rhyl Amusements Ltd* (1959), it was held that the local authority landlord could deny the validity of a lease when it had failed to obtain

requisite consents to the lease; in *Southend-on-Sea Corporation v Hodgson (Wickford) Ltd* (1962) that, where a company had bought land in reliance on a statement from the borough surveyor that planning permission was not needed for use as a builder's yard, the company could not rely on this statement when the planning authority subsequently served an enforcement notice to prevent the continuance of such use.

In *Western Fish Products Ltd v Penwith DC* (1981), the plaintiffs purchased a disused site for use in the manufacture of fish products. After a meeting with the plaintiffs, a planning officer confirmed that 'the limits of the various component parts of the commercial undertaking as now existing appear to be established'. The plaintiffs proceeded to prepare the premises. Some three months later they were asked to submit planning applications and an application for an established use certificate which the planning officer stated to be 'purely a formality'. All the applications were refused and enforcement and stop notices were authorised. It was argued that the council were estopped from denying that the plaintiffs had existing use rights *and* that the council was severely limited in the exercise of its discretion to refuse planning permissions. Further, that the council had acted 'contrary to the legitimate and reasonable expectations induced by them'. The Court of Appeal held, *inter alia*, that estoppel could not be raised to prevent the exercise of a statutory discretion or the performance of a statutory duty. The council alone had power under the Town and Country Planning Act 1971 to determine the applications (though the authority might have been bound if their officer had been held out by them as having authority). Megaw LJ stated:

The defendant council's officers, even when acting within the apparent scope of their authority, could not do what the Town and Country Planning Act 1971 required the defendant council to do; and if their officers did or said anything which purported to determine in advance what the defendant council themselves would have to determine in pursuance of their statutory duties, they would not be inhibited from doing what they had to do. An estoppel cannot be raised to prevent the exercise of a statutory discretion or to prevent or excuse the performance of a statutory duty.

Clearly, such decisions can have very harsh consequences for the parties who relied on the statement or representation. Should the individual be expected to know the limits of the representee's authority? On occasions, the courts have been slow to apply the principle. For example, in *Robertson v Minister of Pensions* (1949), the appellant was informed by the War Office that a disability of his had been accepted as 'attributable to military service'. In reliance on this assurance, he did not obtain an independent medical opinion. The Ministry of Pensions which, in fact, had the authority to decide such a question, later decided that his disability was not so attributable. However, the assurance was held to be binding on the Minister of Pensions. The appellant was entitled to assume that the War Office had consulted other departments concerned. It is difficult to explain this decision by reference to the application of legal principle.

The courts have also established exceptions to the principle:

- Where an authority has power to delegate to its officers to determine specific questions and there is some evidence, beyond the holding of the office itself, to justify the person dealing with the officer for thinking that what the officer said would bind the authority.

In *Lever (Finance) Ltd v Westminster Corporation* (1970), under s 29 of the Town and Country Planning Act 1971 the council, as planning authority, had to determine applications for planning permission. Variations to an approved plan were submitted to a planning officer who said they were not material and, therefore, no further permission was needed for their implementation. Building proceeded on this basis. The planning authority subsequently required and refused permission for the variations. Under s 101 of the Local Government Act 1972, a local authority could arrange for its functions to be discharged by an officer of the authority. Although this had not been done formally as required, it was held that the practice of the authority in allowing the officer to take decisions of the type involved conferred 'ostensible authority' upon him. The authority was bound.

- Where an authority waives a technical procedural requirement relating to an application made to it for the exercise of its statutory powers, it may be estopped from relying on the lack of procedural correctness.

In *Wells v Minister of Housing and Local Government* (1967), Lord Denning MR stated:

... I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on technicalities ... I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid.

However, the assurance must be made in clear and unambiguous terms if it is to be relied upon (see *R v IRC ex parte Matrix Securities Ltd* (1994)).

Further, estoppel simply does not operate at the level of government policy. So, a government department which encouraged an airline to invest in aircraft on the understanding that its licence would be continued was not estopped, on a change of government and reversal of policy, from withdrawing the licence – *Laker Airways Ltd v Department of Trade* (1977).

3.9 Fettering discretion by legitimate expectation

The essence of the concept of legitimate expectation is that if a body with a decision-making power makes a promise or gives an undertaking to exercise the power in a particular way then, until that promise or undertaking is formally revoked, those affected by an exercise of the power have a legitimate,

enforceable, expectation that it will be exercised in accordance with the promise or undertaking. In addition, such an expectation can arise from a past practice or act, including the publication of a policy, on the part of the decision-maker.

The origins of the concept of legitimate expectation are very much rooted in the modern development of the application of the rules of natural justice and served in that context to confer procedural rights to a fair hearing upon a person affected by a decision (see Chapter 5). However, the concept has developed beyond this into the realm of the conferment of substantive rights which potentially restrict the freedom to make even policy decisions. The concept also has a close relationship with estoppel, ie they are both concerned with the idea that an authority may effectively restrict its own discretion.

In the present context, we are concerned with the impact of legitimate expectation upon policy decisions or statements. Such impact may only be to demand that the person affected is given an opportunity to state his or her case before the stated policy is changed or not adhered to (ie a procedural right). So, for example, in *R v Liverpool Corporation ex parte Liverpool Taxi Fleet Operators' Association* (1975), the authority was under a duty to give a hearing before breaking an undertaking not to increase the number of taxi cab licences. However, the impact may extend to conferring a substantive right upon the individual to be dealt with in accordance with the original policy and to preclude the application of a new policy to the instant case. So, for example, in *R v Home Secretary ex parte Asif Mahmood Khan* (1984), a Home Office circular stated the criteria to be fulfilled if a child was to be admitted to the United Kingdom for adoption purposes. An entry clearance was refused on the ground that there were no 'serious and compelling family and other considerations' which would make refusal of permission undesirable. This was not one of the stated criteria. In the Court of Appeal Parker LJ asserted:

... in principle, the Secretary of State, if he undertakes to allow in persons if certain conditions are satisfied, should not in my view be entitled to resile from that undertaking without affording interested persons a hearing and then only if the overriding public interest demands it.

... If the new policy is to continue in operation, the sooner the Home Office letter is redrafted and false hopes cease to be raised in those who have a deep emotional need to adopt, the better it will be. To leave it in its present form is not only bad and grossly unfair administration but ... positively cruel.

The construction given to the stated policy will be all important. In the *Khan* case itself, the policy might have been construed either to the effect that those who fulfilled the conditions would be allowed into the United Kingdom (the construction adopted) or that these were minimum – not exclusive – conditions to be fulfilled.

In *R v Secretary of State for the Home Department ex parte Ruddock* (1987), it was argued that published criteria for the tapping of telephones (in particular, that

there was reasonable cause to believe subversive activity and that interception could not be used for party-political purposes) had been breached. The Secretary of State argued that legitimate expectation applied only where the person affected expected to be consulted or to be able to make representations. This could not be an expectation before a warrant authorising a telephone tap was issued. The minister's argument was rejected – though the minister was found, in fact, *not* to have flouted the criteria and his decision was found not to have been unreasonable. Taylor LJ stated:

... in a case where *ex hypothesi* there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking ... should be kept.

Legitimate expectation was, therefore, capable of conferring a substantive benefit, ie that individuals who did not fall within the government's published criteria for telephone surveillance would not have their telephones tapped.

Limitations on the application of legitimate expectation were, however, expressed in *R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Ltd* (1990), where the applicants purchased bonds in reliance on assurances from the IRC that index-linked payments on redemption would be treated as capital and not income. A subsequent reversal of this decision by the IRC was challenged. Here the application was dismissed. Bingham LJ stated:

... in assessing the meaning, weight and effect to be given to statements of the Revenue the factual context, including the position of the Revenue itself, is all important.

... a statement formally published to the world might safely be regarded as binding, subject to its terms, in any case clearly falling within them. But where the approach to the Revenue is of a less formal nature a more detailed inquiry is, in my view, necessary ... it would ... be ordinarily necessary for the taxpayer to show that certain conditions have been fulfilled.

The taxpayer must have put all his cards face upwards on the table, ie he must give full details of the transaction on which he seeks the Revenue's ruling, must indicate the ruling sought, that a fully considered ruling is sought and the use to be put to any ruling; the ruling itself must be clear, unambiguous and devoid of relevant qualification. This was required because:

The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen.

In this case, the applicants had not made it clear to what use any assurance given would be put and that they would publicise such an assurance amongst their membership. Although the application here was, therefore, ultimately dismissed and the argument of legitimate expectation rejected because of the applicant's failure to provide full details, the implication is that, had such details been provided, the applicant would have acquired a substantive interest. (On the

MFK case, see further Mowbray, 'Legitimate Expectations and Departmental Representations' (1990) 106 LQR 568.) Indeed, in *R v Inland Revenue Commissioners ex parte Unilever* (1996), a 20 year old *practice* of the Inland Revenue to allow Unilever to claim loss relief against profits outside the statutory time limit of two years could not be departed from in the absence of clear advance notice. Also, in *R v Customs and Excise Commissioners ex parte Kay* (1996), a *formal agreement* between the IRC and opticians was found to give rise to a legitimate expectation. In the absence of legislation which obliged the Commissioners to depart from their promise, it would be unfair and an abuse of power for them to do so. By contrast, in *R v Customs and Excise Commissioners ex parte Littlewoods Home Shopping Group* (1997), there had been a new judicial interpretation of relevant law and the Commissioners were released from assurances they had given based on a different (mistaken) view of the law.

There continued, however, to be some judicial debate as to the substantive dimension of legitimate expectation. In *R v Secretary of State for Transport ex parte Richmond upon Thames LBC* (1994), judicial review was sought of the minister's decision to change the rules which governed restrictions on night flights at London's major airports. Laws J held that the variations were outside the power given to the minister under s 78(3) of the Civil Aviation Act 1982 since they had no regard to the maximum number of aeroplane take-offs as required. However, he considered the concept of legitimate expectation to be purely procedural in nature. Laws J was himself considered to have been wrong on this point by Dyson J in *R v Governors of Haberdashers Askes' Hatcham College Trust ex parte Tyrell* (1994). In *R v Ministry of Agriculture, Fisheries and Food ex parte Hamble Fisheries (Offshore) Ltd* (1995), Sedley J also considered Laws J to have been wrong in *Richmond*. Legitimate expectation did have a substantive dimension.

In the *Hamble Fisheries* case, the applicant sought judicial review of the ministry's decision to impose restrictions on its previous policy on the control of fishing in the North Sea, in particular over licences issued for 'beam trawling'. The company argued that, in reliance on the previous policy, the company had entered into commitments which were now frustrated and that the new policy had been introduced with immediate effect and without transitional arrangements or 'pipeline' provisions (ie provisions covering transactions 'in the pipeline'). On the principle of legitimate expectation operating to confer substantive rights, Sedley J was in no doubt:

It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step.

The fine line to be drawn between conferring rights through legitimate expectation and retaining the ability to review and reformulate policy is well illustrated by the *Hamble* case. Sedley J himself was of the view that a concept of

legitimate expectation which conferred substantive rights did 'not risk fettering a public body in the discharge of public duties because no individuals can legitimately expect the discharge of public duties to stand still or be distorted because of that individual's peculiar position'. In the present case:

Fairness did not ... require the perceived need for a swift limitation of North Sea beam trawling for pressure stock to be sacrificed in favour of a class whose expectations, however reasonable and however genuine, might well have eventually subverted the policy. The means adopted bore a fair proportion to the end in view ...

The applicant had a right to be heard, though this would not guarantee success. The minister's decision must be taken in the public interest and it was that which was paramount.

Policy similarly prevailed in *R v Secretary of State for Health ex parte United States Tobacco International Inc* (1992). Here, after negotiations with the government and an agreement not to market snuff to persons under 18, the applicants opened up a factory in 1988 with the assistance of a government grant. The agreement was extended to April 1988 but, in February 1988, the minister announced a proposal to ban oral snuff. The applicants argued that, provided they continued to comply with the agreement and there emerged no stronger evidence on the health risk, they had a legitimate expectation based on a course of conduct that they would be permitted to continue. This was rejected. Morland J stated:

The right of government to change its policy in the field of health must be unfettered. This is so even if the basic scientific evidence remains unchanged or substantially unchanged.

(The regulations were, in fact, quashed but because of inadequate consultation under the Consumer Protection Act 1987.)

Legitimate expectation has also been argued, with limited success, by prisoners wishing to challenge exercises of sentencing powers and changes to sentencing policies by the Home Secretary. In *Re Findlay* (1985), the Home Secretary adopted a new policy of refusing to release on licence prisoners serving sentences of over five years for offences of violence or drug trafficking on licence only except in the most exceptional circumstances. Prisoners affected by this change argued that they had suffered a loss of expectation of parole because, under the old policy, they had good reason to expect release sooner. The House of Lords accepted that legitimate expectation was capable of conferring substantive rights. However, Lord Scarman, who delivered the only speech, stated:

But what was their legitimate expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined in the light of whatever policy the Secretary of State sees fit to adopt provided always that the adopted

policy is a lawful exercise of the discretion conferred ... Any other view would entail the conclusion that the unfettered discretion conferred by the statute upon the minister can in some cases be restricted so as to hamper, or even to prevent, changes of policy.

Similarly, in *R v Secretary of State for the Home Department ex parte Hargreaves* (1997) the Court of Appeal refused to accept that legitimate expectation (had one existed) could be used to challenge a change of policy whereby home leave for prisoners could not be applied for until after one-half rather than one-third of sentence had been served. Indeed, Hirst LJ went so far as to agree with counsel for the Home Office's assertion that Sedley J's approach in *Hamble Fisheries* was 'heresy'. On matters of substance, as opposed to procedure, *Wednesbury* provided the correct test in establishing the legality of a policy. Insofar as Sedley J had propounded that a 'balancing exercise' should be undertaken by the court, his *ratio* in *Hamble* was overruled.

In conclusion, therefore, there are signs of judicial recognition that legitimate expectation can operate to confer substantive rights. However, this cannot operate to fetter altogether future executive action. A minister will always be free to change a stated policy, although where a legitimate expectation of rights accruing from an existing policy has arisen, the minister must (normally) take steps to publish the new policy (unless this would conflict with, for example, national security). It is also clear that legitimate expectation can never be argued to compel the fulfilment of a promise or undertaking which itself is in breach of the law.

3.10 Presumptions of statutory interpretation

In determining the intentions of Parliament as expressed in statute, the courts may be aided by certain presumptions of statutory interpretation, including the following which may be of particular relevance in the context of judicial review.

3.10.1 Taxation cannot be levied without the authority of Parliament

The Bill of Rights 1688 made the levying of money to or for the use of the Crown without Parliamentary approval unlawful. Hence the executive has no power to impose taxation in its own right. If such a power is to exist, it must be clearly expressed in an enabling Act. Examples of this principle abound:

- *AG v Wilts United Dairies* (1921): a charge on milk production imposed under statutory powers to regulate food supply was declared unlawful;
- *Congreve v Home Office* (1976): the infamous attempt to penalise people who had renewed their TV licences early to avoid an increase in the charge payable by threatening revocation of their new licences after eight months was unlawful;

- *Daymond v South West Water Authority* (1976): a charge for sewerage imposed on homes not connected to public sewers was unlawful;
- *Commissioners of Customs and Excise v Cure and Deeley* (1962): a regulation that, in the absence of a tax return, the Commissioners could determine the amount of tax payable was unlawful. The amount to be collected had to be that authorised by Parliament.

Similarly, one House of Parliament cannot unilaterally authorise the raising of revenue. In *Bowles v Bank of England* (1913), a resolution of the Committee of Ways and Means (a committee of the whole House of Commons) could not authorise the collection of revenue and thus a tax demand made in pursuance of a resolution was unlawful. (Such authority was subsequently conferred by the Provisional Collection of Taxes Act 1913.)

3.10.2 In favour of the rule of law

The meanings accorded to the rule of law were reviewed earlier (see pp 22–23). As stated there, a central meaning attached to the rule of law is the absence of arbitrary power on the part of government, ie that all power is subject to definable limits. Administrative law itself is concerned with defining what those limits are. Hence, all cases in the field of judicial review might be considered to be examples of the operation of the rule of law. The following presumptions of statutory interpretation reflect aspects of the rule of law:

Against interference with the liberty of the subject

Entick v Carrington (1765) has already been noted as an illustration of the general principle that government officers must act according to the law. *Hall & Co Ltd v Shoreham-by-Sea UDC* (1964) illustrates the presumption that rights cannot be taken away except by express authority or necessary implication. Hence, a condition attached to planning permission that the applicant must construct an access road effectively to be dedicated to public use was held to be unlawful as unreasonable because it breached the principle that property rights cannot be taken without due compensation. The authority was attempting here to avoid using the powers of the Highways Act 1959 which would require compensation to be paid. In *R v Hallstrom ex parte W* (1986), it was held that, in the absence of clear words in the statute, there was no power to detain a mentally disordered person in hospital; nor was there any obligation on such a person to have a medical examination or undergo medical treatment.

Note also in this context the presumption against the taking of property without compensation (see *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* (1919)). In *R v Secretary of State for Transport ex parte Rothschild* (1989), although the decision to compulsorily purchase land for the construc-

tion of a bypass was upheld despite the applicant objectors' offers of alternative land, Slade LJ stated:

Given the obvious importance and value to land owners of their property rights, the abrogation of those rights in the exercise of his discretionary power to confirm a compulsory purchase order would, in the absence of what he perceived to be a sufficient justification on the merits, be a course which surely no reasonable Secretary of State would take.

On the facts, the minister had acted reasonably, taking into account suitability of the land, delay and cost.

Against retrospective legislation

In *Waddington v Miah* (1974), the House of Lords confirmed the decision of the Court of Appeal that the respondent could not be convicted for offences under the Immigration Act 1971 in respect of conduct before the Act came into force. It was 'hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation'.

Denial of access to the courts

In *Raymond v Honey* (1983), a letter written by a prisoner to his solicitors was stopped by the prison governor. The prisoner then prepared an application for leave to commit the governor for contempt. These documents were stopped by the governor also. Section 47 of the Prison Act 1952 enabled the Secretary of State to make rules for the regulation and management of prisons. Rule 33(3) provided for letters and communications to and from prisoners to be read by the governor. Further, the governor might, at his discretion, stop any letter or communication on the ground that its contents were objectionable or that it was of inordinate length.

The House of Lords, confirming the decision of the Divisional Court, held that the stopping of the letter did not constitute a contempt but that the stopping of the application did. Conduct calculated to prejudice a party's access to the courts or to obstruct or interfere with the due course of justice or the lawful process of the courts was a contempt of court. There was nothing in the Prison Act 1952 which conferred powers to make regulations which would deny, or interfere with, the right of a prisoner to unimpeded access to the courts. Lord Wilberforce asserted that:

... under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication ... there is nothing in the Prison Act 1952 that confers power to make regulations which would deny, or interfere with, the right of the respondent, as a prisoner, to have unimpeded access to a court. Section 47 ... is ... concerned with the

regulation and management of prisons and, in my opinion, is quite insufficient to authorise hindrance or interference with so basic a right.

The absence of statutory authority for the power claimed was confirmed by Lord Bridge of Harwich:

This rule-making power [s 47 of the Prison Act 1952] ... is manifestly insufficient for such a purpose and it follows that the rules, to the extent that they would fetter a prisoner's right of access to the courts ... are *ultra vires*.

In *R v Lord Chancellor ex parte Witham* (1997), access to the court was described as a constitutional right. It could be removed only by primary legislation with an express provision. Measures made by the Lord Chancellor under s 130 of the Supreme Court Act 1981 which revoked exemption from court fees for litigants in person on income support and the power to reduce or remit fees in cases of financial hardship were, therefore, unlawful as effectively precluding access to the courts.

3.10.3 Against ousting the jurisdiction of the courts

Exclusion of judicial review is considered in Chapter 7. It is clear that the courts will not easily accept that their jurisdiction has been excluded except by express words or necessary implication.

In *Chester v Bateson* (1920), a regulation was made, purportedly under powers contained in the Defence of the Realm Consolidation Act 1914, which provided that no one should take proceedings to recover possession of property in which a munitions worker was living without the consent of the Minister of Munitions. In proceedings by a landlord, without the minister's consent, for recovery of possession, the tenant argued that the jurisdiction of the court was ousted by the landlord's failure to obtain the required consent. On appeal by way of case stated it was held that the regulation was *ultra vires* the statute. Darling J commented:

It is to be observed that this regulation not only deprives the subject of his ordinary right to seek justice in the courts of law, but provides that merely to resort there without the permission of the Minister of Munitions first had and obtained shall of itself be a summary offence, and so to render the seeker after justice liable to imprisonment and fine. I allow that in stress of war we may rightly be obliged, as we should be ready, to forgo much of our liberty, but I hold that this elemental right of the subjects of the British Crown cannot be thus easily taken from them.

Avory J concluded that '... nothing less than express words in the statute taking away the right of the King's subjects of access to the courts of justice would authorise or justify it'. Similarly, Sankey J felt that he 'should be slow to hold that Parliament ever conferred such a power unless it expressed it in the clearest possible language, and should never hold that it was given indirectly by ambiguous regulations made in pursuance of any Act.

3.10.4 In favour of international law

The United Kingdom is a dualist state, ie international law does not form part of domestic law enforceable in the domestic courts unless embodied in an Act of Parliament. (Compare monism where international law and domestic law are part of the same system and where, in case of conflict, international law normally prevails.)

There is, however, a presumption that, in enacting legislation, Parliament intends to comply with its international treaty obligations. To the extent of any ambiguity in a statute, therefore, an interpretation consistent with treaty obligations will prevail. (See further Chapter 11 in the context of the European Convention on Human Rights.) The same principle applies to customary international law – see *Mortensen v Peters* (1906). Customary international law may also be used to fill a gap in English law. Treaties, however, cannot be so used as this would, in effect, confer a law-making power upon the executive – see *Trendtex Trading Corp v Central Bank of Nigeria* (1977).

As these are all *presumptions* of statutory interpretation, they can be overridden by express and unambiguous words in the statute.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION I – PREREQUISITES TO REVIEW

Grounds of review

The courts have developed the so-called principles of *ultra vires* and natural justice/fairness. *Ultra vires* can itself be sub-classified into:

- substantive *ultra vires*, ie doing the wrong thing;
- procedural *ultra vires*, ie doing something in the wrong way;
- abuse of power, ie acting unreasonably.

An alternative classification is that of Lord Diplock in *CCSU v Minister for the Civil Service* (1985) of illegality, irrationality and procedural impropriety. Lord Diplock also suggested proportionality as a potential fourth head of review.

Non-justiciability

Even though a decision by a public body has been reached *ultra vires* or in breach of natural justice, the courts will decline to review it if it is within a field which they regard as being ‘non-justiciable’, ie which they regard as being essentially within the executive domain. Non-justiciable fields include:

- foreign affairs, defence and national security;
- law enforcement;
- prison operational decisions;
- political decisions considered by Parliament.

However, none of these fields is completely immune from judicial review.

Surrender of discretion

A discretion must be exercised by the body on whom it was conferred, unless the source of the power itself authorised delegation. This principle requires not only that the person upon whom the decision-making power was conferred exercises that power in practice but also that he or she exercises it in fact, ie that the power is not being exercised at someone else’s dictation

It is accepted, however, that a power conferred upon a government minister may generally be delegated to an official. Also, the Local Government Act 1972 permits local authorities to delegate their functions.

Fettering of discretion

The adoption of a policy to assist in decision-making is acceptable, provided that the policy is not so rigid as to exclude the exercise of the discretion conferred upon the decision-maker. Essentially, this principle requires that the decision-maker is prepared to keep an open mind.

Nor can a public authority fetter the lawful exercise of a discretion by entering into a contract, ie it cannot argue that obligations under an existing contract prevent it from exercising a lawful discretion. However, this principle cannot be used simply to extract the authority from a contractual obligation it no longer wishes to fulfil. Similarly, an authority cannot, by the making of a statement or the giving of a representation, normally be estopped from exercising a statutory discretion or performing a statutory duty. However, this principle can have harsh consequences for those who rely on such statements or representations and the courts have, on occasions, been slow to apply the principle; in particular, where an authority has power to delegate to its officers and there is some evidence to justify a belief that the authority would be bound by the statement of an officer (eg *Lever (Finance) Ltd v Westminster Corporation* (1970)).

A discretion may be fettered by the giving of a promise or undertaking or by a past practice which gives rise to a *legitimate expectation* that the promise/undertaking/practice will be continued until formally revoked. The concept of legitimate expectation has its origins in the extension of the application of the procedural right to a fair hearing. It has been argued, however, that the doctrine can operate to confer *substantive* rights.

Presumptions of statutory interpretation

The following presumptions of statutory interpretation are of particular relevance in administrative law:

- taxation cannot be levied without the authority of Parliament;
- in favour of the rule of law;
- against ousting the jurisdiction of the courts;
- in favour of international law.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION II – SUBSTANTIVE *ULTRA VIRES* AND ABUSE OF POWER

4.1 Definition

The literal interpretation of the phrase *ultra vires* is *beyond the powers*. When power is conferred on an administrative body, the instrument conferring the power may itself provide for restrictions on the exercise of the power. Such restrictions may be procedural (ie *how* the power is to be exercised) or substantive (ie *what* the power authorises to be done). Even though the statute conferring the power does not in terms limit its operation, the courts will impose limits by reference to principles of reasonableness and fairness.

4.2 Classification

A common classification is that of substantive *ultra vires*, procedural *ultra vires*, and abuse of power.

4.2.1 Substantive *ultra vires*

Clearly, the exercise of any power (except an unlimited power to do anything whatsoever) will be limited by the substance of the power, ie *what* the administrative authority is empowered to do. For example, a power to run a tram system does not authorise the running of a bus system. If an administrative authority acts outside the substance of the power conferred then it is, quite simply, 'doing the wrong thing'. This is the concept of substantive *ultra vires*.

4.2.2 Procedural *ultra vires*

An administrative authority may be exercising a power for an authorised purpose but, if it fails to follow a required procedure, its actions will be open to challenge. The authority here may 'doing the right thing' but it is doing it 'in the wrong way'. This is the concept of procedural *ultra vires*.

The exercise of any power (except the power to do anything) will be limited expressly by reference to substance. Not all exercises of power will be limited expressly by reference to procedure. The statute which confers the power *may* itself provide for a procedure to be followed before the power is exercised; for example, a process of consultation or notice to be complied with before a decision is reached. The statute may even provide the opportunity of a public inquiry before a final decision is taken. For further details, see below, pp 121–24.

Even if the statute does not establish a procedural standard, the courts have themselves developed rules to ensure fairness of procedure in decision-making – the so-called Rules of Natural Justice/the Duty of Fairness. The courts demand that decision-makers, in the reaching of decisions, comply with these rules regardless of any expressed procedural requirement. However, the rules may vary according to the nature of the decision-maker and the nature of the decision being taken and, it would appear, there are circumstances where the courts will not demand compliance with these rules at any level at all! (See Chapter 3.)

4.2.3 Abuse of power

The courts have also developed principles to prevent an abuse of power by an administrative decision-maker. It may be the case that the decision-maker is ‘doing the right thing’ and is doing this ‘in the right way’. However, the decision-maker may, for example, have been influenced by ulterior motives or have taken irrelevant considerations into account or have failed to take relevant considerations into account. If so, the courts may regard the decision-maker as having acted unreasonably in a broad sense.

It may also be that the decision-maker has acted in a way that no reasonable person would have acted. If so, the courts may regard the decision-maker as having acted unreasonably in a narrow sense (commonly referred to as *Wednesbury* unreasonableness from the judgment of Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corporation* (1948)). It may even be that the decision-maker has acted in bad faith or through malice. In judging the legality of decision-making, the courts will test the exercise of a power against these principles to prevent an *abuse of power*.

An alternative, and more recent, classification of the heads of review was given by Lord Diplock in *CCSU v Minister for the Civil Service* (1985) (a decision described by HWR Wade as ‘... replete with systematic restatements, almost as formal as Euclidean propositions’ ((1985) 101 LQR at p 153)). It has to be said, however, that Lord Diplock’s classification has not replaced the classification rooted in Lord Greene’s judgment in *Wednesbury*. The classifications tend rather to be used – and sometimes intermixed – according to the individual judge’s choice.

Lord Diplock’s identified heads of judicial review are ‘illegality’ (acting within the scope of authority), ‘irrationality’ (*Wednesbury* unreasonableness) and ‘procedural impropriety’. He also identified ‘proportionality’ as a further head which might be developed in the course of time. Arguably, however, the proportionality concept is already within the broad head of *Wednesbury* reasonableness as witnessed by *R v Barnsley Metropolitan Borough Council ex parte Hook* (1976), where the decision to revoke a market trader’s licence was quashed on the ground, *inter alia*, that the penalty was ‘out of proportion to the occasion’ (see further below, pp 111–15).

By 'illegality' was meant that 'the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.' 'Irrationality' would seem to incorporate the concept of *Wednesbury* unreasonableness as being 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'. 'Procedural impropriety' encompassed the obligation to observe the rules of natural justice (see Chapter 5) which would themselves vary according to the subject matter of the decision, the executive functions of the decision-maker and the particular circumstances in which the decision came to be made. It also encompassed the obligation to observe procedural requirements laid down in the legislative instrument which conferred the power (see below, pp 121–24). (On the importance of the *CCSU* classification, see Jowell and Lester, 'Beyond *Wednesbury*' (1987) PL 368.)

It must be remembered that the various heads of review are not mutually exclusive. Indeed, they are often inextricably bound up with each other. Lord Greene himself in the *Wednesbury* case referred to the example given in *Short v Poole Corporation* (1926) of the teacher sacked because she had red hair as:

... unreasonableness in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

You will find that the cases argue a combination of the heads of review.

4.3 Substantive *ultra vires*

4.3.1 Illustrations

This is, quite simply, using a power for an unauthorised purpose – doing the wrong thing. In *Hazell v Hammersmith and Fulham Council* (1992) (see Loughlin (1990) PL 372 and (1991) PL 568), the council did not have statutory authority to engage in speculative financial transactions, the success of which depended upon a fall in interest rates (in fact, interest rates rose and the authorities involved suffered considerable losses prompting the auditor to challenge the legality of the activity) with a view to making a profit. This activity was not authorised either expressly or by necessary implication. It was beyond the council's power to borrow under Schedule 13 of the Local Government Act 1972 and it was not ancillary to such functions within s 111 of the 1972 Act. In *Laker Airways v Department of Trade* (1977), the minister was empowered under the Civil Aviation Act 1971 to give the Civil Aviation Authority *guidance* as to the exercise of its functions. The minister could not thereby issue the Authority with an *instruction* to revoke Freddie Laker's licence to operate the Skytrain service

from London to New York. *R v Secretary of State for the Environment ex parte Lancashire County Council* (1994) is a more recent illustration in similar vein to *Laker*.

This head of review will often merge with one or more heads of abuse of power (below) as a decision-maker will usually be motivated to do the wrong thing by ulterior motives or irrelevant considerations etc.

4.3.2 Incidental objectives

It is accepted, however, that a power can be used to achieve objectives *incidental* to the stated purpose, though not expressly authorised.

In *AG v Crayford UDC* (1962), it was held that power vested in a local authority under s 111(1) of the Housing Act 1957 for the 'general management, regulation and control of houses' included the local authority entering into an arrangement for the collective insurance of its tenants' household goods, personal effects, fixtures and fittings. In this instance, a relator action had been brought by the Attorney General at the relation of a trade union whose members were employees of another rival insurance company.

Whether such an objective is incidental to or beyond the stated power can be a fine line to draw.

In *AG v Fulham Corporation* (1921), under the Baths and Wash-houses Acts 1846–78, Fulham Corporation had the power to establish baths, wash-houses and open bathing places. Under this power, the corporation established a wash-house where people had facilities for washing their own clothes with the assistance of attendants. In 1920, the corporation proposed a new scheme whereby customers could leave their washing to be laundered or have it collected. This innovative service was advertised as follows:

Important Notice. Household problem solved! A boon to housewives!!!
Recognising the difficulties at present experienced in connection with family washing ... the council has established a department at the baths and wash-houses, for the purpose of relieving housewives to a great extent of this most laborious work.

Unfortunately for the housewives in need of relief, the Attorney General instituted an action at the relation of the ratepayers of Fulham.

Sargent J accepted that the corporation was entitled to do not only what was expressly authorised by the Acts but also what was reasonably incidental to or consequential upon what was expressly authorised. He considered that the intended purpose of the scheme was to afford facilities for persons who did not have such facilities themselves and could not afford to pay for them. The purpose was to provide facilities where people could do their own washing. He did not regard the provision of a laundry service where clothes were washed for customers to be incidental to or consequential upon the stated purpose. He regarded such a service to be 'a completely different enterprise'.

The line here between a legitimate and an illegitimate activity may appear thin. As always in analysing why the judges have reached a particular decision – and no more so than in the field of judicial review – one needs to look for (and sometimes you will find, if not always) clues as to what influenced the judge(s) in reaching a particular conclusion. Such clues are to be found in the *Fulham Corporation* case. Even though Sargent J stated it to be ‘of no consequence’, he nevertheless noted that the service resulted in a ‘very substantial loss’ and was an example of ‘the light-hearted way in which operations are conducted by persons who have not their own pockets to consider, but who have behind them what they may regard as the unlimited or nearly unlimited purse of the ratepayers’. This nature of language is reflected in the much later case of *R v GLC ex parte Bromley LBC* (1984) the ‘fares fair’ case (see below, p 105). That ratepayers’ money is being spent often appears to influence the judiciary’s willingness to exercise powers of review (see below, p 106–07). The same principle does not apply to the spending of taxpayers’ money by central government which is likely to involve issues of central government policy with which the courts will not intervene.

In the more recent case of *Re Westminster Council* (1986), the GLC, in anticipation of abolition and the transfer of its operations to the London Residuary Body and the London borough councils, approved schemes to meet the needs of certain bodies after its abolition from a projected surplus in its finances. The GLC did so fearing that these particular bodies, which included the Interim Inner London Education Authority (£40 million), certain voluntary and community organisations (£25 million) and the Roundhouse Arts Centre (£11 million), would not continue to be funded adequately, if at all, under the new regime. On a challenge by way of judicial review by eight London borough councils, it was held that s 97(1) of the Local Government Act (LGA) 1985 could not be read as giving the GLC power to ‘forward fund’ as attempted.

Of course, this is one of many cases which involved heavy political overtones – an attempt by a Labour council, threatened with abolition by Mrs Thatcher’s Tory government, to sustain its influence after death. The House of Lords took pains to assert that its decision was apolitical. In particular, Lord Bridge stated:

It ought not to need emphasis that the appeal has nothing whatever to do with the political wisdom or unwisdom, propriety or impropriety of the decisions impugned. The applicant councils have throughout disclaimed any intention to challenge the decisions as being ‘unreasonable’ in the *Wednesbury* sense ... Even such a challenge does not, on a proper understanding, involve the courts in making any political decision. But we are still further removed from the political arena when, as in the instant case, the decision turns exclusively on the interpretation of statutes.

That a member of the House of Lords should feel impelled to make such a statement indicates an awareness amongst the highest levels of the judiciary of the

allegations of political decision-making rendered against them. It is a further reminder of the distinction already considered between law and merits.

Under s 111 of the Local Government Act (LGA) 1972 power is given to local authorities to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. In *Hazell v Hammersmith and Fulham London Borough Council* (1990), Woolf LJ (approved by the Court of Appeal and the House of Lords on this point) held that 'functions' referred to specific statutory activities. Section 111 of the LGA 1972 did not authorise any activity which was independent of such an activity; it conferred a subsidiary power only. In two recent decisions of the Court of Appeal – *Credit Suisse v Allerdale Borough Council* (1996) and *Credit Suisse v Waltham Forest LBC* (1996) – it was held that s 111 of the LGA 1972 did not authorise the local authority to guarantee a loan borrowed by a company itself set up by the authority. The borrowing powers of the authority were strictly controlled by statute and could not be circumvented by establishing a company with borrowing power. Section 111 could be used only in conformity with the statutory provisions. As a consequence, the contract of guarantee entered into by the local authority, being *ultra vires* and so void, was unenforceable by the creditor bank.

4.4 Abuse of power

4.4.1 Introduction

A decision may be lawful in the sense of being within the scope of the power conferred (ie substantively correct), and following any prescribed form (ie procedurally correct). However, the courts have developed principles to prevent abuse of power. Such principles are normally referred to in terms of unreasonableness or irrationality.

4.4.2 Unreasonableness

The starting point for an any attempted classification of unreasonableness remains the judgment of Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corporation* (1948), commonly referred to as 'the *Wednesbury case*'.

Under s 1(1) of the Sunday Entertainments Act 1932 an authority could allow a licensed cinema to open on Sundays 'subject to such conditions as the authority think fit to impose'. Permission was granted to the plaintiff cinema proprietors subject to the condition that no children under the age of 15 were to be admitted with or without an adult. The plaintiffs were concerned that such a condition would serve to keep parents at home on Sundays in order to look after their children. They applied for a declaration that the condition was *ultra vires* and unreasonable.

Lord Greene MR noted three essential considerations to be remembered when asked to control this particular exercise of executive power:

- the courts were not here dealing with a judicial act, but an executive act;
- the conditions which, under the exercise of that executive act, might be imposed were in terms, so far as language goes, put within the discretion of the local authority without limitation;
- the statute provided no appeal from the decision of the local authority.

Each of these considerations demonstrates the judicial awareness of the separation or balance of powers within the constitution and the anxiety not to encroach too obviously on the preserve of the executive and/or legislature. However, Lord Greene nevertheless identified limits to executive power and situations in which the exercise of such power would be open to challenge. Although he conceded that:

When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognises certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law.

Nevertheless, the exercise of the discretion, he asserted, must be 'real'. So, for example:

- the authority must have regard to relevant matters (ie those matters which are to be found in the statute, expressly or by implication, which the authority ought to have regard to);
- the authority ought not to have regard to matters if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question.

Lord Greene then went on to consider what these principles upon which a discretion must be exercised were. In so doing, he formulated what are now sometimes referred to as 'broad' and 'narrow' or *Wednesbury* unreasonableness.

It might be that the decision-making authority had acted within the 'four corners' of the stated power and had followed the necessary procedures in reaching its decision. Nevertheless, this in itself did not mean that the decision was beyond challenge. The court's function here was to ensure that, in the exercise of discretion, the decision-maker had not abused the power by acting unreasonably in the sense of either:

- reaching a decision which no reasonable person could reach, ie arbitrariness or perverseness (narrow unreasonableness); or
- being influenced by extraneous considerations, for example, an ulterior motive or irrelevant considerations, or failing to consider relevant issues (broad unreasonableness).

Once again, it is important to stress that the asserted judicial function is to examine the legality of the decision and the decision-making process and not the merits of the decision itself. The discretionary power has not been conferred on the courts and they must not substitute their own views of the right decision for that actually reached. However, the principles as they have developed are extremely broad and allow considerable flexibility in application. This has led one senior member of the judiciary to declare of judicial review that: 'The piano needs the pianist and any two pianists, even with the same score, may produce very different music' (Lord McCluskey, quoted by Simon Lee in *Judging the Judges*, 1988, Faber).

The principle of reasonableness is not new. In *Rooke's Case* (1598), the Commissioners of Sewers levied the charges for repairing a river bank on one adjacent owner only. The Commissioners had the power to levy charges in their discretion but the exercise was held to be unlawful. Lord Coke CJ stated:

... notwithstanding, the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections ...

4.4.3 Narrow unreasonableness

In the *Wednesbury* case, Lord Greene stated:

Once that question (whether relevant considerations had been taken into account and irrelevant considerations excluded) is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matter which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could have come to it.

The second meaning given by Lord Greene to unreasonableness was a decision which was 'so absurd that no sensible person could ever dream that it lay within the powers of the authority'. It was in this context that he referred to the example given by Warrington LJ in *Short v Liverpool Corporation* (1926) of the teacher dismissed because she had red hair. The decision must be 'so unreasonable that no reasonable authority could ever have come to it'. However, 'to prove a case of the kind would require something overwhelming ...'.

The standard of reasonableness was, therefore, set at a high level so containing the power of judicial review within strict boundaries. Lord Greene – and judges in subsequent decisions – have been at pains to assert that the concept of unreasonableness does not empower them to substitute their own decision for that of the person or body on whom the power was originally conferred. Such a person or body would very often be a minister or local authority and the power most often conferred by Parliament itself. As noted above (p 21), the powers of the courts here are strictly powers of review and not appeal. Lord Greene himself stated:

... the decision of the local authority can be upset if it is proved to be unreasonable ... in the sense that the court considers it to be a decision that no reasonable body could have come to. *It is not what the court considers unreasonable, a different thing altogether.*

Similarly, in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* (1977), Lord Diplock stated:

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.

The asserted function of the courts here is to discern and uphold the intentions of Parliament. Parliament intended to confer a discretion on the decision-maker. An element of free will is implicit in discretion. But, at the same time, Parliament cannot have intended that the discretion be exercised in an errant or arbitrary way such that no reasonable person would contemplate.

Instances of the courts finding unreasonableness in the narrow sense are rare (see below). The claim was rejected in the *Wednesbury* case itself. Indeed, a decision which is so unreasonable that no reasonable body could have reached it will almost inevitably be one reached via a route of broad unreasonableness on which a successful challenge can be mounted. A finding of narrow unreasonableness will be unnecessary in its own right to invalidate the decision. It will, however, serve to demonstrate the courts emphatic disapproval of the particular decision (see, for example, *Roberts v Hopwood* (1925) below, p 91).

You might perceive something of a potential contradiction here. Parliament (usually) confers a discretion upon an individual or body. A discretion must contain an element of choice – whether to exercise it and, if so, how. The function of the courts is to uphold the will of Parliament. The function of the courts in the context of judicial review is to examine the *legality* of the decision and not the *merits*. However, is it possible for the judges to be entirely objective here? Can any decision-makers, including the judges, divorce themselves from their instincts of right and wrong in the decision-making process? Some constitutional commentators (see again, for example, Griffiths, *The Politics of the Judiciary*, 3rd edn, 1985, Fontana) assert that the judges, predominantly, share a particular education and upbringing from which their values are moulded.

These values then influence, consciously or sub-consciously, explicitly or implicitly, their decisions. Whether the judges are being objective and whether they are serving to uphold the will of the elected Parliament are central issues to be considered when reading and reviewing cases in the field of judicial review.

4.4.4 Claims of narrow unreasonableness

As stated above, unreasonableness in the narrow sense requires that the decision is one which no reasonable body could possibly have reached. The level of unreasonableness is high. It is not sufficient that the court disagrees with the decision reached. It is most unlikely that a court will find a public body to have acted unreasonably in the narrow *Wednesbury* sense. Such a finding would suggest that the body is acting arbitrarily, perversely, or that it has even taken leave of its senses. In any such case, as noted above, the decision challenged will almost necessarily fall into one or more of the broad heads of unreasonableness (below) and so can be invalidated via a less critical route.

In *Kruse v Johnson* (1898), s 16 of the Local Government Act 1888 empowered a county council to make such by-laws 'as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances ...'. Kent county council made a by-law prohibiting the playing of music or singing within 50 yards of a dwelling-house after a request by a constable or occupier to desist. On appeal by way of case stated from the justices in a prosecution for failure to adhere to a constable's instruction, the appellant argued that the by-law was invalid as unreasonable. Lord Russell CJ suggested that a by-law could be challenged as unreasonable if partial and unequal in operation between different classes, manifestly unjust, disclosing bad faith or 'if [it] involved such oppressive or gratuitous interference with the rights of those subject to [it] as could find no justification on the minds of reasonable men'. Parliament could never intend to give such authority. However, a law was not unreasonable 'merely because particular judges may think that it goes further than is prudent or necessary or convenient'. The court was clearly influenced in this context by the fact that the council was a local representative body and that the making of a by-law was subject to safeguards. The courts would, it was stated, be more willing to guard against the unnecessary or unreasonable exercise of power where authority was delegated by Parliament to bodies which carried on business for their own profit, albeit for the advantage of the public eg railway and dock companies.

Despite the extreme nature of unreasonableness in its narrow sense, striking examples are provided by *Williams v Giddy* (1911) and *Backhouse v Lambeth LBC* (1972). In *Williams*, a gratuity of one penny per year of service was awarded to a retiring civil servant. The Privy Council held this exercise of discretion to be a mere sham. In effect, it was a refusal to exercise the discretion at all. In *Backhouse*, a Labour controlled council determined to evade general increases in council house rents of 55 pence per week required by the Housing Finance

Act 1972 by increasing the rent on an unoccupied council house from £7 per week to £18,000 per week. The leader of the council tenants brought an action to ensure the validity of the council's resolution. Melford Stevenson J held it to be a decision which no reasonable body could have reached. The case is also a clear illustration of an improper purpose and irrelevant considerations.

Roberts v Hopwood (1925) provides another rare instance (pre-dating *Wednesbury*) of a finding of unreasonable conduct on the part of a local authority. It may also be perceived as a case where the judges came dangerously close to challenging a decision on the merits and were less than circumspect in declaring their position. Here, despite a wide discretionary power phrased in subjective terms ('may allow such wages as they think fit') a decision by a council to maintain a minimum weekly wage to both men and women despite a fall in the cost of living from 176% to 82% above the pre-war level was declared by the House of Lords to be unreasonable and unlawful. Lord Buckmaster concluded that '... they took an arbitrary principle and fixed an arbitrary sum, which was not a real exercise of the discretion ...'. Lord Atkinson was even more forthright in his views of the council's actions. In a now famous passage, he declared:

The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they ... allowed themselves to be guided ... by some eccentric principles of socialist philanthropy, or by a feminist ambition to secure the equality of the sexes in the world of labour.

The words 'think fit' were to be construed as meaning 'fitting and proper'. It did not entitle the council to 'pay gratuities or gifts to his employees disguised under the name of wages'.

All this despite Lord Sumner's assertion that:

There are many matters which the courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful ... they often accept the decision of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another.

As noted below (pp 106–07), the courts have assumed the mantle of protectors of ratepayers' money, even though, as elected representatives, councillors are politically accountable to the electorate.

Central government, however, is not immune to findings of unreasonableness. In *Congreve v Home Office* (1976), an increase in TV licences from £12 to £18 was to take effect from 1 April 1975. To avoid the increase, the plaintiff obtained a new £12 licence before the expiry of the existing one as did some 24,500 other subscribers. Under s 1(4) of the Wireless Telegraphy Act 1949, a licence 'may be revoked ... by a notice in writing of the Postmaster General ...'. The Home Office demanded the extra £6 and, in lieu of payment, threatened revocation of the licences without refund. The plaintiff did not comply and

received a letter stating that, unless the £6 was paid by 1 December, the overlapping licence would be revoked and the holder rendered liable to prosecution if he used his colour TV. The plaintiff claimed a declaration that the revocation would be unlawful. The refusal by Phillips J was reversed on appeal. Lord Denning MR stated:

Undoubtedly those statutory provisions give the minister a discretion as to the issue and revocation of licences. But it is a discretion which must be exercised in accordance with the law, taking all relevant considerations into account, omitting irrelevant ones, and not being influenced by any ulterior motives.

... If the licence is to be revoked ... the minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong – if he had given a cheque for £12 which was dishonoured, or if he had broken the conditions of the licence – the minister could revoke it. But when the licensee has done nothing wrong at all, I do not think that the minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause ... these courts have the authority – and, I would add, the duty – to correct a misuse of power by a minister ... no matter how much he may resent it or warn us of the consequences if we do.

The minister's reason – to generate adequate revenue for future requirements – was not authorised:

Want of money is no reason for revoking a licence ... the department did not like people taking out overlapping licences so as to save money. But there was nothing in the Regulations to stop it.

In any case, the minister's demands were also contrary to the Bill of Rights as an attempt to levy money for the use of the Crown without the authority of Parliament (see also on this point *AG v Wilts United Dairies* (1921)).

The Court of Appeal remained undeterred – indeed, it was even speared on – by a thinly disguised threat delivered by Roger Parker QC, leading counsel for the Home Office (his junior being Harry, now Lord, Woolf), in the following terms:

It would be a very sad day if the courts were to use the power – which undoubtedly is one of the most valuable powers in English law – to curb the executive as they are being invited to do. It would not be long before that power started to be called into question ...

Lord Denning retorted to this in his judgment:

In the course of his submissions, Mr Parker said ... that if the court interferes in this case, 'it would not be long before the powers of the court would be called into question'. We trust this was not said seriously, but only as a piece of advocate's licence.

The minister's conduct was also found to have achieved the level of maladministration by the Parliamentary Commissioner for Administration in his Seventh Report.

Congreve may more properly be regarded as a display of unreasonableness in the broad sense of ulterior motives, irrelevant considerations, failure to comply with the objectives of the Act and asserting an authority not conferred by Parliament. However, there was such a catalogue of unreasonableness in the broad sense as arguably to amount to an instance of narrow unreasonableness.

In *Secretary of State for Education and Science v Tameside MBC* (1977), it was the minister himself who had to establish unreasonableness on the part of a local authority in order to justify his intervention in its decision to maintain a number of grammar schools. Section 68 of the Education Act 1944 authorised the Secretary of State to give directions to a local education authority as to how it should perform its statutory functions if 'satisfied ... that any local education authority ... [has] acted or [is] proposing to act unreasonably ...'. After local government elections and a change of power from Labour to Conservative control, the education authority revised its predecessor's plans for total comprehensive education, already submitted to and approved by the minister and to be implemented in the September. The minister's instruction to implement the previously approved proposal was challenged. Each party justified its reasoning. The authority argued that the schools were not ready for their changed roles, that undue disruption would be caused to the pupils and that parents favoured their proposals. The minister asserted that the revised policy could not be implemented for the coming September, that the selection process (reports, records and interviews) was unsound and that teachers and parents were opposed to the revised scheme. The Divisional Court was unanimously of the view that the minister's conduct was lawful – there was material upon which *the minister* could reach the conclusion he did. The Court of Appeal and the House of Lords, however, unanimously disagreed. Section 68 Education Act 1944 did not empower the minister to substitute his own opinion for that of the local education authority. He could only give directions if satisfied that *no reasonable education authority* would act as the authority in question was proposing to act. The minister was, therefore, being required to establish reasonableness in the *Wednesbury* sense. This was clear in the words of Lord Denning MR in the Court of Appeal:

It is one thing to say to a person: 'I think you are wrong. I do not agree with you.' It is quite another thing to say to him: 'You are being quite unreasonable about it.' ... No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view.

In the House of Lords, Lord Wilberforce distinguished the Education Act 1944 from those Acts which 'simply create a ministerial discretion' where the court's power of review was, though still real, limited. Under the Education Act 1944, the minister was himself 'not merely exercising a discretion: he is reviewing the action of another public body which itself has discretionary powers and duties'. The section gave no power to the minister to make his policy prevail –

he could intervene only if the authority was acting unreasonably – in such a way that ‘no reasonable authority’ would attempt to carry out the policy. Might it be argued here that the Court of Appeal and the House of Lords effectively re-wrote s 68 to read ‘If a local education authority is acting or is proposing to act unreasonably’ then the minister could direct it to cease so acting? Was a discretion with a high element of subjectivity allowed on the minister’s part transformed into an essentially limited objective discretion to be judged according to a narrow legal perception of ‘unreasonableness’?

Even the judiciary is not immune from a finding of unreasonableness in decision-making. In *R v Bow Street Metropolitan Stipendiary Magistrate ex parte DPP* (1992), in fresh inquiries into the convictions of the Guildford Four in 1987 (convicted of the Guildford pub bombings in 1975), discrepancies emerged between the typed and hand written notes of one of the four. The policemen who had conducted the original interview were themselves interviewed without caution and without notices prescribed by the Police Discipline Regulations 1985. At the appeal of the Guildford Four in 1989, the Crown no longer sought to uphold the convictions, one reason being that the manuscript notes were not contemporaneous records. In the Court of Appeal, the Lord Chief Justice commented that the police officers ‘must have lied’. The policemen were subsequently charged with conspiracy to pervert the course of justice. The stipendiary magistrate granted an application to stay proceedings because:

- (a) the delay since the original events had been so extreme that prejudice to their trial could be inferred;
- (b) the lapse of time would prejudice them in the preparation of their case;
- (c) adverse media comment was highly prejudicial;
- (d) the defendants had not been cautioned at the early interviews.

The Director of Public Prosecutions applied for judicial review arguing that (b)–(d) were perverse. The court agreed that the magistrate’s decision was one which no reasonable magistrate could have reached in the circumstances. Neill LJ stated:

The jurisdiction to halt criminal proceedings for delay is a jurisdiction which has to be exercised with great care ... Consideration has to be given to the nature of the offence alleged and in particular to the issues which will fall for determination ... the decision of the magistrate ... was unreasonable in a *Wednesbury* sense.

The relationship between narrow unreasonableness and proportionality is considered below (see pp 114–15).

4.4.5 Narrow unreasonableness and justiciability

The concept of narrow unreasonableness appears to achieve special significance in those areas of non-justiciability considered above (see pp 46–60). Although the courts deny themselves a general power of review in the areas they deem to be non-justiciable, they nevertheless sometimes reserve a power to review if such decisions are unreasonable in the narrow sense.

In *R v Governor of Brixton Prison ex parte Soblen* (1963), the Court of Appeal noted that deportation was an executive act and that the minister's discretion could not be challenged unless it could be shown that the order was a sham in that the minister did not genuinely consider it to be in the public interest to expel. Lord Denning MR asserted that if the purpose of the minister was to surrender the applicant as a fugitive to the US because the US authorities had asked him, it would be unlawful. But if it was because the minister considered his presence not to be conducive to the public good then it would be lawful. The court considered that the latter was the case and that such a conclusion could reasonably have been reached.

Similarly, in *Nottinghamshire County Council v Secretary of State for the Environment* (1986), the House of Lords expressed great caution in its willingness to challenge a decision in the field of public financial administration which was itself subject to the approval of the House of Commons. Nevertheless, it indicated a willingness to do so in extreme circumstances – where the minister had abused his power to such an extent that he must 'have taken leave of his senses' or misled or deceived the House of Commons.

4.4.6 Broad unreasonableness

In the *Wednesbury* case, Lord Greene stated:

The discretion must be exercised reasonably. Now what does that mean? ... It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must ... direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not ... he may be truly said ... to be acting 'unreasonably'.

This category of broad unreasonableness now encompasses a whole series of heads including, *inter alia*, error of law, taking into account irrelevant considerations, a failure to take into account relevant considerations, acting for an ulterior motive or for mixed motives (see later).

The courts' function here is to ensure that, in the exercise of discretion, the decision-maker has not abused the power by acting unreasonably in the sense of being influenced by extraneous considerations, for example, an ulterior motive or irrelevant considerations, or failing to consider relevant issues. The

courts have developed a number of principles by reference to which they test the reasonableness of a decision in this broad sense.

4.4.7 Non compliance with the objectives of the Act

Padfield v Minister of Agriculture, Fisheries and Food (1968) involved a milk marketing scheme under which producers of milk had to sell their produce to the Milk Marketing Board. The Board fixed the prices to be paid for it in each of 11 regions to reflect transport costs. The South Eastern Region producers contended that the differential between it and the Far Western Region should be altered. The South Eastern Region producers could not obtain a majority on the Board in favour of their proposal and so referred the matter to the minister with a request to appoint a Committee of Investigation under s 19 of the Agricultural Marketing Act 1958. Section 19 required the committee to consider a complaint 'if the Minister in any case so directs'.

The minister refused to refer the complaint because:

- if the committee upheld the complaint, the minister would be expected (by Parliament or, at least, public opinion) to give effect to the recommendations and he was unwilling to do so;
- the complaint raised wide issues affecting the interests of other regions.

The Court of Appeal dismissed an application for an order of *mandamus*. Diplock and Russell LJJ, while accepting that the minister had a duty to consider a complaint, nevertheless determined that he was under no duty to give reasons for a refusal. The minister's decision was administrative, not judicial. It had not been shown that the minister did not exercise his discretion or that, in so doing, he misconstrued the Act, or took into account irrelevant considerations, or failed to take into account relevant considerations.

Lord Denning MR, in a dissenting judgment, sowed the seeds for the subsequent decision of the House of Lords. He asserted that:

... every genuine complaint which is worthy of investigation should be referred ... The minister is not at liberty to refuse it on grounds which are arbitrary or capricious ... Good administration requires that complaints should be investigated and that grievances should be remedied. When Parliament has set up machinery for that very purpose, it is not for the minister to brush it on one side. He should not refuse to have a complaint investigated without good reason.

Nor would Lord Denning allow a refusal to refer without good cause to be disguised by an absence of reasons:

... it is said that the minister is not bound to give any reason at all ... I do not agree ... If the minister is to deny the complainant a hearing – and a remedy – he should at least have good reasons for his refusal; and, if asked, he should give them. If he does not do so, the court may infer that he has no good reason.

In the House of Lords, the appellants contended that it was the minister's duty to refer every genuine and substantial complaint. Alternatively, the minister's discretion was not unfettered and his refusal was caused by a misdirection in law or the taking into account of irrelevant considerations.

The House of Lords considered that, whilst there could be reasons to justify the minister in refusing to refer the complaint, the minister's discretion was not unfettered. It must be exercised in such a way as to be in keeping with the policy and objects of the Act. This might, in given circumstances, impose a duty to refer on the minister. Lord Reid stated:

Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court.

The intention of the Act was that even the widest issues should be investigated if the complaint was genuine and substantial. The House agreed that this principle could not be frustrated by a refusal to give reasons. As stated by Lord Upjohn:

... if he [the minister] does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly.

In *Padfield* itself, the minister had in fact given reasons for his decision which showed that he was not acting in accordance with the intentions of the Agricultural Marketing Act 1958.

The only dissenting voice was that of Lord Morris of Borth y Gest. He considered that the language of the Act was purely permissive. The minister was endowed with discretionary powers. The appellants had no *right* to have their complaints referred to the committee. The minister was merely bound to *consider* the complaint.

However, the House of Lords did agree that the final assessment of the *public interest* was for the minister:

He may disagree with the view of the committee as to public interest, and, if he thinks that there are other public interests which outweigh the public interest that justice should be done to the complainers, he would be not only entitled but bound to refuse to take action. Whether he takes action or not, he may be criticised and held accountable to Parliament but the court cannot interfere.

This in itself highlights one of the weaknesses of the power of review in contrast to that of appeal. Even though the *ultra vires* decision itself may be declared void, it is open to the decision-maker to make the decision anew and, so long as the new decision is taken *intra vires*, it will withstand further challenge.

Congreve v Home Office (1976) might also be referred to in this context. There, the policy of revoking TV licences to recoup lost revenues was not authorised under the Wireless Telegraphy Act 1949. Although the minister's discretion was not limited expressly under the Act, the court considered that it was to be exercised only for good cause – for example, if payment had been made by a cheque which was dishonoured or if the licence holder had breached the conditions of the licence.

The decision in *Asher v Secretary of State for the Environment* (1974) (the Clay Cross councillors case) might be contrasted with *Congreve*. There, local councillors refused to increase council house rents in accordance with the Housing Finance Act 1972. The Court of Appeal refused to find that the minister had acted unlawfully by sending in the district auditor under alternative statutory powers even though the Housing Finance Act 1972 itself provided for the appointment of a Housing Commissioner to take over the functions of a housing authority. The argument that Parliament had intended the minister to use the machinery specifically established under the Act itself was a strong one. Why did the minister choose not to do so and turn instead to alternative powers? The Court of Appeal accepted the argument that, if sent in to take over the housing functions of the councillors, the Commissioner would be operating in 'hostile terrain' and would be met with opposition. However, it could well be argued that such hostility would normally – if not inevitably – follow from the appointment of a Commissioner.

In *R v Secretary of State for the Environment ex parte Lancashire County Council* (1994), the minister could not, under the guise of issuing statutory 'guidance' to the Local Government Commission in its task of making recommendations on the structure of local government, in fact give a message that the government's hoped-for result (the introduction of unitary authorities) was to be seen as an end in itself, the effect of which was to undermine criteria contained in the statute. The *Fire Brigades Union* case (above, pp 5–6) should also be referred to in the context of fulfilling statutory objectives. There the intention of Parliament that the Home Secretary review from time to time the appropriateness of introducing the statutory scheme for compensating victims of crime could not be denied by an attempt to introduce an alternative scheme under a purported exercise of prerogative power.

4.4.8 Improper purpose/irrelevant considerations

A decision will be subject to challenge if the decision-maker has acted for an ulterior purpose, taken irrelevant considerations into account or failed to take relevant considerations into account. These heads of review are often so interwoven that they are dealt with together here. If a person acts for an ulterior motive then he or she will almost certainly be taking an irrelevant consideration into account. The potential for confusion arising from the use of these terms was recognised by Megaw J in *Hanks v Minister of Housing and Local Government* (1963), where he stated:

... I think confusion can arise from the multiplicity of words which have been used ... as suggested criteria for the testing of the validity of the exercise of a statutory power. The words used have included 'objects', 'purposes', 'motives', 'motivation', 'reasons', 'grounds' and 'considerations' ... the simplest and clearest way to state the matter is by reference to 'considerations'. A consideration ... is something which one takes into account as a factor in arriving at a decision.

A more difficult issue is whether the balance of reasons for the decision can be challenged. Can a decision be challenged on the basis that, although all relevant considerations have been taken into account and all irrelevant considerations omitted, undue or inadequate weight has been given to a certain consideration[s]? In extreme circumstances, this might render the decision arbitrary or perverse. Alternatively, it might render the decision disproportionate (on proportionality, see further below, p 111–15).

In *Roncarelli v Duplessis* (1959), the Prime Minister and Attorney General of Quebec ordered the Licensing Commission to revoke a liquor permit because the holder had assisted Jehovah's Witnesses. This was found to be 'a gross abuse of legal power expressly intended to punish ...' (*per* Rand J). Further, the Commission, to whom the power was given, had acted at the dictation of the Attorney General.

An improper purpose cannot be validated on the basis that the motivation was in the public interest in the sense of providing services for the public.

In *Municipal Council of Sydney v Campbell* (1925), the council was empowered to compulsorily purchase land to carry out improvements to the city. It purchased land in order to obtain the benefit of an increase in value which would result from a proposed extension of a highway. The decision was clearly unlawful. In *Hall v Shoreham UDC* (1964), a condition was attached to planning permission requiring the applicant to construct a strip of road with a public right of passage. The authority thereby avoided using powers under the Highways Act 1959 which would have required compensation to be paid. The condition was *ultra vires*. A striking example is *R v Hillingdon LBC ex parte Royco Homes* (1974) where a condition attached to planning permission required the applicant to let houses built to people on the local authority waiting list. This was held to be unreasonable as a means of requiring the builder to undertake the council's housing duties.

In *R v Somerset County Council ex parte Fewings* (1994), the council argued that it could properly take into account moral considerations in deciding to ban stag hunting on its land under s 120(1)(b) of the Local Government Act 1972. However, the power conferred was related to the proper management of the land and the moral motivation was, in the circumstances, *ultra vires*.

Recent cases have also raised the important issue of the extent to which resources can be taken into account by the providers of public services. Can an authority argue that it simply cannot afford to meet a particular need? This issue has been considered in a number of recent cases, perhaps the most publicised of

which was that of 'Child B' – *R v Cambridge Health Authority ex parte B* (1995) – where a 10 year old girl was refused further medical treatment for leukaemia. In making that decision, the authority had taken into account:

- medical opinion that a second bone marrow transplant was not in B's best interest;
- Department of Health guidance in relation to non-standard or experimental treatment;
- the potential cost of £75,000.

The Court of Appeal considered that it was not the judicial function to decide how the authority's resources should be divided between competing claims, provided the authority had itself acted lawfully (which on the facts of the case it had). Sir Thomas Bingham MR expressed regret in disagreeing with the judge below who had found that the authority had acted unlawfully. However:

... in a perfect world any treatment which a patient ... sought would be provided if doctors were willing to give it ... It would however ... be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities ... are constantly pressed to make ends meet ... Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.

In *Ex parte B*, however, the authority was making a value judgment in the exercise of a *discretion* and it was the reasonableness of the exercise of that discretion which was being challenged. This can be compared with a failure to fulfil a *duty*, as in *R v Gloucestershire County Council ex parte Barry*; *R v Lancashire County Council ex parte Royal Association for Disability and Rehabilitation* (1996). Here, the local authorities were under a duty under s 2(1) of the Chronically Sick and Disabled Persons Act 1970 to make an assessment of a disabled person's needs and the arrangements required to meet them. The first applicant, B, had been assessed as needing home care, including cleaning and laundry services. Such services, though provided initially, were withdrawn on resource grounds. The second applicant, I, had been assessed as needing 24 hour care. This had been met initially by the provision of a resident housekeeper. However, I's needs were later reassessed and it was decided that they would be best met by providing residential care in a nursing home. Again, resources influenced this decision. The Court of Appeal found that the authority had acted unlawfully in B's case in that, once an assessment had determined that certain needs should be met, an absolute duty to provide those services arose. The authority could not simply decide that it could not afford such provision. However, I's application was rejected. In her case, the resources available had merely influenced *how* her needs could be best met, not whether they would be met at all. Swinton Thomas LJ explained the distinction in the following terms:

Resources cannot ... be relevant to a judgment that provision is necessary to meet the needs of the disabled person. If it were otherwise, then it seems to me to be inescapable that if a local authority has no money in the relevant budget, then it would be open to the local authority to make an assessment or judgment that a disabled person has a need which it is necessary to meet applying objective criteria, but they are not required to meet it because of shortage of funds, resulting in an unmet need. The concept of an unmet need seems to me to fly in the face of the plain language of s 2 of the Chronically Sick and Disabled Persons Act 1970 ...

... Once the assessment has been made then resources may well be relevant to the manner in which provision is made to meet the need.

In I's case, the authority was under a duty, once her need had been assessed as requiring such, to provide 24 hour care. They could do so either by making arrangements for her to go into a residential home or by providing care in her own home. In making that decision, they were entitled to have regard to alternative costs. Similarly, in B's case, the authority, having assessed the need for cleaning and laundry services, could decide whether that need was to be met by someone doing B's washing in his own home or by taking it away and having it laundered. It could not refuse to provide any such service at all.

An appeal to the House of Lords in the case of B, however, was upheld by a 3 to 2 majority. The majority was of the view that the criteria for assessing need had themselves to be set taking into account, *inter alia*, the relative cost weighed against the relative benefit and the relative need for that benefit, ie the authority could 'have regard to the size of the cake before deciding how to cut it'. Such an approach permits the criteria for the assessment of needs to be tightened (or, presumably, loosened) according to an authority's resources, which might vary from time to time. It also allows for an assessment of an individual's needs made in the context of today's resources to be adjusted in the context of tomorrow's. The House of Lords decision in *Barry* was applied by Jowitt J in *R v Sefton Borough Council ex parte Help the Aged* (1997). Here, the local authority was under a statutory duty to provide residential accommodation to meet the needs of certain people aged 18 or over. Regulations made under the statute required the authority to charge the full cost of such accommodation if the person in need had capital of £16,000 or more. The authority, which had a larger than average number of elderly people claiming entitlement to such accommodation, adopted a policy whereby the capital threshold was set at a lower level than that specified in the regulations. It did so on resource grounds. Jowitt J held that the authority was entitled to take account of its own resources when considering whether the need which triggered the duty to provide accommodation had been established. The Court of Appeal, however (July, 1997), whilst agreeing with this principle (although it considered it to be very much more difficult to perform a cost benefit analysis when deciding whether a person was in need of *care* as opposed to *services*), allowed the appeal. It concluded that Sefton's policy had not been to use its financial position to provide

a standard against which to assess need, but to differ consideration and payment because of lack of resources) where it had in fact accepted that there was a need of care and attention. Further, Sefton's statutory obligation arose once the applicant's capital fell below £16,000. To allow Sefton to set its own scale would be to defeat the statutory intention.

Even if a decision is influenced by policy considerations of, for example, international relations, the courts will not allow it to withstand a challenge if the purpose is expressly outside the claimed authority.

In *R v Secretary of State for Foreign Affairs ex parte World Development Movement Ltd* (1995), the minister had power under s 12 of the Overseas Development and Co-operation Act 1980 to provide aid to an overseas country 'for the purpose of promoting the development or maintaining the economy ... or the welfare of its people'. An aid contribution was to be paid from the overseas aid fund under s 12 towards the construction of the Pergau Dam in Malaysia. Subsequently, officials of the Overseas Development Administration concluded that the project was uneconomic and should not be implemented for the foreseeable future. The Foreign Secretary, against that advice, approved the aid. He considered that the British government had already made formal offers of support to the Malaysian government and that withdrawal would affect the United Kingdom's credibility as a friend and trading partner. The applicants, concerned to increase the amount of aid to developing countries, applied for judicial review. It was held that the minister was entitled to take into account economic and political considerations in the provision of overseas aid. However, the grant had to be for the purpose of s 1 of the Overseas Development and Co-operation Act 1980, ie for the promotion of economically sound development. The decision to grant aid did not fall within this purpose and it was, therefore, unlawful.

The *Padfield* (1968) and *Congreve* (1976) cases provide further well-known instances of ministers being motivated by irrelevant considerations/ulterior motives. They also demonstrate that, even if the purposes for which a power can be exercised are not explicitly stated, nevertheless unlimited discretionary power will not be permitted.

4.4.9 Mixed motives

If there is a combination of motives, lawful and unlawful, then the legality of the decision taken may depend upon which motive is dominant; alternatively, recent judicial authority suggests that if an improper motive is a material consideration, that will be sufficient to invalidate the decision.

In *Westminster Corporation v London and North Western Railway* (1905), the council had the power under statute to build public toilets. It did not have the power to build subways. The construction of underground toilets with an access from either side of a busy road was challenged by the railway company,

whose land had been compulsorily purchased for the scheme. The House of Lords concluded that the building of the toilets was the dominant motive and the provision of the subway ancillary. The action was, therefore, lawful. The House of Lords conceded that the line between legality/illegality here was a fine one. Correspondence which had passed between the parties indicated the determination of the council to acquire the land. The court may well have been influenced by the fact that, at the time of challenge, the toilets/subway had been built. To find in favour of the applicant would have been to put the ratepayers to further cost.

However, in *R v Inner London Education Authority (ILEA) ex parte Westminster City Council* (1986), an advertising campaign (at a cost of some £651,000) which had the dual purpose of: (a) informing the public about government curbs on local government spending and the effects (lawful); and (b) persuading the public to support the ILEA on the issue (unlawful), was held to be unlawful. The ILEA had the power under s 142 of the Local Government Act 1972 to spend on publishing 'information on matters relating to local government'. Glidewell J determined that the question to be asked in this case was whether the ILEA was pursuing an unauthorised purpose – persuasion – which materially influenced the making of its decision. Persuasion, he concluded, was 'a, if not the, major purpose of the decision'.

4.4.10 Punishment motive alleged

Many of the cases in the field of judicial review concern conflicts between central and local government of different political reflections. It is not surprising, therefore, that challenges by ministers to the decisions of local authorities may appear to be influenced by a desire to punish the local authority for its temerity and to warn other authorities of the likely consequences should they choose to follow suit.

In *Asher v Secretary of State for the Environment* (1974), the Clay Cross councillors argued that the minister's decision to direct an extraordinary audit was punitive in intent. The minister 'must have known that the councillors had no means and were unable to pay. So his purpose must have been to punish them, or at any rate to get them disqualified'. The Court of Appeal was unmoved, with Lord Denning proclaiming:

It may be that in this case he did have, at the back of his mind, that if he directed an extraordinary audit the result would be that these 11 councillors would be disqualified. Even if he did think so, there was nothing wrong in it. These men were flagrantly defying the law. They were not fit to be councillors. The sooner they were disqualified the better.

In *Wheeler v Leicester City Council* (1985), the Labour controlled Leicester City Council had for several years permitted the city's leading rugby football club to use a recreation ground for matches and training. The club failed to comply

with a request to publicly oppose a tour of the English Rugby Football Union team to South Africa and to agree that the tour was an insult to a large proportion of Leicester's population (25% of which was of Asian or Afro-Caribbean origin). After three members of the club had toured South Africa as part of the English team, the council banned the club from using the ground for 12 months. On an application for judicial review on the ground that the council had acted unreasonably, the council argued that, when exercising its discretionary powers concerning the ground, it could have regard to the statutory functions under the Race Relations Act 1976, including the need to promote good race relations under s 71. The Divisional Court and the Court of Appeal found in the council's favour. However, the House of Lords found both a failure to act fairly and an abuse of power. In the absence of any breach of the law or improper conduct on the part of the club, the resolution to ban was unreasonable. Lord Templeman stated:

The club having committed no wrong, the council could not use their statutory powers in the management of their property or any other statutory powers to punish the club.

In *Congreve v Home Office* (1976), where the Home Secretary threatened to revoke the licenses of people who had chosen to renew them early to avoid an increase in the licence fee, Lord Denning MR stated:

If the licence is to be revoked – and his money forfeited – the minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong – if he had given a cheque for £12 which was dishonoured, or if he had broken the conditions of the licence – the minister could revoke it. But when the licensee has done nothing wrong at all, I do not think that the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause.

In *R v Lewisham LBC ex parte Shell UK* (1988), the council decided to boycott Shell's products – where alternative products were available on reasonable terms – because of Shell's interests in South Africa (which then had a government which supported apartheid). On an application by Shell to quash the decision, the council similarly argued that it was acting in pursuance of its statutory duty to promote good race relations under s 71 of the Race Relations Act 1976. The court upheld the application to quash and also issued a declaration that a campaign to encourage other authorities to boycott Shell's products was unlawful. Although race relations were a relevant consideration, the council was also motivated by improper purpose, ie a desire to pressure Shell to cease trading with South Africa. Such trading, however, was not unlawful. The improper motivation served to invalidate the council's decision.

In *R v Derbyshire County Council ex parte The Times Supplements* (1991), the council's ban on advertising in *The Times Educational Supplement* was motivated by a desire to punish *The Times* Newspapers for publishing articles about its

affairs in *The Sunday Times*. This was inconsistent with the need to advertise as appropriate.

The motive for the decision may not, in fact, be one of punishment. It is sufficient that the decision prevents conduct which is lawful. In *R v Coventry City Council ex parte Phoenix Aviation* (1995), decisions of public authorities banning flights and shipments of livestock – in themselves lawful activities under English law – because of disruption by animal rights protesters were unlawful.

4.4.11 Electoral promises

A recurrent argument used to establish the legality of decision-making in the political sphere is that the decision is the result of promises made during an election campaign – the ‘manifesto’ argument.

In *R v GLC ex parte Bromley LBC* (1984), the ‘Fares Fair’ policy was in keeping with promises made during local elections. Both the Court of Appeal and the House of Lords held, however, that the policy could not be said, within the council’s duty under s 1 of the Transport (London) Act 1969, to ‘promote the provision of integrated, efficient and economic transport facilities and services’. It was not economic. (It was also imposing a financial penalty on ratepayers to the advantage of non-ratepayers, in particular, tourists.) The GLC had to run London Transport as a business venture having regard to ordinary business principles. If an efficient operation could not be achieved without some loss, nevertheless the authority could not ‘go out of its way’ to make a loss (*per* Lord Scarman). The decision was dominated by the electoral promise. However, the support of the electorate could not render an otherwise unlawful act – one described by Watkins LJ as a ‘hasty, ill-considered, unlawful and arbitrary use of power’ – lawful.

In the sequel to this case, *R v London Transport Executive ex parte GLC* (1983), a further policy – the ‘Balanced Plan’ – to achieve a 25% reduction in fares was held to be lawful. It was found that, in the formulation of this policy, the GLC had not acted arbitrarily and had considered its duty to the ratepayers and the duties imposed by the Transport (London) Act 1969.

In *Asher v Secretary of State for the Environment* (1974), the unlawful conduct of the housing authority (its refusal to increase council house rents in accordance with the Housing Finance Act 1972) could not be justified in law by reference to promises made leading up to local elections and the electorate’s support for the unlawful policy as evidenced by their election of the promisers.

Both *Bromley* and *Asher* may be criticised as cases where the judges have overstepped the line between legality and merits of decision-making. In *Bromley* it might be argued that the court emphasised the word ‘economic’ in s 1 of the Transport (London) Act 1969 to the disadvantage of ‘integrated and efficient’. The more a public transport system strives to operate ‘on business lines’ almost inevitably the less ‘efficient’ it will be in the sense of providing a service to the

public. It might also be argued that the judges simply did not possess the expertise necessary to undertake such a complex cost benefit analysis. In *Asher* it might be argued that the minister's primary objective was to punish the councillors for challenging government policy and that he rejected the remedy purpose-made by Parliament for the most draconian power at his disposal (see above, p 103).

4.4.12 The manifesto argument and the principle of reasonableness

The manifesto, however, may be a relevant consideration in the exercise of a discretion and in determining the *reasonableness* of the decision. In the *Tameside* case (1977), the wishes of the voter parents was a relevant factor to be considered in determining whether the local education authority had reached a reasonable decision in law when it resolved to revise approved plans for comprehensive education and retain certain grammar schools. This had been a live issue in the local elections.

Note the relationship between this and being motivated by policy: policy considerations are relevant in decision-making but political affiliation is not to be blindly adhered to. In *R v Waltham Forest LBC ex parte Baxter* (1988), Sir John Donaldson drew the distinction clearly:

The duty of an individual councillor ... is to make up his own mind on how to vote, giving such weight as he thinks appropriate to the views of other councillors and to the policy of the group of which he is a member. It is only if he abdicates his personal responsibility that questions can arise as to the validity of his vote. The distinction between giving great weight to the views of colleagues and to party policy on the one hand and voting blindly in support of party policy may on occasion be a fine one, but it is nevertheless very real.

4.4.13 Fiduciary duty/misplaced philanthropy

A desire to benefit members of the locality will not serve to validate an otherwise unlawful action. A philanthropic motive may even reach the heights of unreasonable or arbitrary conduct as in *Roberts v Hopwood* (1925) where the council was found to have acted for 'eccentric principles of socialist philanthropy'.

Where there exists a fiduciary relationship – in this context, in particular, the relationship of local authority and ratepayer – the courts perceive themselves as guardians of the ratepayers' purse in ensuring that local income is not squandered by the authority. They will not allow one section of the population to be benefited at the expense of another section. So, in *Prescott v Birmingham Corporation* (1955), senior citizens could not be allowed free travel on public transport. Jenkins LJ stated:

... while it was left to the defendants to decide what fares should be charged within any prescribed maxima for the time being in force, the undertaking was

to be run as a business venture ... fares fixed ... in accordance with ordinary business principles, were to be charged ... they should ... aim at providing an efficient service ... at reasonable cost, and it may be that this objective is impossible of attainment without some degree of loss. But it by no means follows that they should go out of their way to make losses by giving away rights of free travel.

The influence of this perception is clearly evident. In *Roberts v Hopwood* (1925), the power to pay such salaries and wages as the authority thought fit did not extend to payments which were considered to be so excessive as to amount to gratuities. In *Prescott v Birmingham Corporation* (1955), the free travelling old age pensioners could not be benefited to the detriment of the ratepayers as a whole. In *R v GLC ex parte Bromley LBC* (1984), the GLC had to balance the conflicting interests of the travelling public and the ratepayers.

However, in *Pickwell v Camden* (1983), an agreement reached locally with the National Union of Public Employees, whose members were on strike, was upheld despite national negotiations concluded shortly afterwards which were less favourable to the employees. Forbes J rejected an application by the district auditor who considered that the local councillors had thereby incurred excess expenditure. Vital services had been severely disrupted and 'the whole administrative machine of the borough was in imminent danger of having to close down'. He commented:

It seems to me that, in this climate, we are worlds away from Poplar in the 1920s [a reference to *Roberts v Hopwood*] where a calm and deliberate decision to indulge in what then passed for philanthropy was being taken.

In *R v ILEA ex parte Westminster City Council* (1986), although the publicity campaign costing some £651,000 was declared unlawful as being wrongly motivated, Glidewell J rejected an argument based on breach of fiduciary duty to the ratepayers. The employment of the advertising agency was a matter of discretion for the authority 'which was advised that it had to take into account its duty to the ratepayers'.

4.4.14 Bad faith

Although bad faith is commonly noted as a head of judicial review it is rarely established. Even in the case of *Roncarelli v Duplessis* (1959), where there was a finding of a 'gross abuse of legal power', the court stopped short of an express finding of bad faith. However, bad faith was found in *R v Derbyshire CC ex parte The Times Supplements Ltd* (1991), where the removal of advertising of educational appointments from *The Times Educational Supplement* (TES), after The Times Newspapers had published allegedly libellous articles about the affairs of certain councillors, was found to be motivated by a desire to ban newspapers owned by Rupert Murdoch. Section 38 of the Education (No 2) Act 1986 imposed a duty on schools via their articles of government to advertise a vacancy 'in a manner likely in their opinion to bring it to the notice of persons

... who are qualified to fill the post'. Watkins LJ concluded that the decision to remove advertising from the TES was made regardless of educational requirements and solely because of the articles printed in *The Sunday Times*. The decision was 'activated ... by bad faith or, in a word, vindictiveness'. Nor was the court impressed by attempts to conceal the real reason for removing advertising from the TES and found that the council had 'deliberately sought to mislead' it. Had it been necessary to do so, Watkins LJ would have been prepared to find the decision perverse as having 'no sensible or justifiable basis'. On adherence to party policy, he commented:

It is slavish, thoughtless adherence to the party line which is objectionable and which may very well serve to oblige this court to quash a local authority decision.

Even if an allegation of bad faith was to be upheld, a challenge can be precluded on the words of the statute. In *Smith v East Elloe RDC* (1956), the Minister of Health confirmed a compulsory purchase order over land belonging to the appellant. A house on the site was demolished and new houses erected. The appellant claimed, *inter alia*, a declaration that the compulsory purchase order was wrongfully made and in bad faith. The Acquisition of Land (Authorisation Procedure) Act 1946 permitted a person aggrieved to question the validity of a compulsory purchase order within six weeks of publication of the notice of the confirmation or making of the order. The appellant issued a writ almost six years after the event. It was argued that, as the order had been made and confirmed wrongfully and in bad faith, the time limit did not apply. The provision was to be read as though the words 'in good faith' occurred after 'compulsory purchase order'. The principle that Parliament could not oust the jurisdiction of the courts, especially where fraud is alleged, except by clear words was argued. However, in the House of Lords, Viscount Simonds found that the words used were unambiguous and wide enough to cover any kind of challenge. If a remedy lay, it was not in a challenge to the validity of the order but in damages against the fraudulent individuals. Lord Morton considered that Parliament may well have thought that it was essential to exclude even claims of bad faith in such a situation where building works had been carried out. In contrast, Lord Reid stated that 'bad faith stands in a class by itself' and, whilst acknowledging that there had been few cases where actual bad faith had even been alleged, nevertheless:

In every class of case that I can think of, the courts have always held that general words are not to be read as enabling a deliberate wrongdoer to take advantage of his own dishonesty.

... I would hesitate to attribute to Parliament the view that considerations of that kind (involving a local authority in grievous loss) justify hushing up a scandal.

4.4.15 Human rights

Recent cases suggest that the courts will be concerned to protect fundamental human rights in their review of administrative discretions. In *Bugdaycay v Secretary of State for the Home Department* (1987), the applicant challenged a decision to send him back to Kenya. He argued that the past record of the Kenyan government indicated that he may be returned from there to Uganda where his life would be at risk. Lord Bridge stated:

... [the courts are entitled] to subject an administrative decision to the more rigorous examination ... according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.

Similarly, Lord Templeman stated:

... where the result of a flawed decision may imperil life or liberty, a special responsibility lies on the court in the examination of the decision-making process.

In *R v Horseferry Road Magistrates ex parte Bennett* (1994), the House of Lords considered it appropriate for a court to consider the circumstances in which a detainee had been brought to trial. The applicant claimed that he had been effectively kidnapped from South Africa by the British police in disregard of available extradition procedures and that, therefore, the court should decline jurisdiction to try him for alleged criminal offences. Lord Griffiths, while accepting that there was no question of the applicant not having a fair trial, nor would it have been unfair to try him had he been returned through extradition procedures, nevertheless the court should 'accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law'.

In *R v Ministry of Defence ex parte Smith* (1995), a challenge was mounted to a policy of dismissing known homosexuals from the armed forces (regardless of whether they actively engaged in homosexual activity and regardless of how ably they performed their military roles). The Divisional Court, in asserting that an exercise of prerogative power involving the defence of the realm was justiciable in all but the clearest cases of national security, made it quite clear that the non-justiciability argument was to be balanced against the fundamental human rights argument. The Court of Appeal also adopted this approach and refused – despite the representations of counsel for the Ministry based on *Nottinghamshire County Council v Secretary of State for the Environment* (see above, pp 58–59) – to apply a test more exacting than the *Wednesbury* test. Sir Thomas Bingham MR noted that, although the lives or liberty of the applicants were not affected, nevertheless, the case concerned 'Innate qualities of a very

personal kind and the decisions ... had a profound effect on their careers and prospects. The appellants' rights as human beings are very much in issue'.

In *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants; R v Secretary of State for Social Security ex parte B* (1997), regulations made under the Social Security Contributions and Benefits Act 1992, which removed entitlement to income benefit supplement from categories of asylum seeker, were challenged on the basis that they interfered with the rights of asylum seekers under the Asylum and Immigration Appeals Act 1993. The 1993 Act gave asylum seekers immunity pending determination of their applications and it was argued that this entitlement could not be enjoyed if the applicants were not given financial support pending such determination. The Court of Appeal declared the regulations to be unlawful. They were 'uncompromisingly draconian'. According to Simon Brown LJ:

... these regulations for some genuine asylum seekers at least, must now be regarded as rendering [the rights in the Asylum and Immigration Appeals Act 1993] nugatory. Either that, or the 1996 regulations necessarily contemplate for some a life so destitute that, to my mind, no civilised nation can tolerate it. So basic are the human rights here at issue, that it cannot be necessary to resort to [the European Convention on Human Rights] to take note of their violation ...

Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution.

Such a consequence, if desired, must be achieved by primary legislation. Indeed, Parliament did subsequently incorporate the regulations in the Asylum and Immigration Act 1996. Certain authorities immediately withdrew assistance resulting in some applicants for asylum finding themselves sleeping rough. The regulations were challenged (within a week of their entry into force) in relation, *inter alia*, to the provision of housing in *R v Secretary of State for the Environment ex parte Shelter* (1996). The Divisional Court delivered judgment within a week of commencement of the proceedings and held that, whilst the regulations were effective for future applicants for housing (provided they were applied reasonably in law), they could not, in the absence of clear words, be construed so as to adversely affect rights already acquired before the 1996 Act 1996 came into force.

Human rights, it seems, must, however, still give way to national security (see, for example, *R v Secretary of State for the Home Department ex parte McQuillan* (1995) (above, p 51)).

4.4.16 Failure to fulfil statutory duties

An otherwise potentially lawful decision can be rendered unlawful by a failure on the part of the decision-maker to fulfil other statutory duties. In *West Glamorgan County Council v Rafferty* (1987), a council was held to have acted

unreasonably in seeking an order for possession against travellers occupying a council site because it had, for 10 years, been in breach of its statutory duty under the Caravan Sites Act 1968 to provide adequate accommodation and had failed to make any alternative arrangements to accommodate the gypsies. Ralph Gibson LJ stated: ‘... the law does not permit complete freedom of choice or assessment because legal duty must be given proper weight’. However, this decision is to be compared with that in *R v Avon County Council, ex parte Rexworthy* (1988), where again a council which had not fulfilled its duty under the Caravan Sites Act served notices of eviction on travellers. Rose J distinguished *Rafferty* on the grounds that there the eviction had been from private land owned by the council; here, it was from the highway and the council had to bear in mind also its duties under s 130 of the Highways Act 1980. Further, the council in *Rexworthy* had not abandoned the search for alternative sites and, being aware of its statutory obligation to provide sites and the inadequacy of provision, it had adopted a policy of non-harassment.

4.4.17 Opposition to the policy of Parliament

It almost goes without saying that to attempt to deliberately thwart the intentions of Parliament will not be an acceptable motive and will render a decision *ultra vires*. In *Taylor v Munrow* (1960), the council simply refused to increase rents as required by statute. In *Backhouse v Lambeth London Borough Council* (1972), the council’s flagrant attempt to by-pass a general rent increase by increasing the rent on one unoccupied council house to £17,000 per year was no more successful.

4.5 Proportionality

In *CCSU v Minister for the Civil Service* (1985), Lord Diplock suggested the possibility of the future adoption of proportionality as a ground for review in its own right. Proportionality is already an established head of review, founded on general principles of law, in European law. When confronted with an issue of European law, judges in the United Kingdom may be called upon to apply the principle of proportionality (see Chapter 10). Proportionality is also a recognised principle in the jurisprudence of the European Court of Human Rights in its interpretation of the European Convention on Human Rights (see *The Sunday Times v United Kingdom* (1979) and *Dudgeon v United Kingdom* (1981) and Chapter 11). The essence of the principle is that action must be proportionate to the lawful aim being pursued or, in more colloquial terms, a sledgehammer must not be used to crack a nut. So, in *The Sunday Times* case, English law on contempt, the aim of which was to protect proceedings which were sub judice from interference, led to disproportionate restrictions on freedom of expression. In *Dudgeon*, the blanket criminalisation of homosexual conduct in Northern Ireland, the aim of which was to protect public morals, led to disproportionate restrictions on sexual freedom. As an international treaty which has not been

embodied in a statute, however, the English judiciary are not called upon to implement the principle of proportionality in the European Convention. Repeated attempts to give the Convention force in national law via incorporation in statute have failed. The Convention, however, may have crept in through the back door where European law is concerned (see Chapter 10).

It might be argued that proportionality is not an entirely new concept in English administrative law itself. In *R v Barnsley Metropolitan Borough Council ex parte Hook* (1976), Lord Denning MR quashed a decision to revoke a market stallholder's licence for urinating in a side street after the market had closed as being 'altogether excessive and out of proportion to the occasion'. In *R v Secretary of State for Transport ex parte Pegasus Holdings (London) Ltd* (1988), following the failure of flying tests conducted by the British Civil Aviation Authority by five Romanian pilots, the Secretary of State for Transport provisionally suspended a Romanian organisation's permit to operate charter flights from the United Kingdom. The applicant package holiday company used aircraft chartered from the Romanian organisation. It challenged the order as having been made in breach of natural justice, in particular the failure to provide the opportunity for a fair hearing. Schiemann J spoke effectively of the means used to achieve the desired end of passenger safety:

One has in the context of fairness to bear in mind, on the one hand, the no doubt substantial economic damage to the applicants and perhaps the irritation and inconvenience that I do not doubt the passengers suffered. On the other hand, one has to bear in mind the magnitude of the risk, by which I mean not so much the high percentage chance of it happening but the disastrous consequences of what would happen if something did happen ... if something goes wrong, then very many lives will be lost.

In *R v General Medical Council ex parte Colman* (1990), a doctor who wished to establish a practice in holistic medicine complained that the advertising guidelines of the GMC were, *inter alia*, disproportionate. Here, however, Ralph Gibson LJ (approving Lord Donaldson MR in the Court of Appeal in the *Brind* case, below) clearly concluded that proportionality was not an independent head of review, but an aspect of reasonableness.

The House of Lords had a further opportunity to consider the development of proportionality as a head of review in its own right in *R v Secretary of State for the Home Department ex parte Brind* (1991). This case is a central authority on the principle of proportionality as a head of review in English law. It is also important for its discussion of the influence of the European Convention on Human Rights in English law, in particular in the context of secondary legislation.

***Ex parte Brind* (1991)**

By directives issued under s 29(3) of the Broadcasting Act 1981 and clause 13(4) of the licence and agreement with the BBC and approved by Parliament, the

minister required the IBA and the BBC to refrain from broadcasting words spoken by persons representing organisations proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1978. At it turned out, the ban was extremely limited in that the only effect was that such interviews would be 'voiced over' (and then by someone with an Irish accent!). The applicant journalist claimed that the directives were *ultra vires* in that:

- they contravened Article 10 of the European Convention on Human Rights;
- in conflicting with the broadcasters' duties, in particular to preserve due impartiality under s 4 of the Broadcasting Act 1981 and licence and agreement, they were *ultra vires* the powers in s 29(3) and clause 13(4);
- they were disproportionate to the mischief at which they were aimed (ie the prevention of intimidation by or undeserved publicity/legitimacy for such organisations).

In rejecting the application, the House of Lords held that:

- the European Convention on Human Rights was not part of English law. Although it could be referred to in order to resolve any ambiguity in the statute on the presumption that Parliament intended to legislate in accordance with international commitments, there was no ambiguity in s 29(3) (see further Chapter 11 on the European Convention);
- to apply proportionality would involve the court in substituting its own judgment for that of the Secretary of State;
- it could not be said that the Secretary of State had acted unreasonably.

On the submission that administrative discretion should be exercised so as to accord with international Convention obligations, Lord Bridge stated:

... it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But, where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the

Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it ... When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.

On reasonableness, the Secretary of State had not exceeded the limits of his discretion. Lord Bridge found it 'perhaps surprising ... that the restriction imposed is of such limited scope'.

Their Lordships were averse to developing proportionality as a separate head of judicial review. The reason stated was fear that this would bring them too close to challenging the merits of decisions. Lord Roskill stated:

I am clearly of the view that the present is not a case in which the first step can be taken [to develop the principle] for the reason that to apply that principle in the present case would be for the court to substitute its own judgment of what was needed to achieve a particular objective for the judgment of the Secretary of State upon whom that duty has been laid by Parliament.

However, Lord Roskill stated that rejection of the principle of proportionality in *Brind* itself did not 'exclude the possible future development of the law in this respect ...'.

A challenge based on reasonableness (ie that the ban was so unreasonable a means to achieve the end – 'a sledgehammer to crack a nut') that no reasonable body could have decided to impose it, was also rejected. Lord Ackner stated:

I entirely agree with McCowan LJ [in the Court of Appeal] when he said that he found it quite impossible to hold that the Secretary of State's political judgment that the appearance of terrorists on programmes increases their standing and lends them political legitimacy is one that no reasonable Home Secretary could hold.

The relationship between proportionality and unreasonableness was considered, in particular whether a disproportionate decision would always be unreasonable or irrational. Lord Ackner considered that, although a decision might be so disproportionate as to be unreasonable, proportionality (if accepted) could itself be a separate head of review:

This attack [proportionality] is not a repetition of the *Wednesbury* 'irrational' test under another guise. Clearly a decision by a minister which suffers from a total lack of proportionality will qualify for the unreasonable epithet. It is, *ex hypothesi*, a decision which no reasonable authority could make. This is, however, a different and severer test.

... in order to invest the proportionality test with a higher status than the *Wednesbury* test, an inquiry into and a decision upon the merits cannot be avoided.

This danger was echoed by Lord Lowry:

... proportionality and the other phrases are simply intended to move the focus of discussion away from the hitherto accepted criteria for deciding when the decision-maker has abused his power and into an area in which the court will feel more at liberty to interfere ... there is *no* authority for saying that proportionality in the sense in which the appellants have used it is part of the English common law and a great deal of authority the other way.

Lord Lowry expressed concern that:

- the acceptance of such a principle would encroach on the Parliamentary domain and so be an abuse of the judges' supervisory function;
- the judges were not equipped to decide an administrative problem where the scales were evenly balanced;
- stability and certainty would be jeopardised with applicants 'trying their luck' with judicial review; and
- the consequent increase in applications would waste time and money.

It was in the light of the *Brind* decision that Neill LJ was able to state in *National and Local Government Officers Association v Secretary of State for the Environment* (1992):

... I am quite satisfied that it is not open to a court below the House of Lords to depart from the traditional *Wednesbury* grounds when reviewing the decision of a minister of the Crown who has exercised a discretion vested in him by Parliament ... the constitutional balance in this country between the courts and the executive is a delicate one ... As the law stands at present ... I have no hesitation in saying that on the facts of this case I can see no basis whatever for this court lowering the 'threshold of reasonableness'.

The rejection by the House of Lords of the development of proportionality as a separate head of review in English law appears, therefore, to be based firmly on the established limits of judicial review ie that legality and not the merits of decision-making is subject to challenge. However, the requirement that the principle of proportionality is to be applied in the context of Community law is likely to lead, in time, to inconsistencies emerging and, consequently, a review of the application of the principle in a non-European context.

4.6 Conclusion

The concept of unreasonableness has become central in the field of judicial review. From the very limited formula stated by Lord Greene in *Wednesbury*,

the judges have moulded a dynamic control mechanism over governmental decision-making base upon a catalogue of principles. This dynamism has been accelerated in recent years by the influence of both membership of the EC (see Chapter 10) and of the European Convention on Human Rights (see Chapter 11). Such European influence will almost certainly increase with the proposed incorporation of the European Convention into UK domestic law.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION II – SUBSTANTIVE *ULTRA VIRES* AND ABUSE OF POWER

Definition

Ultra vires means ‘beyond the powers’. When power is conferred on an administrative body, the instrument conferring the power may impose restrictions as to *how* the power is to be exercised (procedural) or *what* can be done (substantive). Even where there are no express restrictions, the courts will require the power to be exercised *reasonably* and *fairly*.

Substantive *ultra vires*

This means using a power for an unauthorised purpose, ie doing the wrong thing.

Incidental objectives

A power can be used to achieve objectives which are incidental to the stated purpose even though not expressly authorised. Also s 111 of the Local Government Act 1972 confers power on local authorities to engage in activities which are incidental to their statutory functions.

Abuse of power

A decision may be lawful in the sense of being within the scope of the power conferred and following any prescribed procedure. The courts have, however, developed principles of unreasonableness to prevent abuse of power. In *Associated Provincial Picture Houses v Wednesbury Corporation* (1948), Lord Greene MR identified narrow and broad unreasonableness. By narrow unreasonableness, he meant a decision which is so unreasonable that no reasonable body could possibly have reached it. By broad unreasonableness, he meant a failure by the decision-maker to direct himself or herself properly in law, a failure to take into account relevant considerations, or the taking into account of irrelevant considerations. In *CCSU v Minister for the Civil Service* (1985), Lord Diplock re-classified the heads of review as illegality, irrationality, procedural impropriety and, possibly, proportionality.

The courts have subsequently developed a number of principles by reference to which this principle of broad unreasonableness is determined:

Non compliance with the objectives of the Act

An exercise of discretion must be in keeping with the objectives of the Act which confers the power.

In *Padfield v Minister of Agriculture, Fisheries and Food* (1968), complaints about the operation of a milk marketing scheme were to be referred to a committee of investigation 'if the minister in any case so directs'. It was held that, despite the permissive language of the Act, the minister was required to refer a complaint if it was genuine and substantial.

Improper purpose/irrelevant considerations

In exercising a discretion, the decision-maker must not act for an unlawful purpose, however, well intentioned. He or she must also take into account all relevant considerations and exclude all irrelevant considerations.

In *R v Secretary of State for Foreign and Commonwealth Affairs ex parte World Development Movement* (1995), the minister, in providing overseas aid for the construction of the Pergau Dam, had taken into account the UK's trading relationship with Malaysia. Although he was entitled to take into account political considerations in the provision of overseas aid, he could only do so to promote economically sound development. The Pergau Dam scheme was not so.

Mixed motives

Where the decision-maker has been influenced by a number of motives, some of which are lawful and some unlawful, the court may ask itself which was the *dominant* motive.

In *Westminster Corporation v London and North Western Railway* (1905), the council had statutory power to build public toilets. It built toilets underground, so providing a subway. It was held that the dominant motive was the provision of toilets and so the action was lawful.

Punishment motive

A decision-maker cannot exercise a discretion so as to punish someone who has not acted unlawfully.

In *Wheeler v Leicester City Council* (1985), the council withdrew use of a recreation ground from a rugby club as a punishment for its failure to condemn a tour of South Africa by some of its players. It was held that, as the club had done nothing wrong, it could not be punished in this way.

Electoral promises

A decision-maker cannot argue that a promise made to the electorate justifies an act which is otherwise outside the power conferred.

In *Bromley LBC v GLC* (1983), a promise was made during local elections to reduce transport fares. It was held that the policy formulated to keep this promise was unlawful because it did not fulfil the council's statutory duty to provide 'economic transport facilities' as it made a deliberate loss.

The manifesto argument

The wishes of the electorate can be a relevant consideration in determining whether a decision is *reasonable* in law.

In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* (1977), a promise was made during local elections to retain grammar schools. The minister issued a statutory direction requiring the council to cease acting 'unreasonably'. It was held that the wishes of the electorate were relevant in determining the reasonableness of the council's decision to retain grammar schools.

Fiduciary duty/misplaced philanthropy

The courts will be especially careful to ensure that a decision-maker acts within the power conferred where a fiduciary relationship exists, for example as between a local authority and its council taxpayers.

In *Prescott v Birmingham Corporation* (1955), senior citizens were allowed to travel free on public transport. It was held that, in the absence of an express statutory power, one section of the population could not be benefited at the expense of another, despite the philanthropic motivation.

Bad faith

The courts will rarely find that a decision-maker has acted in bad faith unless they especially disapprove of his or her conduct.

In *R v Derbyshire County Council ex parte The Times Supplement* (1991), the council discontinued advertising education appointments in *The Times Educational Supplement* because *The Sunday Times* had published allegedly libellous articles about certain councillors. It was held that the decision was unlawful since it was activated by bad faith or vindictiveness.

Human rights

The courts are now vigilant to ensure that a decision-maker acts within the power conferred where the exercise of the power affects human rights.

In *R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants* (1997), the minister made statutory regulations which removed entitlement to income benefit supplement from certain asylum seekers. It was held that the regulations were unlawful; they would leave asylum seekers destitute. Basic human rights were at issue.

Failure to fulfil statutory duties

In *West Glamorgan County Council v Rafferty* (1987), the council sought a possession order against travellers occupying a council site. It was held that the council had acted unreasonably in seeking the order since it had failed to comply with its statutory duty to provide adequate accommodation for travellers.

Opposition to the policy of Parliament

In *Backhouse v Lambeth LBC* (1972), the council attempted to by-pass a rent increase by increasing the rent on one unoccupied council house to £17,000. It was held that this was unlawful as it was a deliberate attempt to thwart the intentions of Parliament.

Proportionality

It was suggested by Lord Diplock in *CCSU* (1985) that proportionality may be a potential head of judicial review. The courts have not, however, subsequently shown themselves willing to develop such a principle.

In *R v Secretary of State for the Home Department ex parte Brind* (1991), the Home Secretary issued directives banning the broadcasting of words spoken by members of certain proscribed organisations. It was held that the directives were not disproportionate to the aim to be achieved in the control of terrorism. In so finding, the House of Lords doubted proportionality as a principle of English law on judicial review. This principle is, however, established in the context of European law.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION III – PROCEDURAL *ULTRA VIRES*

5.1 Introduction

As illustrated in the previous chapter, a decision may be rendered *ultra vires* through the decision-maker doing the wrong thing or abusing the power enjoyed. An action may also be rendered *ultra vires* through a failure to maintain procedural standards. These standards may be imposed by the legal source of the power (normally, in this case, statute). However, the courts have also developed procedural standards in the form of the rules of natural justice or, in more modern terminology, the duty to act fairly. These judicial standards will normally be applied to all judicially reviewable decisions – even those regulated also by a statutory procedure.

The application of the rules of natural justice is not exclusive to decision-making in the public law field. The rules have also been applied in the private law field – for example, to cases of expulsion from trade unions and clubs where there is a contractual relationship between the parties. See, for example, *Burn v National Amalgamated Labourers' Union* (1920); *Lee v Showmen's Guild* (1952); *Leary v National Union of Vehicle Builders* (1971); *Breen v Amalgamated Engineering Union* (1971) (trade union cases); *Dawkins v Antrobus* (1881) (clubs and societies). In such cases, however, a remedy must be sought through the private law avenue.

The fact that Parliament has provided for a statutory procedure will not lead to a conclusion that Parliament intended to exclude the application of natural justice/fairness, though the statutory procedure itself must, of course, also be complied with (provided the procedure is regarded by the courts as being mandatory – see below). To the extent that Parliament (or delegated legislation) has not provided for a fair procedure then 'the justice of the common law will supply the omission of the legislature' (*per* Byles J in *Cooper v Wandsworth Board of Works* (1863)).

5.2 Statutory procedures

5.2.1 Nature and effect

As stated, Parliament may provide for a procedure in the statute conferring the discretionary power – for example, consultation with interested/affected parties, the giving of notice, a public inquiry (particularly in the context of town and country planning) or the laying of an instrument before either or both

Houses of Parliament subject to an affirmative or negative resolution. (In the case of an affirmative resolution, the instrument will not take effect unless *affirmed* within a given period of time; with a negative resolution, the instrument will take effect unless *negatived* within a given time.) In the first instance, therefore, the statute should be checked for any procedure.

The effect of non-compliance with a statutory procedure will not necessarily be to invalidate the decision. The asserted role of the courts here is again to fulfil the intentions of Parliament. The exercise of a discretion will not be thwarted by a technical breach of procedure. Again, the statute should be checked to see if it states what the legal effect of non-compliance will be. It will rarely do so. If the statute is silent, the court will consider the legal effect of non-compliance on the validity of the decision. The court will look to the purpose of the procedure and the effect of non-compliance on those affected by the decision. Influences might include:

- whether the language of the statute is mandatory or directory (see below);
- whether the rights of the individual are affected (eg by a failure to inform of a right of appeal);
- whether a financial burden is being imposed on the citizen.

The courts have developed a flexible approach and strict classifications have been rejected (see, in particular, Lord Hailsham in *London & Clydeside Estates Ltd. v Aberdeen District Council* (1980)).

So, for example, in *Ridge v Baldwin* (1964) (see below) where the police Watch Committee failed, when dismissing a Chief Constable, to act in accordance with disciplinary regulations issued under the Police Act 1919, the House of Lords found that the dismissal was void. A consequence of dismissal was loss of pension entitlements.

A failure to comply with notice or consultation requirements, to inform of a statutory right of appeal or to comply with a statutory duty to give reasons will *normally* render a decision void. (As to the nature of the reasons themselves, see below, p 141.)

In *Bradbury v Enfield LBC* (1967), a failure to notify the public of proposed changes in a reorganisation of schools rendered the decision *ultra vires*. In *R v Lambeth LBC ex parte Sharp* (1988), a deemed order for planning permission for the development of some six acres of parkland situated in a conservation area as an athletics track was quashed. The council had failed to specify in the required notice of the proposed development in a local newspaper the period during which objections should be made. Similarly, in *R v Tower Hamlets Health Authority ex parte Tower Hamlets Combined Traders Association* (1993), a failure to give street traders notice of a period within which they could make representations on proposed increased charges invalidated the authority's decision. The decision affected the income and perhaps even the livelihood of the applicant's

members. In *R v Lambeth LBC ex parte N* (1996), the local authority was held to have been in breach of a statutory duty of consultation in the closure of a school for children with special educational needs. Section 184 of the Education Act 1993 required consultation with 'such persons as appear to them to be appropriate' having regard to guidance issued by the Secretary of State (which guidance had identified parents as important consultees). However, in *Coney v Choyce* (1975), a failure to notify of a school closure at the school entrance was found to have no effect on the legality of the decision. There had been publicity via other methods and the failure had not been the cause of anyone being prejudiced.

In *Agricultural, Horticultural and Forestry Training Board v Aylesbury Mushrooms* (1972), a failure to consult through the non-arrival of a circular which had been sent rendered an order of no effect as against the mushroom-grower non-recipients. This was so even though Donaldson J suggested that the minister would have been justified in concluding that he need not consult the Mushroom Growers' Association at all as not being representative of substantial numbers of employers or persons employed in the industry (as the statute required). Donaldson J was especially strict in requiring compliance with procedural safeguards here as the ultimate decision involved the imposition of a levy (authorised by the statute) on those affected.

In the *Aylesbury Mushrooms* case, Donaldson J described the essence of consultation as 'the communication of a genuine invitation, extended with a receptive mind, to give advice'. So the mere sending of a letter constituted but an attempt to consult and this did not suffice. In *R v Secretary of State for the Environment ex parte Association of Metropolitan Authorities* (1986), Webster J also stipulated that 'to achieve consultation sufficient information must be supplied by the consulting party to enable it to tender helpful advice. Sufficient time must be given by the consulting party to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party'. Although the requirement of consultation was held to be mandatory and not to have been complied with, however, Webster J exercised his discretion in the circumstances to refuse to quash the minister's regulations (cf *R v Secretary of State for Health ex parte United States Tobacco International Inc* (1992)). In *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities*, the essence of consultation was said to be 'the communication of a genuine invitation to give advice and a genuine receipt of that advice'.

In *London and Clydeside Estates v Aberdeen District Council* (1980), a failure to notify of a right of appeal rendered a decision *ultra vires* even though this had not caused any prejudice as the party already knew of the existence of the right.

Where reasons for a decision are required by statute, the reasons must be sufficient and adequate. The giving of reasons also opens up an avenue of challenge through error of law on the face of the record.

A failure to comply with a technical procedural requirement will not affect the legality of the decision. So, for example, a typographical error in a public notice of an application for a licence to operate a bingo club did not prevent the gaming committee from hearing and determining the application (see *R v Dacorum Gaming Licensing Committee ex parte EMI Cinemas and Leisure Ltd* (1971)). In *R v GLC ex parte Bromley LBC* (1984), Lord Denning in the Court of Appeal was prepared to hold that the instruction given to the London Transport Executive to implement the Fares Fair policy was unlawful simply because the instruction was given over the telephone when it was required to be in writing. However, the House of Lords, while finding the decision *ultra vires* as an abuse of power, considered that this breach of procedure was technical only and did not affect the legality of the decision. In *Secretary of State for Trade and Industry v Langridge* (1991), the Court of Appeal held that a requirement to give 10 clear days notice of an intention to apply for an order disqualifying a person as a company director was directory only. The object of the relevant statute was to protect the public and the object of the requirement of notice was merely to inform the person affected rather than to protect his or her rights.

5.2.2 Substantial compliance

It may be the case that statute requires a number of procedures, only some of which have been complied with. Here, the court will have to determine whether the partial failure is sufficiently serious to invalidate the decision. So, for example, in *Howard v Secretary of State for the Environment* (1975), a failure to specify the grounds of appeal in a notification of appeal against an enforcement notice did not invalidate the notice of appeal. It was essential that the planning authority be informed of the appeal in order to suspend the enforcement notice but the grounds could be provided subsequently (even out of time).

The existence of a statutory procedure does not of itself preclude the rules of natural justice/the duty of fairness. As stated by Lord Reid in *Wiseman v Borneman* (1971):

For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But, before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.

The difficulty is clearly that there is inevitably a grey area where it cannot be said with certainty whether the effect of non-compliance with a required procedure will render a decision *ultra vires*. It simply depends on how serious the court considers the effects of non-compliance to be in any given case.

5.3 Natural justice/fairness

5.3.1 Content

There are two limbs to the rules of natural justice:

- the rule against bias (*nemo iudex in causa sua* – no one should be a judge in his own cause);
- the right to a fair hearing (*audi alteram partem* – hear the other side).

5.3.2 History and development

Pre-1964

The courts averred to a power to challenge the validity of even primary legislation in the early 17th century. In *Dr Bonham's Case* (1610), Coke CJ asserted that 'the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void'. However, the 17th century witnessed the growing struggle for power between the monarch and Parliament in which the courts aligned themselves with Parliament. Consequently, the power of judicial review of primary legislation remained dormant, the courts asserting instead the supremacy of Parliament.

Despite classic decisions such as *Cooper v Wandsworth Board of Works* (1863), the development and application of the rules of natural justice in controlling governmental discretion remained piecemeal until well into the 20th century. In *Cooper* itself, the courts asserted a right to a hearing before the applicant's house, built without permission, was demolished in the exercise of statutory power. Byles J stated:

Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law shall supply the omission of the legislature.

This scenario met the requirements of a *lis inter partes* (a dispute between two sides being adjudicated upon by a third party) which was more likely to attract the rules of natural justice. Similarly, a decision which affected a person's rights would attract protection through natural justice. The courts, however, remained cautious in their challenges to exercises of administrative discretion and drew fine distinctions in the application/non-application of the rules.

In *Nakkuda Ali v Jayaratne* (1951), the Controller of Textiles in Ceylon exercised a power to cancel a textile dealer's licence. The Privy Council held that

natural justice did not apply as the Controller was not acting judicially – he was withdrawing a privilege and not affecting a right.

Similarly, in *R v Metropolitan Police Commissioner ex parte Parker* (1953), a taxi driver's licence could be revoked without a hearing. Again, although such revocation affected the taxi driver's livelihood, there was no right to the grant of a licence.

Post-1963

The 1960s saw a period of judicial revival in the field of control of the actions of the administration. The courts revived the jurisdiction of error on the face of the record, asserted a residual power to examine documents for which Crown Privilege was claimed (see *Conway v Rimmer* (1968) below, p 215), limited executive discretion by reference to the objects of the relevant legislation (see *Padfield v Minister of Agriculture* (1968) above, p 96), struggled to overcome the ultimate in exclusion clauses (see *Anisminic v Foreign Compensation Commission* (1969) below, pp 203–04) and re-asserted the rules of natural justice (see *Ridge v Baldwin* (1964) below).

Ridge v Baldwin (1964)

In *Ridge v Baldwin*, the Chief Constable of Brighton was acquitted on a charge of conspiracy to obstruct the course of justice. The trial judge, on sentencing two police officers who were convicted, criticised the Chief Constable for failing to provide 'professional and moral leadership'. The police Watch Committee exercised its power under s 191 of the Municipal Corporations Act 1882 to '... at any time ... dismiss any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same'. This had the effect of loss of pension entitlements. No specific charge was formulated against the Chief Constable who was given no opportunity to present his case to the Committee before its decision to dismiss. An appeal to the Home Secretary (itself stated to be 'final and binding on the parties' under s 2(3) of the Police Appeals Act 1927) failed.

On an application for a declaration that his dismissal was *ultra vires*, the Court of Appeal found that the Watch Committee were acting in an administrative or executive capacity and not a judicial capacity. As such, they were not bound by the rules of natural justice. The House of Lords, however, held that the police discipline regulations issued under the Police Act 1919 required notification of an alleged offence and an opportunity to be heard and that, in any case, a hearing was demanded by the rules of natural justice. Further, the defect was not cured by a meeting between the Committee and the appellant's solicitor subsequent to the Committee's decision.

Lord Reid identified what he perceived to be a misunderstanding of a statement made by Atkin LJ in *R v Electricity Commissioners* (1924). There Atkin LJ had stated:

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having a duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

This statement had subsequently been interpreted as requiring that, for the King's Bench to exert its supervisory jurisdiction, the decision of the inferior body *not only* had to affect rights *but also* had to be operating in a judicial capacity. *Both* requirements had to be fulfilled. Lord Reid asserted, however, that the judicial element of a decision was to be inferred from the nature of the power. If a decision *affected rights*, it was *judicial* and subject to control.

5.3.3 Legitimate expectation

The concept of legitimate expectation – with particular reference to whether it can give rise to substantive rights – has been considered in the context of changes to policies (see above, pp 68–73). It was also noted there that the origins of the development of legitimate expectation lay in judicial attempts to extend procedural fairness in decision-making and the right to a fair hearing. Even though a person's *rights* were not affected, the courts determined that entitlement to a fair hearing might arise from a promise or undertaking given by the decision-maker or (since *CCSU*) from past practice (as opposed to a mere hope on the part of the applicant). Such a promise/undertaking/practice might give rise to a legitimate expectation that the promise/undertaking would be kept or the practice continued. It has even been suggested that there may exist a legitimate expectation of consultation in the absence of a statutory duty, a promise or undertaking, or a past practice. In *R v Brent LBC ex parte Gunning* (1985), Hodgson J held that parents had a legitimate expectation of consultation before the local authority made proposals for the closure or amalgamation of schools. The interest of the parents was 'self-evident' and the legislation also imposed duties upon the parents with consequent criminal penalties for breach. However, there did in any case exist a practice of consultation here.

After the extension of the application of the concept of legitimate expectation in the *CCSU* case, where the House of Lords asserted that an expectation could arise from past practice, Professor Wade expressed the view that legitimate expectation 'looks as if it will be a useful device ... for making *audi alteram partem* [the right to a fair hearing] the "principle of universal application" that it ought to be' (see 'GCHQ and Judicial Review' (1985) 101 LQR 153 at 157).

The concept was first articulated by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* (1969), where students at the Church of

Scientology had their requests for extensions to remain in the United Kingdom denied by the Home Secretary. Claims of a failure to provide a hearing and so observe the rules of natural justice were rejected. This opportunity to make representations depended, according to Lord Denning:

... on whether he has some right or interest, or, I would add, *some legitimate expectation*, of which it would not be fair to deprive him without hearing what he has to say.

The alien Scientology students had no right to remain in the UK once their permissions to remain had expired. However:

If his permit is revoked *before* the time limit expires, he ought, I think, to be given an opportunity of making representations: for he would have a *legitimate expectation* of being allowed to stay for the permitted time.

In the circumstances, the students did not have a legitimate expectation and their applications failed. However, the legitimate expectation concept, used in *Schmidt* to deny relief, has since been developed to expand the scope of application of natural justice.

In *R v Liverpool County Council ex parte Liverpool Taxi Fleet Operators Association* (1975), there was a duty to give a hearing before breaking an undertaking not to increase the number of taxi cab licences.

The application of legitimate expectation arising from a promise is well-illustrated by *AG of Hong Kong v Ng Yuen Shiu* (1983). The government of Hong Kong had for some years adopted a policy whereby illegal immigrants from China were not repatriated if they managed to reach the urban areas without arrest – the ‘reached base’ policy. The government, on revocation of this policy, gave the Director of Immigration power to make removal orders against illegal immigrants. Illegal immigrants from Macau presented a petition to the government and were promised that they would be interviewed and each case treated on its merits. Mr Ng viewed a TV programme to this effect on the evening of the petition. On a challenge to a removal order made against him, the Privy Council found that the undertaking gave rise to a *legitimate expectation*. Lord Fraser stated:

... when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

In *CCSU v Minister for the Civil Service* (1985), it was argued that a past practice of consultation before changes in conditions of employment were affected gave rise to a legitimate expectation that such practice would continue (in this case, before trade union membership rights were abolished). This argument was accepted and the *CCSU* case makes it quite clear that the doctrine extends to

expectations based on past practice as well as on express assurances. As stated by Lord Diplock:

To qualify as a subject for judicial review the decision must have consequences which affect some person ... either:

- (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
- (b) by depriving him of some benefit or advantage which either:
 - (i) he had in the past been permitted by the decision-maker to enjoy and which he can *legitimately expect* to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or
 - (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity for advancing reasons for contending that they should not be withdrawn.

However, in the circumstances of the *CCSU* case, the legitimate expectation gave way to the interests of national security. On past practice, see also *R v British Coal Corporation ex parte Vardy* (1993).

It seems that a legitimate expectation to a hearing can be sacrificed by those entitled. In *Cinnamond v British Airports Authority* (1980), the British Airports Authority used its powers under by-laws to ban six car hire drivers from Heathrow (except as *bona fide* passengers) because they persistently touted for trade, contrary to by-laws, and had convictions for such conduct. The drivers argued that a failure to provide a hearing invalidated the decision. In the circumstances, however, it was found that the drivers had no legitimate expectation. They were engaging in unlawful conduct and the reason for the prohibition must have been apparent to them. As stated by Shaw LJ:

... the drivers put themselves so far outside the limits of tolerable conduct as to disentitle themselves to expect that any further representations on their part could have any influence or relevance.

It might be argued whether this was a legitimate use of the concept of legitimate expectation or whether the court was pre-judging the merits of the claim. Was it legitimate for the court to preclude judicial review without giving the applicants an opportunity to state their case?

It might also be questioned whether the concept of legitimate expectation is really any different from a finding that the decision-maker has failed to take into account a relevant consideration (ie the promise, undertaking or past practice) and/or has taken into account an irrelevant consideration (eg non published criteria as in *R v Secretary of State for the Home Department ex parte Asif Mahmood Khan* (1984), see above, p 69). It is suggested, however, that there is a

clear difference. Once conduct has given rise to a legitimate expectation, that expectation cannot be denied simply by the decision-maker taking account of it; the practice *must* be continued until withdrawn in an appropriate way.

5.3.4 The development of fairness

In *Board of Education v Rice* (1911), the House of Lords quashed the Board's refusal to pay teachers in church schools at the same rate as those in local authority schools. In the course of his judgment, Lord Loreburn stated that in ascertaining the law and/or facts, the Board 'must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything'.

This has become the classic statement of the modern duty laid upon decision-makers.

In *Ridge v Baldwin*, Lord Reid referred to 'what a reasonable man would regard as *fair* procedure in the particular circumstances'. The core development of the principle of fairness as an essential of good administration is, however, to be found in *Re HK* (1967). Here, an immigration officer refused entry to HK who claimed to be under 16 and the son of AR, a Commonwealth citizen ordinarily resident in the United Kingdom. If so, HK would have a right of entry. Suspicion was aroused as HK's stated date of birth was 29 February 1951 (not a leap year) and HK appeared to be older than claimed. HK was referred to a medical officer and both HK and AR were interviewed before entry was refused. On an application for a writ of *habeas corpus* (to secure release) and an order of *certiorari* (to quash the decision), it was argued that the immigration officer was acting judicially and there had been a failure to comply with the rules of natural justice. The Divisional Court held that, even if the immigration officer was not acting in a judicial or quasi judicial capacity, he was under a duty to act *fairly*. However, this duty had been fulfilled. As stated by Lord Parker CJ:

Good administration and an honest or *bona fide* decision must ... require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.

In *R v Gaming Board of Great Britain ex parte Benaim & Khaida* (1970), the Gaming Board refused to give reasons when denying the applicants a certificate of consent (a necessity before a licence could be applied for). The applicants argued breach of natural justice – that they could not answer the case against them. Whilst Lord Denning MR asserted that:

It is an error to regard [the applicants] as having any right of which they are being deprived. They have not had in the past, and they have not now, any right

to play the games of chance ... for their own profit. What they are really seeking is a privilege ...

Nevertheless, he accepted that:

... the board have a duty to act fairly. They must give the applicant an opportunity of satisfying them ... They must let him know what their impressions are ... but I do not think that they need quote chapter and verse ... are they bound to give reasons? I think not.

The Gaming Board, it was found, had acted with complete fairness. It had disclosed all relevant information but kept the source secret.

This emphasis on the duty of fairness in preference to the rules of natural justice was reinforced in *Bushell v Secretary of State for the Environment* (1981) and *CCSU v Minister for the Civil Service* (1985). In *Bushell*, Lord Diplock stated:

... rather than use such phrases as 'natural justice' which may seem to suggest that the prototype is only to be found in procedures followed by English courts of law, I prefer to put it that [the procedure] must be fair to all who have an interest in the decision ...

In *CCSU* Lord Roskill went so far as to assert that natural justice might now be laid to rest and replaced by speaking of a duty to act fairly. It cannot be said, however, that this movement has been universal and the courts continue to talk in terms of both natural justice and fairness.

5.3.5 Flexibility of content

Fairness is a variable quality. The degree of fairness demanded will depend upon the circumstances of each case. In *Russell v Duke of Norfolk* (1949) Tucker LJ stated:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth.

Similarly, in *R v Gaming Board of Great Britain ex parte Benaim & Khaida* itself, Lord Denning stated:

It is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject matter ...

In *Durayappah v Fernando* (1967), Lord Upjohn stated that the correct approach is to bear in mind:

- the nature of the property/ office/status affected;
- the circumstances in which the decision-maker is entitled to intervene;
- the sanctions which can be imposed.

Natural justice/fairness may require (depending on the above):

- a hearing – public, private, oral or written;
- notice of the allegations adequate in substance to prepare a defence;
- notice of the hearing adequate in time;
- legal representation;
- submission of evidence;
- the calling of witnesses;
- examination/cross-examination;
- the giving of reasons.

5.4 The right to a fair hearing

5.4.1 Introduction

It is essential that, before a decision is taken, individuals affected are given the opportunity to present their case. This is a universal principle. As stated by Fortescue J in *R v University of Cambridge* (1723): ‘... even God himself did not pass sentence upon Adam, before he was called upon to make his defence.’

The general right to a fair and public hearing within a reasonable time by an independent and impartial tribunal is recognised in Article 6 of the European Convention on Human Rights (see Chapter 11). The principle that a person affected by a decision ‘must be given the opportunity to make his point of view known’ is also recognised in EC Law (see *Transocean Marine Paint Association v EC Commission* (1974) and Chapter 10). This right to a fair hearing encompasses a number of procedural requirements. Where statute has not provided a process for fair decision-making, the courts will intervene (see *Cooper v Wandsworth Board of Works* (1863), above, p 34).

As stated above, what a fair hearing requires will vary according to the circumstances of the case. In addition to procedural requirements of notice, rights of appeal and consultation (which, if provided for in the statute, will normally be regarded as mandatory – see above, pp 121–24), the following may (depending on the circumstances) also be required for a fair hearing.

5.4.2 Disclosure of evidence

A fair hearing necessitates that the ‘accused’ is made aware of the case to be answered (subject to the principle of justiciability as evidenced by *R v Secretary of State for the Home Department ex parte Hosenball* (1977)). This requires that evidence is disclosed and a reasonable opportunity given to prepare a case to refute it.

In *R v Chief Constable of North Wales Police v Evans* (1982), remedies of unfair dismissal were allowed to a probationary police constable required to resign by his chief constable because of allegations about his private life which he was not given the opportunity to answer.

Similarly, a decision must not be based on evidence which is not disclosed to the person(s) affected or which emerges after consultation with the person(s) affected without a further opportunity for consultation being given (see, for example, *Fairmount Investments Ltd v Secretary of State for the Environment* (1976)).

5.4.3 Limits on disclosure

Sources of information need not be disclosed where to do so would be against the public interest. In *R v Gaming Board for Great Britain ex parte Benaim and Khaida* (1970), Lord Denning MR required that the applicants be given an opportunity to satisfy the Board of the matters which under Schedule 2 para 4(5) and (6) of the Gaming Act 1968 the Board was to have regard to in determining whether the applicants were fit to run a gaming club (including the applicants' character, reputation and financial standing). The Board must 'let [the applicant] know what their impressions are so that he can disabuse them'. However, the duty was limited and the Board need not 'quote chapter and verse against him as if they were dismissing him from office ... or depriving him of property'. In *R v Secretary of State for the Home Department ex parte Fayed* (1997), in refusing applications by the Fayed brothers for naturalisation as British citizens, the Home Secretary must 'identify the subject of his concern in such terms as to enable the applicant to make such submissions as he can. [Where] to do this could involve disclosing matters which it is not in the public interest to disclose ... it would suffice if he merely indicated that this was the position to the applicant who ... could challenge the justification for the refusal ... Administrative convenience cannot justify unfairness ...'.

In *Re Pergamon Press Ltd* (1971), it was held, in the investigation of a company's affairs by inspectors of the Board of Trade, that neither the names of witnesses nor actual passages from their report need be disclosed. However, the nature of the charges had to be disclosed.

The decision-making body must also have all relevant evidence before it in reaching its decision.

5.4.4 Preliminary hearings/recommendations

The rules of natural justice will not be applied strictly to stages which precede the making of the decision itself, for example to the making of a preliminary report which will inform a later decision or to a suspension pending further enquiries.

In *Pearlberg v Varty* (1972), a taxpayer's claim that he should have been given a hearing before a tax assessment was made on him was rejected. The taxpayer would be able to appeal against the assessment which itself only raised a *prima facie* case against him. A similar decision was reached in *Wiseman v Borneman* (1971). In *R v Secretary of State for Transport ex parte Pegasus Holdings* (1988), the minister provisionally suspended flying permits granted to five Romanian pilots who had failed voluntary flying tests conducted by the Civil Aviation Authority. The suspension was pending a full investigation. On a challenge by a package holiday company affected by the suspensions, Schiemann J found that, in the circumstances – an emergency, potentially high risk, situation with a provisional suspension only – the case was 'at the low end of the duties of fairness'. There had been no breach of natural justice.

By contrast, in *Re Pergamon Press* (1971), an investigation by inspectors of the Board of Trade into the company's affairs must be conducted fairly. Although the investigation would produce a preliminary report only, this in itself might have an adverse effect on the company. However, in the context of such an administrative hearing, the requirements of fairness were set at a low level.

5.4.5 Nature of the hearing

There is no requirement that a hearing must always be oral though the circumstances of the case may require such an opportunity, for example, if there are witnesses who may need to be cross-examined. In *R v Immigration Appeal Tribunal ex parte Mehmet* (1977), a refusal by a tribunal to give leave to appeal against a decision that there were no circumstances to allow an appeal against a deportation order out of time was set aside on the basis that the tribunal had not allowed the applicant an oral hearing. This was simply on the basis that, had an oral hearing been allowed, it was possible that further matters could have been advanced on the applicant's behalf.

The opportunity to present a case in writing may suffice if adequate in the circumstances.

In *Lloyd v McMahon* (1987), councillors in Liverpool who had failed to set a rate by the required date were given the opportunity to submit written representations to the district auditor before he decided to certify that the sum of £106,103 had been lost due to their wilful misconduct. The councillors did not, at that stage, request an oral hearing and made written representations. They appealed against the auditor's decision to so certify on the basis that they should have been given an oral hearing. Lord Bridge stated that the rules of natural justice 'are not engraved in tablets of stone'. What the rules demand depended upon 'the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates'. Lord Keith noted that the auditor had arrived at his decision on the basis of

documentary evidence, all of which the applicants had been made aware. The absence of an oral hearing had not prejudiced the applicants.

However, in *R v Army Board of the Defence Council ex parte Anderson* (1992), the Army Board, in hearing a complaint of racial discrimination, could not have an inflexible policy against oral hearings. Although an oral hearing may not be required in all cases, this would depend upon the subject matter and circumstances and whether there were substantial issues of fact which could not be resolved on the written evidence. It is to be noted that the Army Board was exercising a jurisdiction (racial discrimination in the field of employment) which in civilian life would have been exercised by an industrial tribunal. While Taylor LJ was not prepared to draw a direct analogy with tribunal procedures (on the basis that, if Parliament had intended the Board to be bound by them, it would have said so), nevertheless, the Board, as the forum of last resort (no appeal lay from its decision) dealing with an individual's fundamental statutory rights, must achieve a high standard of fairness. It had failed to consider the applicant's request for an oral hearing on its merits.

5.4.6 Time

Sufficient time must be given to prepare a case against the charges levelled. In *R v Thames Magistrates' Court ex parte Polemis* (1974), the conviction of a ship's captain for discharging oil into the Thames was quashed on this basis. In *Glynn v Keele University* (1971), a student who had appeared naked on campus was suspended by the Vice Chancellor. In the absence of prior notice and any opportunity to make representations, the court found a breach of natural justice. (The court nevertheless exercised its discretion to refuse the applicant a remedy, Pennycuik VC stating that there was 'no doubt that the offence was one of a kind which merited a severe penalty according to any standards current even today' and that he had no doubt that suspension was a proper penalty.)

It should be noted that *ex parte Polemis* concerned a criminal prosecution where the standard of natural justice is high. *Glynn v Keele University* involved the absence of any hearing whatsoever and provides an extreme example of non adherence to natural justice.

The hearing itself must also not be conducted with unfair haste. However, in *R v Panel on Take-overs and Mergers ex parte Guinness Plc* (1990), a refusal to accede to a request for a short adjournment to enable the applicant to consider lately submitted corroborative evidence was refused: the Panel was acting not in a disciplinary but inquisitorial capacity, the applicant was a witness rather than a defendant at this stage and it was considered that the refusal had not caused injustice.

5.4.7 Witnesses

The ability to call and cross-examine witnesses will most commonly arise where an oral hearing is demanded. Indeed, this may be the very justification for an oral hearing in the circumstances of the particular case.

In *R v Board of Visitors of Hull Prison ex parte St Germain (No 2)* (1979), Geoffrey Lane LJ stated that the discretion whether or not to allow witnesses to be called had to be exercised reasonably, in good faith and on proper grounds. A witness could not be refused, for example, on the grounds that the chairman of the Board of Visitors considered that there was ample evidence against the accused or if the refusal was based on an erroneous understanding of the prisoner's defence (eg that an alibi did not cover the material time of day when, in fact, it did). The number of witnesses could be limited for good reason, for example where unnecessary to establish the point at issue. It could not, however, be limited for reasons of administrative convenience – 'convenience and justice are often not on speaking terms'.

5.4.8 Cross-examination

In *R v Commission for Racial Equality ex parte Cottrell & Rothon* (1980), in an investigation by the Commission for Racial Equality, there was held to be no right of cross-examination where the statute (the Race Relations Act 1976) did not provide for it and the penalties did not include fine or imprisonment. In *Bushell v Secretary of State for the Environment* (1980), the House of Lords (reversing the Court of Appeal) upheld the decision of an Inspector in a public inquiry to refuse cross-examination of witnesses. The objectors to a proposed motorway had sought to challenge the department's methodology to predict future traffic needs. The Inspector had allowed criticism of the published methodology and had allowed expert witnesses to be called but refused to allow departmental representatives to be cross-examined. Lord Diplock stated that whether fairness demanded rights of cross-examination depended on all the circumstances. Viscount Dilhorne concluded that the views of departmental witnesses on the comparative merits of different methods of forecasting traffic were not likely to affect the outcome of the inquiry. The Inspector had allowed expert witnesses to be called and that evidence would be available to the minister in reaching his decision.

5.4.9 Legal representation

A fair hearing will not of necessity include the right to legal representation. Indeed, many administrative tribunals were established to provide speedy and relatively informal mechanisms for dispute resolution. The presence of lawyers would increase formality, complexity and cost. Although there may not be a right to legal representation before such tribunals, nevertheless representation

will normally be permissible – if the applicant can afford it. Legal aid is rarely available for tribunal proceedings.

Natural justice may require legal representation only where the proceedings are clearly judicial or, sometimes, affect the applicant's livelihood. In *Pett v Greyhound Racing Association* (1969), Lord Denning stated:

It is not every man who has the ability to defend himself on his own. He cannot bring out the point in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence ... when a man's reputation or livelihood is at stake, he not only has the right to speak by his own mouth. He also has the right to speak by counsel or solicitor.

Even so, in *Pett (No 2)* (1970), there was, in the circumstances, found to be no right to legal representation.

In *Enderby Town Football Club v Football Association* (1971), a challenge to a rule which excluded legal representation in an appeal to the Football Association failed. Neither party was allowed representation and it was unlikely that points of law would be raised.

In the context of prison disciplinary proceedings, it was held by the Court of Appeal in *Fraser v Mudge* (1975) that there was no right to legal representation in a disciplinary hearing before a Board of Visitors, although the Board could allow representation. However, in *R v Secretary of State for the Home Department ex parte Tarrant* (1985), the Divisional Court held that in certain circumstances the Board must allow representation. Webster J identified the circumstances to be considered as being:

- the seriousness of the charge and of the potential penalty;
- whether any points of law are likely to arise;
- the capacity of the prisoner to represent his own case;
- procedural difficulties such as the difficulty some prisoners might have in cross-examining a witness, particularly one giving expert evidence, without previously having seen that witness's evidence.

These factors were to be balanced against the need for reasonable speed and the need for fairness between prisoners and between prisoners and prison officers. In the particular case, the Board had failed to consider the exercise of its discretion which, in the circumstances, should have been exercised in the applicants' favour.

In *R v Board of Visitors of the Maze Prison ex parte Hone and McCartan* (1988), however, claims to a right of legal representation were dismissed. Lord Goff rejected the submission that any person charged with the equivalent of a crime and liable to punishment was entitled to legal representation. Though the rules of natural justice may require legal representation before a Board of Visitors, they did not do so in every case as of right. Everything depended on

the circumstances of the case. So, for example, in the case of a simple assault where no question of law arose and where the prisoner was capable of presenting his own case, representation was not required.

The European Court of Human Rights (see Chapter 11) has also pronounced in this context that 'justice cannot stop at the prison gate'. In *Campbell and Fell v United Kingdom* (1984), Campbell claimed that disciplinary proceedings in which he was found guilty of mutiny and gross personal violence to an officer, for which he lost 570 days remission, breached Article 6 of the Convention. The court, while accepting a distinction between disciplinary and criminal proceedings, nevertheless held that, in the circumstances, Article 6 applied to the proceedings and that the applicant's inability to obtain legal assistance or representation constituted a violation.

5.4.10 Reasons

It might be thought to be a natural adjunct to fairness in decision-making that reasons are given to explain the decision. However, at least until recently, it could not be said that, in the absence of a statutory requirement (see, for example, s 10 of the Tribunals and Inquiries Act 1992), natural justice demanded the giving of reasons as a norm (see *R v Gaming Board ex parte Benaim and Khaida* (1970)). However, it might on occasions be difficult to establish the legality of a decision unless reasons were given. In *Padfield v Minister of Agriculture, Fisheries and Food* (1968), the House of Lords said that an absence of reasons could raise an inference of no good reasons opening the decision up to judicial review. (In that case, the minister had, in fact, given bad reasons which showed that he was wrongly motivated/had taken irrelevant considerations into account/failed to take relevant considerations into account.) As stated by Lord Pearce:

If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament ... and he gives no reasons whatever for taking a contrary course, the court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions.

However, the limitations on this principle were vigorously stated by Lord Keith in *R v Secretary of State for Trade and Industry ex parte Lonrho* (1989) as follows:

The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for suggested irrationality of the decision. The only significance ... is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker ... cannot complain if the court draws the inference that he has no rational reason for his decision.

The giving of reasons will also give way to the principle of justiciability (see Chapter 3) as evidenced by *ex parte Hosenball* (1977) and *ex parte Cheblak* (1991).

5.4.11 Why are reasons for decisions needed?

- To satisfy the parties that the decision is not purely arbitrary.
- To enable the parties to discern whether grounds of appeal or review exist.
- To avoid lengthy pre-trial procedures, eg the absence of reasons may lead to pressure for greater discovery in judicial review proceedings.
- To demonstrate good practice and compliance with international standards, eg Council of Europe Resolution 77(31) recommended that reasons be given for administrative acts which adversely affect the rights, liberties, or interests of persons.

In his Hamlyn lectures ('Protection of the Public – A New Challenge', 1990), Lord Woolf made a plea for a general requirement of the giving of reasons in the following terms:

... I regard the giving of satisfactory reasons as being the hallmark of good administration and if I were to be asked to identify the most beneficial improvement which could be made to English administrative law I would unhesitatingly reply that it would be the introduction of a general requirement that reasons should normally be available, at least on request, for all administrative actions. The only exception which I would countenance ... is a compelling case for saying that the giving of reasons would be harmful in the public interest.

Even if there is still no general duty to give reasons, recent cases indicate the courts' willingness to find such a duty in the circumstances of the case. In *R v Civil Service Appeal Board ex parte Cunningham* (1991), the Board had adopted a policy of not giving reasons for an award of compensation on its finding of unfair dismissal. Lord Donaldson MR declared that the proposition that there was a general rule of common law that a public authority should always or even usually give reasons was not arguable. Nevertheless, in the circumstances, the Court of Appeal held the Board bound to give reasons. It was performing a judicial function and an industrial tribunal carrying out a comparable function was bound to give reasons. Reasons were necessary to enable the parties to know the issues addressed and that the Board had acted lawfully. It is difficult to envisage circumstances where this last consideration would not be present.

Similarly, in *R v Secretary of State for the Home Department ex parte Doody* (1994), the Home Secretary's tariff decisions on the period to be served before the applicant mandatory life prisoners could be considered for parole were declared unlawful in part because of a failure to give reasons for a departure from the period recommended by the judiciary. Although there was no general duty to give reasons, a duty emerged where the decision-maker was susceptible to judicial review and it was necessary for reasons to be given to detect the possibility of error of law. Lord Mustill stated that although 'the law does not at present recognise a general duty to give reasons for an administrative decision' it

was 'equally beyond question that such a duty may in appropriate circumstances be implied'. In *R v Secretary of State for the Home Department ex parte Duggan* (1994), a prisoner was entitled to reasons for the retention of his Category A status which affected the date of his release.

However, in *R v Universities Funding Council ex parte Institute of Dental Surgery* (1994), in a challenge to the Institute's research rating by the Higher Education Funding Council upon which the allocation of research funding would be determined, it was held that a purely academic judgment did not call for reasons. Sedley J explained the position as follows:

- (a) There is no general duty to give reasons for a decision, but there are classes of case where there is such a duty.
- (b) One such class is where the subject matter is an interest so highly regarded by the law – for example personal liberty – that fairness requires that reasons, at least for particular decisions, be given as of right.
- (c) Another such class is where the decision appears aberrant. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengeable) or apparent.
- (d) It follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision.
- (e) Procedurally, the grant of leave in such cases will depend upon *prima facie* evidence that something has gone wrong. The respondent may then seek to demonstrate that it is not so and that the decision is an unallayed exercise of an intrinsically unchallengeable judgment. If the respondent fails, relief may take the form of an order of *mandamus* to give reasons, or (if a justiciable flaw has been established) other appropriate relief.

In *R v Secretary of State for the Home Department ex parte Gallagher* (1994), the Secretary of State was not obliged to give specific reasons for making an exclusion order where the evidence involved matters of national security. (One would not expect a decision otherwise in the context of national security.) However, in *R v Secretary of State for the Home Department ex parte Moon* (1995), it was deemed to be unfair not let an applicant know why it was now contrary to the public good to allow him into the country when he had, in fact, been allowed in three years earlier.

The existence of a general duty has been asserted by Sir Louis Blom-Cooper in *R v Lambeth LBC ex parte Walters* (1993). However, this was doubted by Rose LJ in *R v English Nursing Board ex parte Roberts* (1993), although he accepted that:

The authorities show an ever-increasing variety of situations where, depending on the nature of the decision and the process by which it is reached, fairness requires that reasons be given.

However, in *R v Kensington and Chelsea Borough Council ex parte Grillo* (1996), the Court of Appeal overruled Sir Louis Blom-Cooper on this point. The applicant had there been offered accommodation as a homeless person which she considered to be unsuitable. Her appeal (which did not stem from a statutory right but was a practice instituted by the council itself) was rejected. She challenged that decision by way of judicial review on the ground, *inter alia*, that she had not been given reasons for the rejection or that the reason given was inadequate. It was argued that if no, or inadequate, reasons were given in such a case the applicant for housing would be 'left in the dark as to why his appeal had been rejected' and he would not be able to 'make an informed decision whether or not to accept the accommodation before the offer was finally withdrawn'. Further, without reasons it would be difficult to establish whether the decision itself was reasonable. These would appear to be convincing arguments. However, the court denied the existence of a general duty to give reasons based on fairness. Neill LJ stated:

... it would be wrong to impose ... any general legal duty to give reasons ... The position may well be different where an individual decision is demonstrably out of line with the housing policy of the relevant authority ... In other cases an authority may wish to give reasons as part of a sensible and sensitive policy ... But ... the courts should be careful not to impose legal duties ... where Parliament has chosen not to do so unless the exceptional facts of a particular case justify the interference ...

As noted above, the appeal procedure in *Grillo* had been introduced voluntarily and not due to the existence of a statutory requirement. It might be suggested that the imposition of a duty to give reasons for all decisions would be a disincentive to authorities to establish such voluntary practices of good administration. One might argue for a distinction to be drawn where statute actually confers a *right* of appeal.

In *Ex parte Fayed* (1997), Lord Woolf MR reiterated that there is no universal obligation to give reasons. He would nevertheless have regarded this (a refusal of an application for naturalisation) as certainly a case where reasons should be given had it not been that s 44(2) of the British Nationality Act 1981 expressly prohibited requiring the minister to give reasons.

(On the duty to give reasons see Campbell, 'The Duty to Give Reasons in Administrative Law' (1994) PL 184–90.)

5.4.12 What kind of reasons?

Where a duty to give reasons is established, those reasons must be 'proper, intelligible and adequate' (*per* Megaw J in *Re Poyser and Mills' Arbitration* (1964)). In *R v Croydon LBC ex parte Graham* (1993) Sir Thomas Bingham MR stated:

There is ... an obligation under the Act [Housing Act 1985] to give reasons and that must impose on the council a duty to give reasons which are intelligible and which convey to the applicant the reasons why the application has been rejected in such a way that if they disclose an error of reasoning the applicant may take such steps as may be indicated.

In *Save Britain's Heritage v Secretary of State for the Environment* (1991), Lord Bridge said that 'the degree of particularity required will depend entirely on the nature of the issues falling for decision' and that:

The alleged deficiency will only afford a ground for quashing the decision if the court is satisfied that the interests of the applicant have been substantially prejudiced by it ... There are in truth not two separate questions: (1) were the reasons adequate? (2) if not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question ... is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given.

5.4.13 Can an unfair hearing be cured by a fair appeal?

A further issue which has arisen is whether a breach of natural justice at the original hearing can be cured by an appeal which complies with principles of fair decision-making. Where the 'appeal' is, in fact, a re-hearing then the defect can be cured. In other cases, it has been held that the applicant has the right to a fair hearing at each stage and a defect cannot be so cured. In *Leary v National Union of Vehicle Builders* (1971) Megarry J stated:

If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal? ... As a general rule ... a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.

The issue came before the House of Lords in *Calvin v Carr* (1980), where Lord Wilberforce was of the opinion that the above principle was too broadly stated and that, in the circumstances of the instant case – a domestic dispute between a race horse owner and a jockey club – where the applicant had received, overall, full and fair consideration, the court should not interfere.

5.5 The rule against bias – *nemo iudex in causa sua*

5.5.1 What is bias?

The rule against bias is concerned with appearances – actual bias need not be established. It is sufficient that bias might have influenced a decision. In the words of Atkin LJ in *R v Sussex Justices ex parte McCarthy* (1924) (see below),

'justice should not only be done, but should manifestly and undoubtedly be seen to be done'. Two main tests have been propounded to establish whether bias is such as to call for the decision-maker to be disqualified – the 'real likelihood' test and the 'reasonable suspicion' test. The Court of Appeal in the *Lannon* case (below) reasserted the reasonable suspicion test. However, in *R v Gough* (1993), the House of Lords preferred to state the test in terms of real likelihood except for cases where the decision-maker has a direct pecuniary or proprietary interest. In the leading judgment, however, Lord Goff explained the reason for this preference as being 'to ensure that the court is thinking in terms of possibility rather than probability of bias'. The cases which follow must now be read subject to the decision in *Gough*.

5.5.2 Pecuniary interest

A pecuniary interest will disqualify a judge even though it is established that the judge was not influenced by the interest in reaching a decision. In *Dimes v Grand Junction Canal* (1852) Lord Cottenham's decision in favour of the canal company was set aside because he held shares in the company to the value of several thousands of pounds. (The House of Lords then considered the appeal on its merits and reached the same decision as Lord Cottenham.) A pecuniary interest leads to automatic disqualification. The test for bias does not apply here.

This argument was taken to extremes in *R v Mulvihill* (1990), where a bank robber appealed against conviction on the ground that the judge was a shareholder in one of the banks. The appeal was rejected. In the absence of a direct pecuniary interest in the outcome, bias was not to be presumed. The test to be applied was that of reasonable suspicion and such a suspicion could not reasonably be held.

5.5.3 Professional interest

In *R v Hendon Rural District Council ex parte Chorley* (1933), a grant of planning permission from residential to commercial use was quashed as a councillor present when the application was approved was also the estate agent for the applicants. Nor did it make any difference that the councillor took no active part in the deliberations. His mere presence was enough to invalidate the decision. The professional interest here was also a financial one.

In *R v Sussex Justices ex parte McCarthy* (1924), a solicitor acting on behalf of a client suing a motorist was also clerk to the justices who convicted the same motorist of dangerous driving. He retired with the magistrates, though was not consulted by them. The mere fact that he had retired with them, however, was sufficient to invalidate the conviction. As stated by Lord Hewart CJ: 'Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.'

In the later case of *R v Camborne Justices ex parte Pearce* (1955), the magistrate's clerk was a member of the county council whose officer had instigated criminal proceedings against the applicant. The court here rejected the mere suspicion test and adopted the test of a real likelihood of bias.

In *Metropolitan Properties v Lannon* (1969), the solicitor chairman of a rent assessment committee lowered the rent of a flat below the level requested even by the tenant. He lived in a flat of which his father was the tenant and the landlord of which was associated with the landlord of the previous flat. The solicitor also advised his father and other tenants in fair rent proceedings. The Court of Appeal quashed the rent determination on the basis that, although it was not claimed that the chairman was actually biased, the facts were such as to give rise to an appearance of bias. Lord Denning MR spoke in terms of whether right-minded persons would think that there was a real likelihood of bias – 'Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased"' – while the other members of the Court of Appeal spoke in terms of reasonable suspicion.

In *R v Altrincham Justices ex parte Pennington* (1975), a conviction for selling vegetables underweight to a school when the convicting magistrate was a member of the local education authority was quashed. Lord Widgery CJ referred to both the reasonable suspicion and real likelihood tests. Not surprisingly, he was not clear which test should be applied.

5.5.4 Personal interest

In *Cottle v Cottle* (1939), a magistrate who was a friend of the mother of one of the parties was disqualified.

5.5.5 Involvement in the decision-making process

In *Cooper v Wilson* (1937), a chief constable who had dismissed a police sergeant was present at the meeting of the Watch Committee which heard the sergeant's appeal. Such presence invalidated the Committee's decision.

In *R v Barnsley MBC ex parte Hook* (1976), the manager of a market who had received a complaint about Hook's behaviour and consequently banned him from trading in the market was present throughout subsequent meetings of council sub-committees and gave evidence in Hook's absence. Again, such presence invalidated the decision.

In *Hannam v Bradford Corporation* (1970), the dismissal of a school teacher over three months after he had absented himself without leave and not returned was held to be in breach of natural justice. The governors of the school dealing with the dismissal were also members of the local authority committee whose task it was to decide whether to prohibit the dismissal. The decision was invalidated even though the governors had not been present at the committee meeting which had recommended dismissal. A rationale put forward for this

decision was that the governors would be inclined to support the views of their fellow governors. This approach was not, however, adopted in *Ward v Bradford Corporation* (1971) (see above, p 27) but there the court appears to have been unduly influenced by its disapproval of the conduct of the applicant.

In *R v Kent Police Authority ex parte Godden* (1971), a police authority proposed to retire a chief inspector early on the grounds of mental health. To do so, they had to refer the inspector to a doctor. They proposed to refer him to the same doctor who had examined him the previous year and had declared him unfit from medical disorder. The doctor was disqualified.

However, there may be cases where involvement will not invalidate a decision, for example, where Parliament has provided that a person or body performs a dual role. So, in *R v Frankland Prison Visitors ex parte Lewis* (1986), a prison visitor was not disqualified from acting as chairman in disciplinary proceedings when he had previously taken part in determining the same prisoner's application for parole. In *R v Manchester Metropolitan University ex parte Nolan* (1993), the presence of invigilators at a meeting of the Common Professional Examination Board to consider the penalty to be imposed on a student who had taken unauthorised notes into an examination did not invalidate the Board's decision. Similarly, where only one person is empowered to act, necessity will dictate that natural justice gives way.

5.5.6 Closed mind

The decision-maker must remain open to persuasion. This may seem especially unlikely in circumstances where a minister has formulated a policy and then hears representations against that policy. The courts accept that in such situations an element of bias must be accepted – indeed, if the minister is active and committed then it is to be expected that he or she will favour certain policies and outcomes. An extreme example arose in *Franklin v Minister of Town and Country Planning* (1948), where the minister had made up his mind that Stevenage would be the first new town to be designated under the New Towns Act 1946. The minister had addressed a public meeting in Stevenage and, to cries of 'gestapo' he proclaimed 'It is no good your jeering: it is going to be done'. After a subsequent public inquiry, the minister indeed confirmed the designation order. All that was required according to the House of Lords was that the minister followed the statutory procedure and genuinely addressed the question with an open mind. Lord Thankerton was of the opinion that the applicants had not established that the minister's speech 'had forejudged any genuine consideration of the objections or that he had not genuinely considered the objections at a later stage when they were submitted to him'.

For a more recent instance where the courts were prepared to find that a minister had failed to keep an open mind (to the extent that he refused to hear representations), see *R v Secretary of State for the Environment ex parte Brent LBC* (1982) (above, p 64).

5.5.7 *R v Gough* (1993)

In *R v Gough*, the applicant was convicted and sentenced to 15 years' imprisonment for conspiracy to commit robbery. At his trial, his brother had been referred to by name, a photograph of the applicant and his brother shown to the jury and the brother's address read to the jury. One of the jurors lived next door to the brother but she had not recognised him nor connected him with the applicant until after conviction. The applicant appealed against conviction on the ground that there was a reasonable suspicion that he had not had a fair trial. It was accepted that, should the test be one of real likelihood, the appeal must fail. Both the Court of Appeal and the House of Lords held that the normal test to be applied here was whether there was a real danger of bias (though the Court of Appeal had stated that such a test applied only in cases concerned with jurors; the reasonable suspicion test was to be applied in cases concerned with magistrates and other inferior tribunals). Only in the case of a direct pecuniary or proprietary interest would the court assume bias and automatically disqualify. In such a case, the absence of actual bias, a real likelihood of bias or a reasonable suspicion of bias was irrelevant as 'the nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand' (*per* Lord Goff). Lord Goff concluded as follows:

I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators ... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court ... personifies the reasonable man ... Finally ... I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias ... having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias ...

The *Gough* test of real danger was applied by the Court of Appeal in *R v Inner West London Coroner ex parte Dallaglio* (1994), where the coroner had refused to resume the inquests into the deaths of victims of the Marchioness disaster after adjournment of those inquests pending the outcome of criminal proceedings. In a meeting with journalists, the coroner had described one of the applicants, the mother of a victim, as 'unhinged'. Simon Brown LJ explained the real danger test in the following terms:

By 'real' is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility.

Simon Brown LJ considered that the applicants had not established a probability of bias. They had, however, established a real possibility that the coroner

‘unconsciously allowed himself to be influenced against the applicants ... by a feeling of hostility towards them’. There was ‘not a probability but a not insubstantial possibility that he thought them troublemakers and in the result unfairly undervalued their case for a resumption’.

Gough was itself concerned with an allegation of bias in a court of law; indeed, in the context of a criminal trial. One would expect maximum protection for the accused, whose liberty is at stake, here and, therefore, a strict test to be applied. However, there was no suggestion that an alternative test was to be applied in the context of administrative decisions. In *R v Secretary of State for the Environment ex parte Kirkstall Valley Campaign Limited* (1996), both the Divisional Court and the Court of Appeal confirmed that the real danger test was a universal test to be applied regardless of the nature of the decision-maker.

In *Kirkstall Valley* itself, the test was applied to an urban development corporation acting as local planning authority. An original application for planning permission for a proposed development was refused by the Corporation. At that time, a number of members of the Corporation present stood to benefit financially or professionally from the development. A later revised application was approved. At this stage, one member had divested himself of his previous financial interest and another did not play any part in the decision-making process. It was this approval which was challenged. The Court of Appeal upheld Sedley J’s refusal of the application. There, Sedley J had stated:

Is there then a real danger that the decision ... to grant planning permission ... was affected, at the date when it was taken, by the pecuniary interest which had been formerly held by the chairman ...? If I were persuaded that [this] decision ... was a product of a prior decision tainted by the participation of a member with an incompatible personal interest, I would consider that a real danger of bias tainted the later decision too ...

... I do not say that there was no risk of contamination, or that a reasonable onlooker might not have been suspicious about it; but the evidence does not ... establish a real danger that the 1994 decision was so bound up with the tainted decision of January 1993 that the effect of the chairman’s former pecuniary interest was still operative.

5.5.8 Discretionary nature of remedies

As noted in Chapter 1, remedies in the field of public law are discretionary. The court may, therefore, choose not to award a remedy despite a breach of natural justice/fairness having been established.

A remedy has been refused on the ground that the applicant has delayed unduly in seeking judicial review of a decision as had the students in *R v Aston University Senate ex parte Roffey* (1969) in their challenge to the decision of the Senate not to exercise its discretion to allow a second re-sit attempt at failed

examinations. A much more questionable ground for refusal of a remedy is one based on the merits of the application or the applicant, ie that the court considers that the merits of the applicant's case are such that no remedy would have been granted anyway or simply that the court disapproves of the applicant. Indeed, these two aspects of merits can themselves be combined as in *Glynn v Keele University* (1971), where the court refused to grant a remedy to a student who was excluded from his university for a year and fined for sunbathing on campus in the nude. A remedy was refused on the basis that the student had got what he deserved and that a hearing would have been a mere formality and not have changed the outcome. One can understand the court not wishing to waste its time on an application when there is no chance of the decision being affected by anything the applicant has to say – as stated by Lord Wilberforce in *Malloch v Aberdeen Corporation* (1971): 'The court does not act in vain.' But this approach that a hearing would have made no difference – one which is not entirely uncommon (see also the similar approach in the *Cinnamon* case in the context of legitimate expectation, above, p 129) – is very dangerous. It is effectively tantamount to pre-judging the merits of a case for a second time in disregard of the opportunity for a fair hearing. As stated by Megarry J in *John v Rees* (1970):

... the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

5.5.9 Fault

A remedy has also been denied where the fault which led to a breach of natural justice was not that of the decision-maker. The rules of natural justice/the duty of fairness have developed to ensure fairness in the decision-making process. The decision in *R v Secretary of State for the Home Department ex parte Al-Mehdawi* (1990), however, suggests that this is to be approached from the angle of the duty imposed on the decision-maker and not from the perspective of the person affected. Here a fair hearing had been denied not through the fault of the decision-maker but that of the applicant's solicitor who mistakenly sent letters to the applicant at an old address. As a consequence, the applicant was not represented at a hearing and his appeal against deportation was dismissed. Reversing the decision of the Court of Appeal, the House of Lords found that, in the absence of fault on the part of the decision-maker, there had been no breach of natural justice. Lord Bridge noted that the applicant was not left wholly without a remedy. The Secretary of State had a discretion to refer to the adjudicator a matter which was not before him at the time of the decision.

5.5.10 Waiver of natural justice

The denial of a fair hearing is personal and so can be waived by the person directly affected. It is a corollary of this principle that persons not directly affected by the absence of a fair hearing have no enforceable rights (see *Hoffman La Roche v Secretary of State for Trade and Industry* (1975)). It is unlikely in any case that such persons would have the necessary *locus standi* to bring an application for judicial review (see Chapter 6).

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION III – PROCEDURAL *ULTRA VIRES*

An action may be deemed *ultra vires* where there has been a failure to maintain procedural standards. These standards may be imposed by the legal source of the power (normally, in this case, statute). However, the courts have also developed principles of procedural standards in the form of the rules of natural justice or, in more modern terminology, the duty to act fairly. These judicial standards will normally be applied to all judicially reviewable decisions – even those regulated also by a statutory procedure. The principles of natural justice are equally applicable in the private law sphere.

Statutory procedures

Statute may provide for a procedure when conferring a discretionary power. In such cases, the statute itself should be examined in the first instance for any procedure. Failure to comply with any statutory procedure will not necessarily invalidate the decision. The courts will seek to establish the intentions of Parliament so that a technical breach of a procedure may not render the exercise of a discretion invalid.

The effect of non-compliance with a statutory procedure may be stated in the statute conferring the power. Where the statute is silent on the issue, the court will consider the effect of non-compliance. Where a statute requires a number of procedures and only some are complied with, the court will consider whether the partial failure is sufficiently serious to invalidate the decision. The existence of a statutory procedure does not preclude the application of the principles of natural justice/duty to act fairly.

Natural justice/fairness

There are two aspects to the rules of natural justice:

- the rule against bias – *nemo iudex in causa sua*; that is, that no one should be a judge in his or her own cause;
- the right to a fair hearing – *audi alteram partem*; that is, the right to be heard.

These principles are applicable where a decision affects rights *and* the decision-maker is operating in a judicial capacity. The judicial intent is inferred from the nature of the power so that if a decision affects rights, then it is judicial and subject to control by the courts (*Ridge v Baldwin* (1964)).

Legitimate expectation

The courts have determined that although an individual's rights are not affected, he or she may be entitled to a fair hearing on the basis of a promise or undertaking given by the decision-maker (*CCSU* (1985)) or through past practice. Such a promise, undertaking or practice may give rise to a legitimate expectation that the promise or undertaking is kept or the practice continued. Legitimate expectation as originally developed gave rise to procedural rights. Arguably, it may now give rise to substantive rights.

The development of fairness

The development of the principle of fairness as an essential of good administration is found in *Re HK* (1967). The emphasis on the duty of fairness in preference to the rules of natural justice was reinforced in *Bushell v Secretary of State for the Environment* (1981) and *CCSU* (1985). In *CCSU*, Lord Roskill went so far as to assert that natural justice might now be laid to rest and replaced by speaking of a duty to act fairly. This move has not, however, been universal and the courts continue to talk in terms of natural justice and fairness.

Fairness is a variable quality and the degree of fairness required will depend on the circumstances of each case. Natural justice/fairness *may* require:

- a hearing – public, private, oral or written;
- notice of the allegations adequate in substance to prepare a defence;
- notice of the hearing adequate in time;
- legal representation;
- submission of evidence;
- calling of witnesses;
- examination/cross-examination;
- the giving of reasons.

The right to a fair hearing

It is essential that, before a decision is taken, individuals affected are given the opportunity to present their case.

Disclosure of evidence

A fair hearing necessitates that the 'accused' is made aware of the case to be answered, subject to the issue of justiciability. Sources of information need not be disclosed where to do so would be contrary to the public interest.

Preliminary hearings/recommendations

The rules of natural justice/fairness will not be strictly applied to stages which precede the decision itself.

Nature of the hearing

The hearing need not necessarily be an oral one although the circumstances of the case may require such an opportunity. The opportunity to present a case in writing may suffice.

Time

Sufficient time must be given to prepare a case against any charges levelled.

Witnesses

The calling of witnesses and cross-examination of them will most commonly arise where an oral hearing is required.

Legal representation

A fair hearing will not necessarily include the right to legal representation. Representation will, however, normally be permitted. Natural justice may require legal representation only where the proceedings are clearly of a judicial nature. In the context of prison disciplinary proceedings, the courts have held that there is no right to legal representation. The circumstances of a case may, however, require representation, for example the capacity of the prisoner to represent himself or herself.

Reasons

There is no absolute duty to give reasons but the failure to do so may raise an inference of no good reasons (*Padfield v Minister of Agriculture, Fisheries and Food* (1968)). The giving of reasons will give way to the principle of justiciability (*ex parte Hosenball* (1977)).

Can an unfair hearing be cured by a fair appeal?

Where an appeal is in fact a rehearing, then any defect can be cured. In other cases it has been held that the applicant has the right to a fair hearing and a defect cannot be cured.

The rule against bias – *nemo iudex in causa sua*

The rule against bias is concerned with appearances; actual bias need not be established. It is sufficient that bias might have influenced a decision. The test is that there must be a *real danger* of bias (*R v Gough* (1993)).

Bias will arise where there is:

- a pecuniary interest;
- a professional interest;
- a personal interest;
- involvement in the decision-making process;
- a closed mind.

Discretionary nature of remedies

Remedies in the field of public law are discretionary so that a court may choose not to award a remedy despite a breach of natural justice/fairness having been established. A remedy may also be denied where the breach of natural justice was not the fault of the decision-maker (*Al Mehdawi* (1989)).

REMEDIES IN ADMINISTRATIVE LAW

6.1 Introduction

The importance of remedies generally is reflected in the maxim *ubi ius ibi remedium* – where there is a right, there is a remedy. It is axiomatic that a legal right is of little, if any, use unless accompanied by an effective remedy. Remedies should be effective in terms of both procedure and effect, ie the procedure for obtaining the remedy should be clear, simple and speedy and the remedy once granted should be suitable to protect the legal right from infringement and/or to compensate the victim for such infringement. In the field of administrative law, remedies can be obtained speedily. In particular, interlocutory remedies are available pending the outcome of the full hearing. However, the rapid increase in applications for judicial review in recent years has imposed further pressure on the courts' time and delayed the hearing of applications. Once obtained, the remedies are generally effective in protecting from continuing infringement of legal rights. However, it must again be remembered that the judicial power here is one of review. A decision challenged cannot be overturned on the merits and a fresh decision substituted. The decision-maker is free to re-take the decision, provided he or she does so within the law.

Judicial review is an inherent power of the High Court. However, as the principles for the judicial control of executive power have of necessity been developed by the judges themselves, so the judges had to adopt existing remedies. These remedies took, in part, the form of the so-called 'prerogative writs', developed originally to enable the King's Bench to control the actions of inferior bodies and available only at the suit of the Crown. The courts also adopted private law remedies. It was inevitable that the manipulation of existing remedies would not prove to be entirely satisfactory to serve new demands. In particular, the existing remedies proved to be cumbersome in terms of procedure. Each remedy had its own requirements of *locus standi*. An applicant for a remedy had to establish that he or she had standing to bring an action, ie a special interest which the courts would regard as sufficient to justify the individual challenging an executive decision. Further, the public law remedies (the prerogative writs) and the private law remedies had developed independently of each other and had separate procedures for application. As a consequence, a complainant could not combine public and private law remedies in the same proceedings. Despite procedural reforms of 1977, an applicant for judicial review of an executive decision can still be confronted with significant procedural difficulties (see below).

6.2 History

Pre 1978 remedies in administrative law could be public or private law remedies. In public law, the prerogative remedies of *certiorari*, prohibition and *mandamus* (and *habeas corpus*); in private law, injunction, declaration and damages. Also, statutory remedies, which might be exclusive, might have been provided. The public law and private law remedies had their own procedures. Applications for the prerogative remedies were made in the Court of Queens Bench exercising its inherent supervisory jurisdiction. The private law remedies were available through ordinary civil proceedings in the High Court, either the Queen's Bench or Chancery Divisions. Thus, whilst public law remedies could be combined with each other and private law remedies could also be so combined, a public law remedy could not be combined with a private law remedy. If the applicant sought both a public and private law remedy then he or she had to initiate two sets of proceedings. Each of the remedies also had individual requirements of standing (see below). Further, interlocutory procedures for discovery of documents or the serving of interrogatories were not available in the context of the prerogative remedies.

6.3 The private law remedies

6.3.1 Injunction

The injunction is normally prohibitory in nature. It prohibits the commission or the continuation of an unlawful act, eg one which is *ultra vires* or in breach of natural justice. It even lies to prevent a minister acting in accordance with an Act of Parliament which is itself potentially in conflict with EC law. (See *R v Secretary of State for Transport ex parte Factortame Ltd (No 2)* (1991), where the House of Lords, after a reference under Article 177 of the Treaty of Rome to the European Court of Justice, held that an interim injunction lay to prevent the implementation of provisions of the Merchant Shipping Act 1988 pending the outcome of a challenge, by way of an application for judicial review, to the validity of those provisions. It was claimed that the provisions were inconsistent with Community law and deprived the applicants of enforceable Community rights.) Much less frequently, an injunction may be mandatory in nature, ie to compel the performance of a certain act. (However, the use of *mandamus* is more commonly seen in administrative law to compel the fulfilment of a public (normally statutory) duty.)

An injunction may be permanent or interim, ie temporary, maintaining the status quo pending full trial. (For the principles to be applied on the grant of an interlocutory injunction see *American Cyanamid v Ethicon* (1975).)

The injunction was once considered not to be available against officers of the Crown or someone acting as an officer or representative of the Crown. (See

eg *Merricks v Heathcote-Amery* (1955), *Factortame* and also s 21 of the Crown Proceedings Act 1947.) However, this is now subject to the House of Lords' decision in *M v Home Office* (1992).

M v Home Office (1992)

An application for political asylum in the UK was rejected by the Home Secretary. An application for leave to apply for judicial review was refused. The applicant was informed that he was to be returned to Zaire. A renewed application to the Court of Appeal was dismissed. The applicant then made a further application on allegedly new grounds to the High Court and Garland J indicated that he wished the applicant's departure to be postponed until that application had been considered. Garland J understood counsel for the Secretary of State to have given such an undertaking. However, counsel had no such instructions and did not appreciate that he had in fact given such an undertaking. The applicant was subsequently put on a plane bound for Zaire. The judge made an order – a mandatory injunction – requiring the Secretary of State to secure the applicant's return and Home Office officials made such arrangements. However, the Home Secretary, after receiving legal advice, cancelled the arrangements on the basis that the interim mandatory injunction issued did not lie against an officer of the Crown. The injunctive order was subsequently set aside. The applicant instituted committal proceedings against the Home Office and the Secretary of State. At first instance it was held that the Crown's immunity from injunctive relief was preserved by s 21 of the Crown Proceedings Act 1947. However, on appeal the Court of Appeal held that, although the Crown and the Home Office could not be the subject of contempt proceedings as they had no legal personality, individual officers of the Crown were subject to the court's contempt jurisdiction for acts or omissions done personally by them in the discharge of their official duties. Breach constituted a contempt of court and was punishable, at the court's discretion, by fine or imprisonment. The House of Lords agreed unanimously that the disregard of the injunction by the minister acting in his official capacity rendered him in contempt of court. To hold otherwise would be to place the executive beyond the law. As stated by Lord Templeman:

... the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would ... establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity ...

6.3.2 Declaration

The declaration simply declares the legal position of the parties. It is not enforceable *per se* but, once the legal position has been declared, other remedies may be available if it proves necessary to enforce the rights declared. The declaration

cannot be used to answer hypothetical questions (see *Blackburn v AG* (1971), where applications for declarations that, by signing the Treaty of Rome, the government would irreversibly surrender sovereignty and was thus acting in breach of the law were rejected. Not only were the treaty-making powers of the Crown not subject to judicial challenge, ie non-justiciable, but the declaration could not be used to challenge a hypothetical action. The Treaty had not yet been signed. Even if it had been, the courts would take no notice of it until embodied in an Act of Parliament. As stated by Salmon LJ:

The sole power of the courts is to decide and enforce what the law is and not what it should be – now, or in the future.

Of course, once enacted, the courts would not have been able to challenge the validity of the European Communities Act. Mr Blackburn was in a Catch 22 position. It can be used to declare governmental action to be unlawful. It is available against the Crown and so can be used in the context of, for example, an exercise of the prerogative power (see *CCSU v Minister for the Civil Service* (1985)). It is discretionary.

6.3.3 Damages

Damages are most relevant in the context of the tortious and contractual liability of public authorities (see Chapter 12).

6.4 The public law remedies

6.4.1 Nature and form

The public law remedies – *certiorari*, prohibition, *mandamus* and *habeas corpus* – are granted at the suit of the Crown. Applications are, therefore, brought in the name of the Crown on behalf of the applicant. As such, they cannot be brought against the Crown but do lie against ministers and officials. They are all discretionary, except *habeas corpus*. Originally in the form of writs, in 1938 all except *habeas corpus* became orders (s 7 of the Administration of Justice (Miscellaneous Provisions) Act 1938).

6.4.2 *Certiorari*/prohibition

Certiorari and prohibition are similar in effect and may be dealt with together. The essential difference between them is one of timing. *Certiorari* lies to quash a decision already made; prohibition to prevent the commission of a future act which would be *ultra vires* or in breach of natural justice. The remedies are often complementary, with *certiorari* quashing a decision already reached and prohibition controlling the legality of future decisions. They are discretionary.

6.4.3 *Mandamus*

Mandamus compels the performance of a public duty (which nowadays is most usually a statutory duty). Whereas *certiorari* and prohibition serve to control illegal acts, *mandamus* serves to compel a public authority to act where it has failed in its duty to do so. A statutory duty must also be performed within a reasonable time and *mandamus* lies to compel such performance (see *R v Secretary of State for the Home Department ex parte Phansopkar and Begum* (1976), where the Court of Appeal held that the issue of certificates of patriality which would have allowed the applicant wives from India and Bangladesh respectively to exercise their right to join their husbands in the United Kingdom 'without let or hindrance' could not be delayed without good cause. Since applications made in India and Bangladesh were subject to considerable delay, the Home Office could not refuse to consider the applications and *mandamus* lay accordingly). *Mandamus* is often used in combination with *certiorari*. It is discretionary.

As the prerogative remedies are historically the Crown's remedies and are still brought in the name of the Crown, they cannot be used against the Crown personally. They are clearly available against ministers and any other officer of the Crown invested with a public power or duty.

6.4.4 *Habeas corpus*

The writ of *habeas corpus* requires an prisoner to justify the imprisonment. It is not subject to the application for judicial review procedure but is available as of right by writ. It is not discretionary.

6.5 The introduction of the application for judicial review

As far back as 1949, Lord Denning had commented on the unsuitability of the prerogative orders (The Hamlyn Lecture, 'Freedom under the Law') as follows:

Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of *mandamus*, *certiorari*, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions, and actions for negligence ... We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge.

In a report published in 1976 ('Remedies in Administrative Law') the Law Commission identified the procedural difficulties which might be encountered by an applicant seeking to challenge administrative action as follows:

The five methods by which judicial review of the acts or omissions of public authorities may be obtained (ie the prerogative orders of *certiorari*, prohibition, and *mandamus* and actions for a declaration or an injunction) each have their characteristic procedural advantages and disadvantages from the standpoint of the litigant. There is, however, no single procedure of review available which preserves the advantages of some of these remedies, while eliminating, or at least reducing, the disadvantages of the other remedies; furthermore, it is not even possible to obtain in a single proceeding a declaration or injunction as an alternative to a prerogative order. Nor is it possible to join with an application for a prerogative order a claim for damages for loss arising from the illegal acts or omissions in respect of which the prerogative order is being sought ...

The Law Commission recommended the introduction of a new procedure to be called the 'application for judicial review' under which the applicant would be able to obtain any of the remedies or a combination as appropriate.

The introduction of the application for judicial review by the RSC Order 53 in 1977 (with effect from 1 January 1978) made all the remedies (except *habeas corpus*) available in a single procedure. The new procedure was given statutory force by s 31 of the Supreme Court Act (SCA) 1981.

6.6 Rules of the Supreme Court (RSC) Order 53

RSC Order 53 provides as follows:

1(1) An application for:

- (a) an order of *mandamus*, prohibition or *certiorari*; or
- (b) an injunction ... restraining a person from acting in any office in which he is not entitled to act,

shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in para (1)(b)) may be made by way of an application for judicial review, and on such an application the court may grant the declaration if it considers that, having regard to:

- (a) the nature of the matters in respect of which relief may be granted by way of an order of *mandamus*, prohibition or *certiorari*;
- (b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and
- (c) all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

2 On an application for judicial review any relief mentioned in rule 1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

3(1) No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule.

(2) An application for leave must be made *ex parte* ...

(7) The court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

Under rule 4(1) as amended by SI 1980/2000:

An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made (replacing the former rule that the court could refuse leave or a remedy where there had been undue delay if, in the court's opinion, granting the remedy would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. However, the SCA 1981 appears to overlook this amendment – see s 31(6) below.

4(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

7(1) On an application for judicial review the court may, subject to para (2), award damages to the applicant if:

- (a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and
- (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

Under rule 8, an interlocutory application (for discovery, interrogatories, cross-examination) in proceedings on an application for judicial review may be made.

6.7 Section 31 of the Supreme Court Act 1981

Section 31 of the SCA 1981 states:

31(1) An application to the High Court for one or more of the following forms of relief, namely:

- (a) an order of *mandamus*, prohibition or *certiorari*;
- (b) a declaration or injunction under subsection (2); or

- (c) an injunction under s 30 restraining a person not entitled to do so from acting in an office to which that section applies (any substantive office of a public nature and permanent character which is held under the Crown or which has been created by any statutory provision or royal charter),

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

(2) A declaration may be made or an injunction granted under this section in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to:

- (a) the nature of the matters in respect of which relief may be granted by orders of *mandamus*, prohibition or *certiorari*;
- (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
- (c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with the rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(4) On an application for judicial review the High Court may award damages to the applicant if:

- (a) he has joined with his application a claim for damages arising from any matter to which the application relates; and
- (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages.

(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant:

- (a) leave for the making of the application; or
- (b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made. (A time limit of three months remains for *certiorari* under RSC Order 53 rule 4 as amended by SI 1980/2000.)

A careful reading of Order 53 and s 31 of the SCA 1981 reveals some differences of wording, in particular in relation to the operation of time limits. This is considered below, pp 165–66.

Applications for an order of *certiorari*, *mandamus*, prohibition or injunction (to restrain a person from acting in a public office to which he is not entitled) in an issue of public law *must* be made by an application for judicial review. The High Court has a discretion to make a declaration or grant an injunction if ‘just and convenient’ where an application for judicial review has been so made. The court may award damages if sought and the court is satisfied that they would have been awarded in an action brought for this purpose.

The court may allow discovery, interrogatories and cross-examination.

If it appears that an action commenced by way of application for judicial review should have been pursued through private law procedures, the court can order that the proceedings continue as if begun by writ. Thus, it is not necessary to institute proceedings anew. There is, however, no equivalent facility where proceedings are mistakenly started through private law procedures.

6.8 Procedure

The application for judicial review is a two-stage procedure. Leave to bring an application must first be sought. If granted, the application will be heard on its merits.

6.8.1 Leave stage

Application for leave is made *ex parte* (ie without hearing the other party) before a single member of the Queen’s Bench Division. This is intended as a filter, to prevent applications being pursued by applicants who do not have a sufficient interest in the case and to prevent hopeless applications proceeding. It would seem, therefore, that merits may be considered at this preliminary stage. In *R v Hammersmith and Fulham LBC ex parte People Before Profit Ltd* (1983), People Before Profit, then an unincorporated association, appeared as an objector at a public inquiry into a proposed development. The local planning authority resolved to grant outline planning permission before publication of the inspector’s report which, when published, substantially upheld People Before Profit’s objections. The local planning authority rejected the inspector’s recommendations and confirmed the grant of permission. People Before Profit then formed itself into a company and sought leave to apply for judicial review of the authority’s resolutions. Comyn J held that, although the applicant technically had *locus standi* and the fact that it had reconstituted itself in a different form did not deprive it of standing, nevertheless it had no reasonable ground (merits) for securing the quashing of the authority’s resolutions and leave to apply for judicial review should be disallowed.

According to Lords Wilberforce and Diplock in *R v IRC ex parte National Federation of Self-Employed and Small Businesses* (1982) (see below, pp 181–83) an ‘arguable case’ is sufficient to establish *locus standi* at the filter stage. Lord Diplock stated:

The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

According to Lord Scarman, the plaintiff must show ‘a *prima facie* case, or reasonable grounds for believing that there has been a failure of public duty’, so to prevent abuse by busybodies, cranks, and other mischief-makers or vexatious applications.

In *R v Secretary of State for the Home Department ex parte Swati* (1986), Sir John Donaldson MR stated that:

... an applicant must show more than that it is not impossible that grounds for judicial review exist. To say that he must show a *prima facie* case that such grounds do in fact exist may be putting it too high, but he must at least show that it is a real, as opposed to a theoretical, possibility. In other words, he must have an arguable case.

In any case, the applicant had not exhausted statutory appeal procedures.

An application may be refused if there has been undue delay. If refused, the *ex parte* application can be renewed, again before a single judge, and then further renewed before the Court of Appeal. In the case of a hearing *inter partes*, a right of appeal lies to the Court of Appeal (but not to the House of Lords). If leave is granted, the substantive application is made to the Divisional Court. Neither the requirement of leave nor the time limit applies to an application by the Attorney General on the Crown’s behalf. There is no leave requirement in cases of *statutory* judicial review procedures.

The leave requirement is an additional hurdle in public law proceedings. It has no counterpart in private law actions. Nor can it be dispensed with by agreement of the parties.

6.8.2 Merits stage

As the title suggests, this involves a full consideration of the merits of the application. However, *locus standi* can also be reconsidered at this stage (see *National Federation of Self-Employed and Small Businesses* (1982) below, pp 181–83).

6.9 Time limits

Time limits are strict. The nature of public decision-making is often such that finality is necessary to enable the decision to be acted upon without any further threat of challenge. As stated by Lord Diplock in *O'Reilly v Mackman* (1983):

The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

Order 53 (as amended in 1980) requires an application for judicial review to be made promptly and, in any case, it must be brought within three months of when the grounds for the application arose, unless the court considers there are good grounds for extending the period of application. Section 31 of the SCA 1981, however, speaks in terms of undue delay, where it can refuse to grant leave for making the application or relief sought if it considers that to do so would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. There are further discrepancies between the provisions. Rule 4(1) applies only to applications for leave to apply for judicial review whereas s 31(6) of the SCA 1981 applies to both applications for leave and to applications for substantive relief. Rule 4(1) looks to the existence of good reasons whereas s 31 looks to the effects of the delay. (An attempt to repeal s 31(6) of the SCA 1981 by the Administration of Justice Bill 1985 failed when the bill was abandoned.)

In *R v Dairy Product Quotas Tribunal ex parte Caswell* (1990), the applicants applied for judicial review of a decision of the Dairy Produce Quotas Tribunal two years after it had taken its decision. An appeal from a decision of the High Court declining to grant relief despite a finding that the tribunal had erred in its construction of statutory regulations was dismissed by the Court of Appeal and the House of Lords. 'Application for judicial review' in s 31(6) and (7) of the SCA 1981 were to be read as including an application for leave to apply for judicial review (ie the filter stage). Even where there was good reason for the delay, the court could refuse leave or, where leave had been granted, refuse substantive relief, where the grant of relief was likely to cause hardship or prejudice or would be detrimental to good administration. In the instant case, to grant relief would so prejudice good administration. Decisions in the circumstances of the case needed to be given quickly so those affected could act accordingly. A re-opening of the case would lead to other similar applications and so to the re-opening of quota allocations over a number of years.

Lord Goff attempted to reconcile RSC Order 53 and s 31 of the SCA 1981 as follows:

... when an application for leave to apply is not made promptly and in any event within three months, the court may refuse leave on the ground of delay unless

it considers that there is good reason for extending the period; but, even if it considers that there is such good reason, it may still refuse leave (or, where leave has been granted, substantive relief) if in its opinion the granting of the relief sought would be likely to cause hardship or prejudice (as specified in s 31(6) SCA 1981) or would be detrimental to good administration.

An application made outside the three month time limit was also rejected in *R v Secretary of State for Health ex parte Furneaux* (1994), where a practice of doctors challenged the minister's decision not to grant them permission to provide pharmaceutical services six months after the refusal. In the meantime, a company had purchased a local pharmacy. The Court of Appeal, reversing the decision of Popplewell J, dismissed the doctors' application. Mann LJ stressed the importance of adhering to the three month time limit where third parties were concerned.

In contrast, in *R v Stratford upon Avon DC ex parte Jackson* (1985), the Court of Appeal allowed an application for leave to apply for judicial review made out of time. The applicant's explanation that the delay included time taken in obtaining legal aid and trying unsuccessfully to persuade the Secretary of State for the Environment to intervene was accepted.

On an *ex parte* application, the judge would be most likely to consider whether there was good reason to extend the period under rule 4(1). Whether delay would cause hardship or detriment could arise on a contested application for leave or on the hearing of the substantive application. However, on an *inter partes* application for leave, a finding that the application was made promptly under rule 4 will not prevent the court on the hearing of the substantive application from finding that there has been undue delay under s 31(6) of the SCA 1981 and exercising its discretion to refuse relief (see *R v Swale Borough Council ex parte RSPB* (1991)). The fact that the point of delay is not taken by the respondent does not preclude the court from exercising its discretion.

Statute may curtail the time limit in any given case. Nor does the fact that an application has been made within the three month period necessarily mean that it has been made promptly (see *Re Friends of the Earth* (1988); *R v Independent Television Commission ex parte TVNI Ltd*; *R v ITC ex parte TVS Television Ltd* (1991)). In the *TNVI* case, for example, the applicants sought judicial review after the Commission had confirmed the names of companies to which it had previously announced it proposed to grant licences. The original proposal was announced on 16 October and the confirmation made on 4 December. Lord Donaldson MR considered that the applicants had not been sufficiently prompt, albeit that they had applied within the three month time limit. After the 4 December confirmation, third parties (the companies granted licences) would be affected. The applicants had not given 'clear and prompt notice'.

6.10 Limits on the application for judicial review – the public/private law dichotomy

The reforms of 1977 were intended to simplify the procedure for application in cases of judicial review and to break down the barriers between the public law and the private law remedies in the context of the application for judicial review. It was not intended as a corollary of this that the application for judicial review should become the exclusive remedy of public law. The Law Commission in its 1976 Report on 'Remedies in Administrative Law' expressly stated that it was not recommending that the application for judicial review 'should be exclusive in the sense that it would become the only way by which public law issues relating to the legality of the acts or omissions of persons or bodies could be decided'. Where such issues arose in ordinary actions or criminal proceedings they would 'not have to be referred to the Divisional Court but would continue to be dealt with as at present by the court seized of the case'.

After the introduction of the application for judicial review, however, the House of Lords quickly established the exclusivity of remedies in public law and a strict dichotomy between public and private law emerged. The exclusivity of the remedy was unequivocally declared by the House of Lords in *O'Reilly v Mackman* (1983). To proceed by way of an ordinary action where an application for judicial review was the appropriate path would be an abuse of the process of the court. The procedural simplification of the remedies which was so much the basis for the introduction of the application for judicial review has consequently been marred by arguments over whether proposed proceedings are an issue of public or private law. This public/private dichotomy in the context of the exclusivity of the public law remedies has been described as a 'procedural minefield' (per Lord Lowry in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* (1992), below, p 173).

Just as an ordinary action cannot be used where the application for judicial review is the appropriate path, so the application for judicial review cannot be used where a remedy in private law is appropriate against the public authority, eg for breach of contract or the commission of a tort. So, for example, dismissal from employment must normally be pursued through an action for wrongful dismissal or for breach of the contract of employment (see, for a recent example, *Equal Opportunities Commission v Secretary of State for Employment* (1995), where the House of Lords considered it inappropriate to join a second applicant to the proceedings where that individual's proper remedy lay in private law and she had, in fact, already commenced proceedings in the industrial tribunal) – unless the decision stems from an issue of public law as in, for example, *CCSU v Minister for the Civil Service*.

O'Reilly v Mackman (1983)

Prisoners were charged with disciplinary offences before a Board of Visitors arising out of riots in 1976 and 1979. In 1980, three plaintiffs brought private law actions by writ in the Queen's Bench Division of the High Court for a declaration that the Board had acted in breach of the Prison Rules and the rules of natural justice. The fourth brought an action by originating summons in the Chancery Division for a declaration alleging breach of natural justice. These private law actions were chosen because the plaintiffs expected there to be disputed questions of fact for which the application for judicial review was not suited. At first instance Peter Pain J considered this to be a rational choice. He stated:

It might be thought that the plaintiffs have made their choice of procedural route capriciously. This is not so. I was told by their counsel that they anticipate that there will be a substantial dispute as to fact and they have therefore chosen a route that provides for oral evidence as a matter of course rather than a route in which the evidence is nearly always taken on affidavit. This is clearly a rational choice.

The Court of Appeal reversed that decision on the basis that the proceedings were an abuse of the process of the court. The House of Lords upheld the decision of the Court of Appeal, regarding the actions as being 'blatant attempts to avoid the protection for the defendants for which RSC Order 53 provides'. Both the Court of Appeal and the House of Lords agreed that the only proper remedy was by way of the application for judicial review. Lord Diplock noted in particular the following points:

- None of the applicants had any remedy in private law.
- The disadvantages which previously existed with the prerogative orders had been removed by the application for judicial review. Interlocutory applications, discovery, interrogatories and cross-examination were all now allowed. Damages, declaration and injunction were available in the same proceedings.
- If the application for judicial review was selected when a private law remedy was appropriate, the court could order the proceedings to continue as if begun by writ. There was no such converse power to allow an action begun by writ to continue as if it were an application for judicial review.
- An action begun by writ instead of application for judicial review would evade protection against groundless, unmeritorious or tardy harassment of statutory tribunals and decision-making public authorities provided by RSC Order 53. Also, it would defeat the public policy which underlies those protections, ie the need for speedy certainty, in the interests of good administration and of third parties who may be affected, as to whether the decision challenged is valid.

Lord Diplock stated:

The position of applicants for judicial review has been drastically ameliorated by the new RSC Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under RSC Order 53) despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons RSC Order 53 provided.

Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of RSC Order 53 for the protection of such authorities.

Lord Diplock considered this to be a statement of the general rule. He conceded that there may be exceptions, especially where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons.

The judgments in *O'Reilly v Mackman* were very much based on the protection of public authorities rather than the advancement of the rights of the citizen. The decision has led to what Wade and Forsyth (*Administrative Law*, 7th edn, 1994, Oxford University Press) describe as 'surgical operations to sever public from private law'.

This issue of the public/private law divide was further considered by the House of Lords in *Cocks v Thanet District Council* (1983).

***Cocks v Thanet District Council* (1983)**

This case was decided the same day as *O'Reilly v Mackman* (1983).

The plaintiff applied to the council for permanent accommodation. The council provided temporary accommodation. The plaintiff applied for a declaration, mandatory injunction and damages in the county court (moved by consent into the High Court to determine the preliminary issue of whether the plaintiff should proceed under RSC Order 53) that the council was in breach of its statutory duty under the Housing (Homeless Persons) Act 1977. Milmo J held that the plaintiff was entitled to so proceed. On appeal direct to the House of Lords, it was held unanimously that the plaintiff must proceed by way of

application for judicial review. The issue turned on whether the council could conclude that the plaintiff had made himself intentionally homeless and was in the realm of public law. Only once this was determined properly did rights in private law emerge, ie to the provision of appropriate housing. This was explained by Lord Bridge as follows:

On the one hand, the housing authority are charged with decision-making functions. It is for the housing authority to decide whether they have reason to believe the matters which will give rise to the duty to inquire or to the temporary housing duty. It is for the housing authority, once the duty to inquire has arisen, to make appropriate inquiries and to decide whether they are satisfied, or not satisfied as the case may be, of the matters which will give rise to the limited housing duty or the full housing duty. These are essentially public law functions ...

On the other hand, the housing authority are charged with executive functions. Once a decision has been reached by the housing authority which gives rise to the temporary, the limited or the full housing duty, rights and obligations are immediately created in the field of private law. Each of the duties referred to, once established, is capable of being enforced by injunction and the breach of it will give rise to a liability in damages. But it is inherent in the scheme of the [Housing (Homeless Persons) Act 1977] that an appropriate public law decision of the housing authority is a condition precedent to the establishment of the private law duty.

The exclusivity of the public law remedies was thereby established. *O'Reilly v Mackman* and *Cocks v Thanet DC* were, however, soon to be distinguished in *Davy v Spelthorne Borough Council* (1984) and *Wandsworth LBC v Winder* (1985).

***Davy v Spelthorne Borough Council* (1984)**

Here, the plaintiff owned premises used to produce pre-cast concrete. In 1979, he agreed with the defendant council that he would not appeal against an enforcement notice (requiring that such use of the property ceased and the removal of all buildings and works) provided it was not enforced for three years from service. The notice was served in 1980 as agreed and the plaintiff did not appeal. The statutory period for appeal subsequently elapsed. In 1982, the plaintiff brought an action by writ for:

- (a) an injunction to prevent enforcement of the notice;
- (b) damages for negligent advice in that he acted upon the council's advice and did not appeal against the enforcement notice and, consequently, lost his chance to establish a defence to that notice;
- (c) an order that the notice be set aside.

The Court of Appeal struck out (a) and (c) in that they involved a challenge to the validity of the notice and were matters of public law. However,

distinguishing *O'Reilly v Mackman* and *Cocks v Thanet DC*, (b) was for breach of a duty owed in the private law of tort – the negligence action depended on the fact that the plaintiff had lost his chance to impugn the notice. The House of Lords dismissed an appeal by the local authority to strike out the claim for damages. Lord Fraser stated:

The present proceedings, so far as they consist of a claim for damages for negligence, appear to me to be simply an ordinary action for tort. They do not raise any issue of public law as a live issue.

Cocks v Thanet was distinguished in that there the applicant had to challenge the council's decision (that he was intentionally homeless) as a 'condition precedent' to enforcing his statutory private law right (to be provided with accommodation); whereas in *Davy v Spelthorne* the applicant 'does not impugn or wish to overturn the enforcement notice. His whole case on negligence depends on the fact that he has lost his chance to impugn it'.

Lord Wilberforce asserted that, even had the applicant been able to proceed by way of application for judicial review in his claim for damages (which in the circumstances he could not), he could still choose the court and the procedure which suited him best. The onus would be on the defendant to show that the choice selected was an abuse of process as in *O'Reilly* where it was possible to show that the plaintiffs were 'improperly and flagrantly seeking to evade the protection which the rule confers upon public authorities'.

Similarly, if the plaintiff had waited to be prosecuted for breach of the notice, he could presumably have argued invalidity of the notice as a defence (see *Winder* below).

Wandsworth Borough Council v Winder (1985)

Here, Winder occupied a flat let by the council. He refused to pay increased rents which he considered to be excessive though he continued to pay an increased rent to the extent he considered reasonable. In proceedings by the council for arrears and possession, Winder argued that the rent increases were *ultra vires* and void as being unreasonable and counterclaimed for a declaration to that effect. The council applied to strike out the defence as being an abuse of the process of the court to challenge the conduct of a public authority other than by way of application for judicial review. Judge White allowed the council's application. Winder was subsequently refused leave to apply for judicial review out of time. He then appealed from Judge White's decision to the Court of Appeal. The Court of Appeal (by a majority) and the House of Lords (unanimously) refused to strike out his defence as an abuse of the process of the court.

The issue here was whether any choice of action was available to Winder. Was he obliged to challenge the decision by the council to increase rents by way of judicial review and so act within the stipulated time limit for judicial review,

or could he stand by and wait for the council eventually to take proceedings against him and then argue illegality of their decision? It is arguable that on these facts Winder should have been required to challenge the council's decision by application for judicial review rather than wait to be evicted. A speedy decision was required to establish whether the council was acting unreasonably. On the other hand, why should it be required that Winder challenge the validity of the council's actions when they presumably could have applied for a declaration as to the legality of their own conduct?

In the leading judgment, Lord Fraser considered that the case did not fall within any of the exceptions to the general rule (that a challenge to a decision of a public authority which infringed rights under public law was to be challenged by the application for judicial review only) as stated by Lord Diplock in *O'Reilly v Mackman* since the invalidity of the council's decision was not a collateral issue in a claim for infringement of a right arising under private law; rather, the issue of the invalidity of the decision was central to the defence. Lord Fraser accepted that it would be of great advantage to the council and their ratepayers if challenges to their decisions were limited exclusively to the procedure of application for judicial review. If the appellants' decisions were held to be invalid, the basis of their financial administration since 1981 would be upset. However, there may be other ways of obtaining speedy decisions; for example, the public authority itself might initiate judicial review proceedings. In the instant case, Winder did not select the procedure to be followed and was merely seeking to defend proceedings brought by another. It was 'impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by RSC Order 53, which was directed to introducing a procedural reform'. Winder's complaint was of 'the infringement of a contractual right in private law' and he had not initiated the proceedings. Winder was, therefore, allowed to defend the action by reference to the illegality of the rent increase, though his defence ultimately failed on its merits.

More surprisingly, in *Gillick v West Norfolk and Wisbech Area Health Authority* (1986), the House of Lords allowed an action by writ for a declaration that guidance issued by the Department of Health and Social Security (DHSS) on contraceptive advice to children under the age of 16 was unlawful and a breach of parental rights to proceed. The private law content of the claim – the threat of infringement to her private law rights as a parent – was so great as to permit the plaintiff to proceed down the private law path. According to Lord Scarman:

Mrs Gillick's action is essentially to protect what she alleges to be her rights as a parent under private law.

Lord Bridge, however, disagreed:

If the claim is well-founded, it must surely lie in the field of public rather than private law. Mrs Gillick has no private right which she is in a position to assert against the DHSS.

It seemed here that the House of Lords was indeed willing to offer Mrs Gillick the choice – she could also, in the alternative, have proceeded by way of the application for judicial review.

In the *Credit Suisse* (1996) actions against Allerdale and Waltham Forest councils for the enforcement of guarantees (see above, p 86), the councils were allowed to argue the illegality of *their own* conduct (entering contracts which were in breach of s 111 of the Local Government Act 1972) in defence.

Winder was itself approved in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* (1992), where the plaintiff GP brought an action against his Family Practitioner Committee for payment of part of his basic practice allowance withheld on the ground that he had failed to devote a substantial amount of time to general practice as required by statute. The committee applied to strike out the claim as an abuse of process on the ground that their decision was a public law decision and must be challenged by way of application for judicial review. The Court of Appeal held that the plaintiff had a contract for services with the Committee and, therefore, his proper remedy did, in fact, lie in private law. The House of Lords dismissed an appeal, holding that a private law right could be enforced by ordinary action even though the proceedings involved a challenge to a public law decision. Lord Lowry preferred what was labelled a ‘broad’ approach whereby it would not be insisted that a complainant pursue her or his complaint via an application for judicial review unless private law rights were not at stake at all. A ‘narrow’ approach, on the other hand, would normally require a challenge to a decision of a public body to proceed by way of judicial review, even though the complaint involved issues of both public and private law. However, that norm would be subject to exceptions. Their Lordships did not express a clear preference for one approach over the other. Nor is it entirely clear by reference to which approach the case was decided. Lord Bridge stated:

It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

Lord Lowry advocated a substantial degree of flexibility to avoid lengthy debate on the form the proceedings in any particular case should take. Unless the procedure selected was ‘ill suited to dispose of the question at issue’, there was ‘much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard’. This approach was later echoed in *Mercury Communications Ltd v Director General of Fair Trading* (1996). In breaking the

monopoly of British Telecom, the Telecommunications Act 1984 required BT to enter into an agreement whereby Mercury could use its telephone lines. The agreement was subject to renegotiation after five years. If no renegotiation could be agreed, a determination could be made by the statutory regulator. Mercury, however, considered that the Director General had misinterpreted provisions in the licensing scheme and applied for a declaration by way of originating summons in private law. The House of Lords refused to strike out the proceedings as an abuse of the process of the court. The issue was not solely one of public law and the procedure of RSC Order 53 was not so well-suited to the case that to allow the matter to be dealt with in private law would be an abuse of process.

By contrast to *Winder*, in *Avon County Council v Buscott* (1988), in an action by the local authority to recover possession of land, the defendant, while not denying that he was a trespasser, asserted that he was a gypsy and that the authority had failed to fulfil its duty under the Caravan Sites Act 1968 to provide accommodation for him. On this basis, he argued in defence that the authority was acting unreasonably and *ultra vires*. The Court of Appeal held that a defendant could challenge the reasonableness of a decision of a public authority in an ordinary action (as opposed to by way of application for judicial review) *only* in support of a private *right* and where he had not selected the forum of the proceedings. Buscott could not, therefore, defend the eviction proceedings on the ground that the council was acting unreasonably in instituting such proceedings. Buscott admitted being a trespasser and, therefore, had no rights in private law. The authority's decision could be challenged only by way of judicial review.

R v East Berkshire Health Authority ex parte Walsh (1985) provides an example of proceeding by way of an application for judicial review when a private law action was the appropriate forum. Here a senior nursing officer employed by the health authority under a contract incorporating the Whitley Council agreement on conditions of service was dismissed by the district nursing officer for misconduct. He applied for judicial review for *certiorari* on the basis that the officer had no power of dismissal and also for breach of natural justice. At first instance, it was held that application for judicial review was available on the basis of public concern to ensure that a great public service acted lawfully and fairly. The Court of Appeal, however, allowed an appeal. Sir John Donaldson MR held that an applicant for judicial review had to show that a public law right had been infringed. Public law was not to be equated with 'the interest of the public' unless 'the public through Parliament gives effect to that interest by means of statutory provisions'. Employment by a public authority did not *per se* inject any element of public law. The existence of statutory provisions, for example restricting powers of dismissal or otherwise underpinning the employment, might do so. But here the applicant's rights arose solely from his contract of employment. Nor would the court in this instance order the

proceedings to continue as if begun by writ. The only remedy the applicant had sought was *certiorari* which was not available in a civil action and there was no indication of the form a declaration might take.

The main case law to date on the public/private dichotomy was recently reviewed by Laws J in *British Steel plc v Customs and Excise Commissioners* (1996). The plaintiff company used hydrocarbon oil in its manufacture of steel and was assessed to excise tax on that oil under the Hydrocarbon Oil Duties Act 1979. The Act provided for exemptions from the payment of such duty but the Commissioners had refused to accept that British Steel fell within the stated exemptions. Consequently, British Steel had paid the excise duty demanded of it. The company then, however, instituted private law proceedings in restitution for recovery of the duty paid and argued the illegality of the past demands on the part of the Commissioners. Laws J was of the view that the House of Lords in cases from *O'Reilly v Mackman* to *Mercury Communications* had laid down five propositions:

- 1 Where a complaint touches only a public law issue, there being no question of a private right involved, the complainant must generally seek his remedy by way of judicial review (*O'Reilly*). Otherwise there would be abuse of process because public policy requires that the safeguards of RSC Order 53 for the protection of public authorities (and, so, ultimately the public) are not evaded.
- 2 Where a defendant to a private law suit has a defence which consists in arguments against his plaintiff based on public law, he will not be non-suited for being in the wrong court (*Winder*). It cannot be an abuse of process or against public policy for a defendant to assert any defence which legally arises when someone else takes him to court.
- 3 Where statute confers what is plainly a private law right, if on the Act's true construction the right enures only after and in consequence of a purely public law decision in favour of the claimant, any complaint directed to the public decision-making must be brought by RSC Order 53 (*Cocks v Thanet*).
- 4 Where a claimant enjoys a private right whose existence is not contingent upon the making of a prior public law decision in his favour, the claimant may sue in private law even though he must assault an administrative or discretionary decision on the way (*Roy*).
- 5 All said, there needs to be some procedural flexibility as the boundaries between public and private law have not been fully worked out and exceptions to the general rule should be developed on a case to case basis.

Laws J concluded that the *British Steel* case itself fell within 3:

... had the plaintiffs been able to establish by judicial review proceedings that they were entitled to be accorded approval status, and that was duly granted to

them, then a private right would have enured in their hands ... Otherwise there is no private right.

The harshness of the approach enunciated by the House of Lords in *O'Reilly v Mackman* has, therefore, been diminished. However, it remains somewhat difficult to predict in which direction the court will jump in any particular case. This being so, the court is, in a sense, exercising a yet further discretion in determining the applicant's case. In any event, it can be difficult to forecast what the court's response will be and the law has become something of a lottery for the applicant.

6.11 Against whom is the application for judicial review available?

A challenge by way of judicial review must be to the actions of a body which performs public functions and not, for example, a trade union, company or club engaging in a 'private' relationship with its membership. In determining whether a body is subject to judicial review, therefore, the source from which the body derives its power is not determinative, but rather the nature of the power being exercised. Hence, judicial review extends not only to public bodies established by statute or under the prerogative but to any body which exercises a public function. This principle was well-established in *R v Panel on Takeovers and Mergers ex parte Datafin* (1987).

***R v Panel on Take-overs and Mergers ex parte Datafin* (1987)**

The applicants, Datafin, who were bidding in competition with company N to take over another company, complained to the respondent that N had acted in breach of the City Code on Take-overs and Mergers. The respondent dismissed the complaint and the applicant applied for judicial review of that decision. The Divisional Court refused the application on the basis that the Panel's decision was not susceptible to judicial review. On a renewed application before the Court of Appeal, Sir John Donaldson MR found that the Panel was not set up by statute but was a 'self-regulatory' body in the sense that there existed 'a system whereby a group of people, acting in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising'. It was an unincorporated association with no legal personality. It had no statutory, common law or prerogative powers. It had no contractual relationship with the financial market it regulated. It had the power to impose sanctions for breach of the code which were 'no less effective because they are applied indirectly and lack a legally enforceable base'. The applicants argued that in deciding whether the court could exercise its supervisory jurisdiction over the Panel 'regard has to be had not only to the source of the body's power, but also to whether it operates as an integral part of a system which has a

public law character, is supported by public law in that public law sanctions are applied if its edicts are ignored and performs what might be described as public law functions'. The Court of Appeal held that the Panel was subject to judicial review (but dismissed the application on the merits). No avenue lay in private law and it was 'unthinkable that, in the absence of legislation such as affects trade unions, the panel should go on its way cocooned from the attention of the courts in defence of the citizenry ...'.

Lloyd LJ repeated the now well-established maxim that '... it is not just the source of the power that matters, but also the nature of the duty ...'. Even if this was not the case there was 'an implied devolution of power' by government which had 'deliberately abstained from exercising power'.

However, the nature of the power being exercised may not only determine whether the decision-maker is subject to judicial review as a public body, but may also affect the level of review to which the decision-maker is to be subjected. So, in *R v Panel on Take-overs and Mergers ex parte Guinness plc* (1990) the Court of Appeal would intervene with a decision of the Panel which was taken in the exercise of inquisitorial rather than disciplinary functions and in which the applicant was a witness rather than a defendant only where satisfied that the decision had led to injustice.

A contrasting decision to that in *Datafin* can be seen in *R v Disciplinary Committee of the Jockey Club ex parte The Aga Khan* (1993). Here, the applicant sought to challenge by judicial review a decision of the Jockey Club to disqualify his horse after a race and to fine his trainer £200. A sample of the horse's urine had been found to contain a prohibited substance. The applicant argued that the disqualification damaged his reputation and that the breeding value of the horse had been badly affected. The Divisional Court held that the decision of the Jockey Club was not subject to judicial review. On appeal, the Court of Appeal agreed. Although the Jockey Club regulated a significant national activity in the public interest and, had it not existed, the government would probably be driven to create a public body to do so, it was not in its origin, history, constitution or membership a public body and its powers were not governmental. Further, the relationship between the Jockey Club and its members gave rise to private rights enforceable by private law remedies. Hoffmann LJ accepted that, since *Datafin*, the source of the power was not conclusive in determining the public nature of a body. However:

... the mere fact of power, even over a substantial area of economic activity, is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and livelihood of many individuals. But that does not subject it to the rules of public law.

To be subject to review in public law, the power needed to be 'governmental'. However, the court did state that in a situation where an applicant had no recourse in private law against the Jockey Club then judicial review might be available.

The fact that the source of the power originated from a contractual relationship appears to have been determinative in precluding a challenge via the public law route in *R v Lloyds ex parte Briggs* (1993) and in *R v Insurance Ombudsman Bureau ex parte Aegon Life Assurance Ltd* (1994). In *Briggs*, the court concluded that Lloyds was not a public body susceptible to judicial review. Leggatt LJ stated:

Even if the Corporation of Lloyds does perform public functions, for example for the protection of policy holders, the rights relied on in these proceedings relate exclusively to the contract governing the relationship between the Names and their members' agents and ... their managing agents. We do not consider that involves public law ... All of the powers which are the subject of the complaint ... are exercised by Lloyds over its members solely by virtue of the contractual agreement of the members ... to be bound by the decisions and directions of the council.

In *Aegon*, Rose LJ considered that this statement applied equally to the Insurance Ombudsman Bureau (IOB). The IOB, established in 1981 as a self-regulatory body to resolve complaints by customers in the insurance industry, had subsequently been recognised by the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO), which body had itself been recognised as being subject to judicial review (see *R v LAUTRO ex parte Ross* (1993)). It was argued that, just as LAUTRO controlled its members by a process of contracts supported by the Financial Services Act 1986, so there 'trickled down' to the IOB a discharge of government functions coupled with controls through consent – the IOB had been 'woven into' a wider system of governmental control. Rose LJ disagreed. In his view, the IOB's power was still 'solely derived from contract and it simply cannot be said that it exercises governmental functions. In a nutshell, even if it can be said that it has now been woven into a governmental system, the source of the IOB's power is still contractual, its decisions are of an arbitral nature in private law and these decisions are not, save very remotely, supported by any public law sanction'.

The requirement that the power be 'governmental' in nature appears to have been determinative in *R v Chief Rabbi ex parte Wachmann* (1993). According to Simon Brown LJ, to be within the definition of a public body for the purposes of public law, the body must be 'an integral part of a regulatory system which, although itself non-statutory, is nevertheless supported by statutory powers and penalties clearly indicative of governmental concern'. It could not be said that, had the regulatory powers of the Chief Rabbi not existed, government would have felt impelled to introduce a system of statutory regulation.

It has been asserted that the 'governmental' test as explained in the *Chief Rabbi* case is a refinement and 'substantial narrowing' of the *Datafin* test in that it looks at the context of the power rather than focusing on the nature of the power (see Black, 'Constitutionalising Self-Regulation' (1996) 59 MLR 24 at p 36)).

6.12 Standing – *locus standi*

6.12.1 Rationale and application

The law does not allow just anyone to challenge a decision of a public authority simply because he or she disagrees with or disapproves of the decision. There are good reasons for this. A free for all approach would open the flood-gates to challenge, imposing an undue burden on the courts and aggravating delay in judicial decision-making. It would unduly delay governmental decision-making. Judicial review would become an even greater weapon in the hands of groups wanting to delay or deny the implementation of particular decisions. In any case, why should a person or group which does not have a particular interest or is not directly affected by a decision be allowed to challenge it when others with such an interest or so directly affected (assuming such persons exist) have not felt inclined to mount a challenge. There are also good countervailing arguments. It may be that no individual or group has an interest in the decision over and above the rest of the population. Should such a decision be rendered unchallengeable purely for that reason? Is it adequate to have to rely on the Attorney General bringing an application or lending his name to an applicant? (On so-called ‘relator’ actions see below.) It might simply be argued that *all* citizens have an interest in securing that government does not act beyond the law and, therefore, that all decisions in the public domain should be subject to challenge by anyone.

The availability of a remedy in English law, however, is generally dependant upon the applicant having a right which has been affected – a reflection of the maxim *ubi ius ibi remedium* (where there is a right there is a remedy). Such a principle is clearly appropriate in the private law arena, the very essence of which is that a private right has been infringed. It is not, however, a principle which can be applied with such a degree of precision and clarity in the field of public law. Actions of public bodies may affect large sections of the population and the effect may often be indirect in the sense that the objector does not suffer any personal physical or financial loss. On the other hand, such decisions cannot be opened up to popular challenge. Government must be allowed to govern without the threat of constant challenges to its decisions at the whim of any individual or group in society which disagrees with those decisions.

The class of persons to whom an application for judicial review is available is restricted, therefore, by reference to the principle of *locus standi*, ie an applicant must have sufficient standing (‘a sufficient interest in the matter to which the application relates’) in the eyes of the law to sustain a challenge to the particular decision made by the public authority. An individual who is the direct object of a decision, eg the person refused planning permission or the person against whom a deportation order is made, will clearly have *locus standi*. Such

a person is directly affected by the decision. Standing, however, is often not so clear cut. For example, members of pressure groups such as Greenpeace have a particular interest in a particular issue but can they be said to be affected by relevant decisions any more than any other member of society simply because they have a special interest in the subject matter of the decision? The courts have effectively had to address the question whether and, if so, in what circumstances, membership of such a group confers standing to challenge governmental decisions upon individuals who, had they not been members of such a group, would not have standing as individuals to challenge the relevant decision. The balance between unduly restricting the ability of individuals or groups to challenge and opening the floodgates to challenges of governmental decision-making is a fine one.

Prior to the introduction of the application for judicial review, each of the remedies had its own rules of standing. One would expect the requirements for standing to differ as between the private and the public law remedies, with more stringent requirements operating for the private law remedies. In fact, standing was even more complex, with the rules for standing differing not only as between the groups of remedies (ie private and public) but also within those groups.

An injunction required interference with a private right or special damage over and above that suffered by the rest of the community. Where such an interest was not present, then reliance had to be placed on the Attorney General intervening in the public interest by way of a so-called 'relator action'. In such a case, the Attorney General could institute proceedings as guardian of the public interest in his own right. More commonly, he would merely lend his name enabling an application to be made but the costs would be borne by the 'real' applicant.

Since the essence of a declaration is to declare the parties' legal rights (existing or future) the remedy clearly would not lie where no legal right existed. If such a legal right did not exist, the applicant would again have to rely on the Attorney General lending his name for a relator action (see *Gouriet v Union of Post Office Workers* (1978)). There were inconsistencies in judicial attitude to declaratory relief. For example, in *Prescott v Birmingham Corporation* (1955), a ratepayer was allowed to challenge a local authority's decision to allow free travel for old age pensioners; in *Blackburn v Attorney General* (1971), the applicant's standing to challenge accession to the Treaty of Rome went unchallenged.

Certiorari/prohibition lay 'where any body of persons having legal authority to determine questions affecting the rights of subjects, and having a duty to act judicially, act in excess of their legal authority ...' (per Atkin LJ in *R v Electricity Commissioners* (1924)). They lay *ex debito justitiae* where the applicant had a particular grievance, ie the court would normally exercise its discretion to grant the remedy in favour of the applicant. If there was no such grievance,

then they were discretionary (see *R v Thames Magistrates Court ex parte Greenbaum* (1957)). For application by a 'stranger' see *R v GLC ex parte Blackburn* (1976).

A line of case law required the applicant for *mandamus* to establish a specific legal right. At the other extreme, an applicant was allowed to apply for an order of *mandamus* to compel the police to enforce the law (see *R v MPC ex parte Blackburn* (1968) and *AG ex rel McWhirter v IBA* (1973)).

As already noted, in 1977 the private and public law remedies were made available in one proceeding, the application for judicial review, by RSC Order 53. Both RSC Order 53 and s 31 of the SCA 1981 require an applicant for judicial review to have a *sufficient interest in the matter to which the application relates*. It is now, therefore, the question of *sufficiency of interest* which must be addressed. What was meant by 'a sufficient interest' and whether a uniform rule of standing to be applied to all applications for judicial review, regardless of the particular remedy sought, had thereby been established was addressed by the House of Lords in *R v IRC ex parte National Federation of Self-Employed and Small Businesses* (1982).

R v IRC ex parte National Federation of Self-Employed and Small Businesses (NFSESB) (1982)

Fleet Street casuals – workers in the printing industry – were called into work as necessary. They gave false names and addresses when collecting pay dockets incurring a loss to the Revenue of £1,000,000 per annum. The Commissioners agreed with the employers and unions that in future tax would be deducted at source or properly assessed. In return, it was agreed that tax owed from certain previous years would not be pursued.

The NFSESB was disgruntled that such an agreement had been reached and that the Inland Revenue had not dealt with its members in such a lenient way in the past. It applied for judicial review for a declaration that the Inland Revenue had acted unlawfully and *mandamus* to compel them to fulfil their public statutory duty of tax collection.

The initial question to be determined by the House of Lords was whether a group of businessmen had sufficient standing to challenge the decision of the Inland Revenue which did not affect its membership directly but about which its membership felt aggrieved. The case is a stark illustration of the difficulty of assessing sufficiency of interest and the gradations of approach (restrictive to liberal) which might be taken.

It is clear from the decision of the House of Lords in *NFSESB* that the issue of standing is to be considered *both* at the leave stage *and* the merits stage of the application for judicial review. At the leave stage, applications which are hopeless or made by mere busybodies are to be excluded. At the merits stage, standing can be denied on the basis that the applicant does not have an arguable case

on the merits. The Divisional Court held at the leave stage that the Federation had standing; at the hearing (merits) stage that it had no 'sufficient interest'.

The Court of Appeal proceeded on the assumption that the IRC had no power to grant a tax amnesty and were acting unlawfully. It held that the Federation had a sufficient interest.

The House of Lords unanimously (though not all on the same grounds) allowed the IRC's appeal.

According to Lord Wilberforce, the question of standing was not to be treated as a preliminary issue, ie to be decided before consideration of the merits, as it had been treated by the Divisional Court. 'There may be simple cases where it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application.' However, in other cases 'it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed ... the question of sufficient interest cannot ... be considered in the abstract ... it must be taken together with the legal and factual context'.

The test of sufficiency of interest under RSC Order 53 was not one of pure discretion on the part of the court and the fact that the same words were used to cover all the forms of remedy did *not* mean that the test was the same in all cases. The test may well be stricter, for example, in cases of *mandamus* - '... we should be unwise in our enthusiasm for liberation from procedural fetters to discard reasoned authorities ...'.

A good working rule in the context of *mandamus* was to inquire whether the complainant was, expressly or impliedly, within the scope or ambit of the duty. The position of taxpayers whose own assessments were not in question must be judged according to whether they had a sufficient interest.

The framework of the legislation must be taken into account. Assessments were confidential. No list or record of assessments was available for public inspection. There was no common fund of the produce of income tax in which taxpayers as a whole could be said to have an interest (as compared with ratepayers). Tax collected was paid into the Consolidated Fund for any purpose that Parliament thought fit. Lord Wilberforce stated:

As a matter of general principle I would hold that one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been under-assessed or over-assessed: indeed, there is a strong public interest that he should not. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have an interest.

Lord Wilberforce, therefore, allowed the appeal on the basis that the applicant had no sufficient interest.

This approach may be contrasted with that of Lord Diplock. Lord Diplock agreed with Lord Wilberforce that the question of sufficiency of interest could not be separated from the merits of the application. However, while he found that, on the merits, the IRC were acting within the law, he was alone in finding that the Federation had standing. In his view:

It would ... be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament ... they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.

Lord Diplock, therefore, considered that the Federation had sufficient standing but that it failed on the merits of the application.

Lord Fraser was of the opinion that the NFSESB did not have standing. He said:

The new RSC Order 53 ... no doubt had the effect of removing technical and procedural differences between the prerogative orders ... but I do not think it can have the effect of throwing over all the older law and of leaving the grant of judicial review in the uncontrolled discretion of the court.

... a direct financial or legal interest is not now required ... there is also general agreement that a mere busybody does not have a sufficient interest. The difficulty is ... to distinguish between the desire of the busybody to interfere in other people's affairs and the interests of the person affected by or having a reasonable concern with the matter to which the application relates ... The correct approach in such a case is ... to look at the statute under which the duty arises, and to see whether it gives any express or implied right to persons in the position of the applicant to complain of the alleged unlawful act or omission.

Lord Scarman concluded that the Federation had no standing *because* they had not shown that the IRC had failed in their duties, ie interest and merits were one.

Lord Roskill, like Lords Wilberforce and Fraser, found that the Federation, merely as a body of taxpayers, had no sufficient interest.

While the House of Lords was of the view that the NFSESB as a group of taxpayers lacked standing to challenge the tax assessments of other taxpayers, they did not rule out all possibility that a taxpayer could have sufficient standing to challenge others' assessments, though this would be exceptional. In *R v AG ex parte Imperial Chemical Industries Plc* (1987), ICI was held to have

standing to challenge the manner in which ethane was valued for the calculation of Petroleum Revenue Tax. ICI manufactured ethylene from naphtha but ethylene could be produced more cheaply from ethane. The valuation method adopted, it was alleged, therefore unduly favoured ICI's rivals. Further, the actions of the Inland Revenue amounted to state aid within Article 93 EC and was unlawful.

In general, the decisions of the courts subsequent to *NFSESB* have reflected a liberal view of standing.

In *R v HM Treasury ex parte Smedley* (1985), Slade LJ noted the relaxation of the rules of *locus standi* by the House of Lords in *National Federation of Self-Employed and Small Businesses*. He concluded that the taxpayer's application in the instant case (to challenge the government's proposal to designate as a 'Community treaty' a treaty providing extra funds to the Community) was not frivolous and that the applicant 'if only in his capacity as a taxpayer, has sufficient *locus standi* to raise this question ...'. The application ultimately failed on the merits.

More recently, in *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg* (1994), in an application for *certiorari*, prohibition and a declaration that any purported ratification of the Treaty on European Union would be unlawful, *locus standi* was accepted on the basis of the applicant's 'sincere concern for constitutional issues'. Lloyd LJ, referring to *Smedley*, concluded that:

There is no dispute as to the applicant's *locus standi*, and in the circumstances it is not appropriate to say any more about it ...

In *R v Felixstowe JJ ex parte Leigh* (1987), a journalist not involved in the court proceedings themselves had *locus standi*, as guardian of the public interest in open justice, for a declaration (but not *mandamus*) that justices were not entitled to withhold their names.

6.12.2 Pressure groups

As in the *NFSESB* case itself, an application may be made by an association on behalf of its membership. This is especially common in the case of pressure groups whose very *raison d'être* is to persuade government to promote its particular interest or to refrain from conduct which would jeopardise that interest. Such pressure groups have commonly been afforded standing.

In *R v Secretary of State for Social Services ex parte CPAG* (1990), the Child Poverty Action Group (CPAG), Islington and Hackney London Borough Councils and the National Association of Citizens Advice Bureaux applied for judicial review that a regulation under s 98 of the Social Security Act 1975 had not been properly construed resulting in the determination of claims for benefit being unduly delayed. Woolf LJ stated:

If the appellants' contentions are correct, it is the individual claimants for supplementary benefit whose claims have been delayed who were directly affected as a result of the Secretary of State and the chief adjudication officer misinterpreting their responsibilities. However, the application for judicial review has been made by the appellants because the issues are agreed to be important in the field of social welfare and not ones which individual claimants for supplementary benefit could be expected to raise. Furthermore, the Child Poverty Action Group and the National Association of Citizens Advice Bureaux play a prominent role in giving advice, guidance and assistance to such claimants.

The CPAG was held to have standing.

By contrast, in *R v Secretary of State for the Environment ex parte Rose Theatre Trust Co* (1990), Schiemann J denied *locus standi* to a group formed after the event which had cemented them together had occurred. The Rose Theatre Trust, a non-profit making company, was formed after a Shakespearean theatre had been discovered during the course of an office building development. The purpose of the Trust was to protect the newly discovered site. However, the Trust was held not to have *locus standi* to challenge the minister's decision not to schedule the site as a historic monument even though the minister had accepted that the site was one of national importance. Schiemann J formulated the following propositions which he asserted were 'not inconsistent' with *National Federation of Self-Employed and Small Businesses*:

- Once leave has been given to move for judicial review, the court which hears the application ought still to examine whether the applicant has a sufficient interest.
- Whether an applicant has a sufficient interest is not purely a matter of discretion in the court.
- Not every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision by that statute. To rule otherwise would be to deprive the phrase 'a sufficient interest' of all meaning.
- However, a direct financial or legal interest is not required.
- Where one is examining an alleged failure to perform a duty imposed by statute it is useful to look at the statute and see whether it gives an applicant a right enabling him to have that duty performed.
- Merely to assert that one has an interest does not give one an interest.
- The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest.
- The fact that those without an interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest.

A company could have no more standing than its individual members. Nor could an agglomeration of individuals have a greater standing than any one of the individuals which comprised it. So, the issue was whether any of the individual members had *locus standi* as an individual. The membership included people of distinction in the fields of archaeology, the theatre, literature, local residents and the local MP. Schiemann J held there to be no sufficient interest. On the argument that, if the Trust was not allowed to challenge, the minister's conduct would go unchallenged, Schiemann responded:

This submission is clearly right. The answer to it is that the law does not see it as the function of the courts to be there for every individual who is interested in having the legality of an administrative action litigated. Parliament could have given such a wide right of access to the court but it has not done so. The challenger must show that he 'has a sufficient interest in the matter to which the application relates'. The court will look at the matter to which the application relates ... and the statute under which the decision was taken ... and decide whether that statute gives that individual expressly or impliedly a greater right or expectation than any other citizen of this country to have that decision taken lawfully. We all expect our decision-makers to act lawfully. We are not all given by Parliament the right to apply for judicial review.

The application also failed on the merits. The decision of Schiemann J on the point of *locus standi* has been criticised as over-restrictive. It has been said of the decision that: 'The practical result ... is to create that pariah of modern administrative law, the unreviewable decision' (see Clive Lewis, 'No Standing in the Theatre: Unreviewable Decision' (1990) CLJ 189 at 191). It is especially unsatisfactory that a decision of the executive should be essentially non reviewable and that such a principle should be acceptable, or at the least accepted, by a court of law. Indeed, Schiemann J has himself identified the 'undesirability of putting certain actions beyond legal challenge' in the following terms:

The politically, financially or socially strong can oppress the weak, safe in the knowledge that the courts cannot interfere. This is undesirable not only because oppression is undesirable, but also because if the law is openly flouted without redress in the courts the law is brought into contempt as being a dream without substance.

Lewis (above) also argues that there are some governmental decisions in which all members of the public have an interest: 'Where the decision is one of major national importance affecting the public generally, then any member of the public should be able to challenge it.'

It also seems somewhat unsatisfactory that a pressure group should be denied standing because it is formed *ad hoc* to meet a particular exigency as was the case in *Rose Theatre*. Clearly the pressure group would not have been established before discovery of the site. It was hardly an event to be anticipated! (For an account of *locus standi* by Sir Konrad Schiemann himself, see (1990) PL 342–53.)

In *R v Poole Borough Council ex parte Beebee* (1991), however, Schiemann J found that the Worldwide Fund for Nature (UK) and the British Herpetological Society had sufficient interest to challenge a grant of planning permission over an area of special scientific interest. Although those representing the Worldwide Fund for Nature would not alone have had sufficient *locus standi*, the British Herpetological Society had by reason of its financial input into the site and its connection with the planning permission and a condition attached relating to the protection of species. Schiemann J distinguished his own decision in the *Rose Theatre* case.

The courts have looked to various factors in determining whether a group has standing. In *R v Inspectorate of Pollution ex parte Greenpeace (No 2)* (1994), the Court of Appeal noted as relevant the nature of the applicant, the extent of the applicant's interest in the issues raised and the nature of the relief sought. In *R v Secretary of State for Foreign Affairs ex parte World Development Movement Ltd* (1995), relevant standing factors were said to include vindication of the rule of law, the importance of the issue raised, the absence of any other responsible challenger, the nature of the breach, the role of applicants in tendering advice, guidance and assistance re aid and the applicant's national and international expertise and interest.

6.12.3 Waiver of standing

The question here is whether the parties can agree that the issue of standing will not be argued in an application for judicial review. The answer would appear to be negative. In *ex parte CPAG* (above), the respondent agreed not to dispute the issue of *locus standi* because of the importance of the issue. However, the court concluded that for the parties not to raise the issue of *locus standi* did not confer a jurisdiction on the court which was otherwise absent. Woolf LJ stated:

... the question of *locus standi* goes to jurisdiction of the court ... The parties are not entitled to confer jurisdiction, which the court does not have, on the court by consent ...

6.12.4 Relator actions

In certain circumstances, an absence of standing on the part of an individual or group can be overcome by what is known as a 'relator action'. In his or her capacity as protector of public rights, the Attorney General always has standing *ex officio* (ie flowing from the nature of his or her office) to bring an application for an injunction or a declaration (though in this context the injunction is more commonly sought). Thus, the private law remedies could be used in a public law context even before the reforms of 1977. It is rare that the Attorney General exercises this *ex officio* power. In addition, however, a person or group might persuade the Attorney General in effect to lend the name of the office to

enable the bringing of an application for an injunction. The Attorney General 'stands behind' the real applicants with the application being brought in the Attorney General's name but the real applicants paying the costs. Such an application is called a 'relator action' because it is brought 'at the relation of' the Attorney General. Such applications are identifiable by the use of the words *ex rel* in the case citation.

Consent to a relator action is in the Attorney General's discretion. In *AG ex rel McWhirter v IBA* (1973), Lord Denning MR had suggested that, where the Attorney General 'refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly' then the individual could apply for an injunction despite the otherwise absence of standing. However, in *Gouriet v Union of Post Office Workers* (1978), the House of Lords asserted that the discretion of the Attorney General whether or not to lend his name was unreviewable (though *Gouriet* was concerned with an attempt to use judicial review to enforce the criminal law – an attempt to prevent a trade union boycotting the sending of mail to South Africa as a protest against apartheid).

The Attorney General never lent his name where the proceedings were against a minister or government department.

The relator action is of less importance now with the courts' more liberal attitude towards standing.

A local authority has a power under s 222 of the Local Government Act 1972 to, *inter alia*, institute proceedings where they 'consider it expedient for the promotion or protection of the inhabitants of their area'.

Parliament also on occasions confers power on a particular body to supervise the application of and, where necessary, to enforce legislation; for example the Equal Opportunities Commission and the Commission for Racial Equality established under the Sex Discrimination and Race Relations Acts respectively.

6.13 Discretionary nature of the remedies

Both the public law and the private law remedies are discretionary on the part of the court (with the exception of the prerogative writ of *habeas corpus*; see *R v Governor of Pentonville Prison ex parte Azam* (1974)). The court may require that an applicant exhausts all available statutory remedies before accessing judicial review. A remedy may not be granted when other satisfactory remedies are available, for example, where provided by the statute under which the power is exercised (see further Chapter 7). The court might exercise its discretion to refuse a remedy where it considers there has been undue delay (quite apart from the time limits imposed under the Supreme Court Act 1981). In *R v Monopolies and Mergers Commission ex parte Argyll Group plc* (1986), the court refused relief where reliance had been placed on the decision challenged by third parties. In *R v Secretary of State for Social Services ex parte Association of*

Metropolitan Authorities (1986), a declaration was allowed but *certiorari* refused where the decision challenged had been acted upon and a successful challenge would result in administrative chaos. Webster J stated:

The regulations have been in force for about six months ... If [they] were to be [quashed] all applicants who had been refused benefit would be entitled to make fresh claims and all authorities would be required to consider each such claim.

The court therefore considers the effect on the public of providing a remedy to the applicant, the applicant's conduct as being unreasonable (see *ex parte Fry* (1954)) or unmeritorious (see *Ward v Bradford Corporation* (1971)), and even that the court considers that the penalty was deserved or that the decision-maker would reach the same decision on reconsideration and so there is no point in affording an opportunity to challenge (see *Cinnamond v British Airports Authority* (1980)).

(See further Sir Thomas Bingham, 'Should Public Law Remedies be Discretionary?' (1991) PL 64–75.)

REMEDIES IN ADMINISTRATIVE LAW

A legal right is of little, if any, value if there is no effective remedy. In the field of administrative law remedies can be obtained speedily. Once obtained, remedies are generally effective in protecting from continuing infringements of legal rights. It must be remembered, however, that the judicial power here is one of review only so that a challenged decision cannot be overturned on its merits and a fresh decision substituted. The decision-maker is free to retake the decision providing he or she does so lawfully.

The private law remedies

Injunction

An injunction is normally prohibitory in nature. It prohibits the commission or continuation of an unlawful act, for example one which is *ultra vires* or in breach of natural justice. An injunction may be permanent or temporary. Injunctions are now available against officers and representatives of the Crown (*M v Home Office* (1992)).

Declaration

A declaration stipulates the legal position of the parties. It is not in itself enforceable but, once the legal position has been declared, other remedies may be available to enforce the rights declared.

Damages

Damages are most relevant in the context of the tortious and contractual liability of public authorities.

The public law remedies

The public law remedies are *certiorari*, prohibition, *mandamus* (the prerogative orders) and *habeas corpus* (the surviving prerogative writ). They are granted at the suit of the Crown. Applications are, therefore, brought in the name of the Crown on behalf of the applicant. They cannot be brought against the Crown itself although they do lie against ministers and officials. All, except *habeas corpus*, are discretionary.

Certiorari/prohibition

These are similar in effect and may be dealt with together. The essential difference is one of timing. *Certiorari* quashes a decision already made whilst prohibition prevents the commission of a future act which would be *ultra vires* or in breach of natural justice/fairness.

Mandamus

This compels the performance of a public duty.

Habeas corpus

This writ is available as of right and requires the prisoner to justify the applicant's imprisonment. It is not discretionary.

The introduction of the application for judicial review

In 1976, the Law Commission recommended the introduction of a new procedure to be called 'the application for judicial review'. Under this procedure, an applicant would be able to obtain any of the remedies or a combination as appropriate. The procedure was introduced by the RSC Order 53 in 1977. It was given statutory force by s 31 of the Supreme Court Act 1931.

Rules of the Supreme Court Order 53

Any matter which is an issue of public law *must* be pursued by way of an application for judicial review. The court has a discretion to make a declaration or grant an injunction if 'just and convenient' where an application for judicial review has been made. The court may also award damages where they would have been available as a matter of private law. Where a matter has been commenced by way of an application for judicial review and should have been pursued through private law procedures, the court has the power to order that the proceedings continue as if begun by writ.

Procedure

An application for judicial review is a two-stage procedure:

- **Leave stage**

Application for leave is made *ex parte* and operates as a filter to prevent hopeless applications proceeding. An applicant must show that he or she has an 'arguable' or *prima facie* case (*R v IRC ex parte National Federation of Self-Employed and Small Businesses* (1982)).

- **Merits stage**

The merits stage is an additional hurdle in public law proceedings and has no counterpart in a private law action. This stage requires a full consideration of the merits of the application.

Time limits

Order 53 requires that any application is brought within three months of the grounds arising. Exceptionally, the court may extend this period. The time limit is strict with the aim of providing legal certainty.

Limits on the application for judicial review – the public/private law dichotomy

In *O'Reilly v Mackman* (1983), the House of Lords made clear that, where a matter is one of public law, the Order 53 procedure for judicial review *must* now be used. The use of a private law action would, in such circumstances, amount to an abuse of the process of the court. This principle has not always been strictly applied (eg *Wandsworth Borough Council v Winder* (1985)).

Against whom is the application for judicial review available?

The decision-maker being challenged by way of judicial review must perform a public function. In determining whether a body is performing a public function, both the source and the nature of the power being exercised is examined (*R v Panel on Take-overs and Mergers ex parte Datafin* (1987)). Where the relationship between the applicant and the decision-maker arises in private law (eg contract) the decision-maker will not be subject to the courts' supervisory jurisdiction (*R v Disciplinary Committee of the Jockey Club ex parte The Aga Khan* (1994)).

Standing – *locus standi*

This requirement seeks to ensure that not just anyone can bring an application for judicial review. An applicant must show that he or she has a 'sufficient interest in the matter to which the application relates'. In *R v IRC ex parte National Federation of Self-Employed and Small Businesses* (1982), the House of Lords (Lord Diplock dissenting) determined that one taxpayer did not have standing to challenge the tax affairs of another. Subsequent cases have displayed a more liberal view of standing (eg *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees Mogg* (1994)).

Pressure groups

An application may be made by an association on behalf of its membership (*R v Secretary of State for Social Services ex parte CPAG* (1990)). A group formed after the event, however, will not be allowed standing unless individual members have standing in their own right (*R v Secretary of State for the Environment ex parte Rose Theatre Trust Co* (1990)).

Waiver of standing

Parties to an application cannot agree to waive the requirement of standing.

Relator actions

The absence of standing may be overcome by a 'relator' action. The Attorney General in his or her capacity as protector of public rights always has standing *ex officio*. It is, however, rare for the Attorney General to exercise this power and it is of less significance since the relaxation of the requirement of standing. In addition, an applicant may persuade the Attorney General to lend his or her name to an application.

Discretionary nature of the remedies

In the context of an application for judicial review, the public and private law remedies, with the exception of the writ of *habeas corpus*, are discretionary. As such, a remedy may not be granted, for example, when other satisfactory remedies are available or where the applicant has unduly delayed bringing his or her application.

STATUTORY REMEDIES AND EXCLUSION OF JUDICIAL REVIEW

7.1 Statutory remedies

Parliament itself may provide a complainant with a remedy at the time it invests a body with power by way of legislation. Such a remedy may take the form of an appeal from the decision. Such appeal may be general in nature or restricted to a point of law only. Appeal may lie to, for example, a minister, a tribunal or a court. An appeal, it must be remembered, is to be distinguished from the power of judicial review. On appeal, the merits of the decision may be considered. On review, the courts are, in theory, concerned with only the legality of the decision (eg was the decision reached *intra vires* and in accordance with natural justice) and not with whether the decision is right or wrong on the merits.

When such statutory remedies are provided, Parliament also commonly restricts their availability. So, for example, availability might be restricted to particular persons, often defined as 'persons aggrieved'. The grounds of appeal might be limited. Also the period in which an appeal can be brought might be limited to, for example, within six weeks of the decision being notified. Sometimes Parliament takes the opportunity to attempt to exclude challenge by resort to judicial review either partially or totally.

Parliament has also enacted legislation establishing bodies to receive complaints of maladministration by central government departments or local government in the form of the Parliamentary Commissioner for Administration (under the Parliamentary Commissioner Act 1967) and the Commissions for Local Administration (under the Local Government Act 1974). Commissioners were also established for the National Health Service under the National Health Service Reorganisation Act 1973. Such bodies were modelled upon the so-called 'Ombudsmen' already well-established in a number of jurisdictions, most notably Scandinavia (see Chapter 9).

Parliament also frequently reserves to members of central government (notably ministers) power to control the exercise of power by local government. This often takes the form of 'default' powers which commonly enable the minister to send in persons (commissioners) to take over a particular function of a local authority where he or she considers the authority to have failed in its statutory functions. Such a decision by a minister could, of course, itself be challenged by the authority by reference to judicial review (see, eg, *Asher v Secretary of State for the Environment* (1974), although the challenge by local councillors to the appointment of a Housing Commissioner by the minister here failed).

7.2 Exhaustion of alternative remedies

The prerogative orders of *certiorari*, prohibition and *mandamus* (the public law remedies) and the equitable remedies of injunction and declaration (the private law remedies) are discretionary. The discretionary nature of the remedies allows the court to refuse judicial review where, *inter alia*, it is considered that an alternative remedy is more suitable.

However, in some cases, the issue has been raised whether alternative statutory remedies *must* be exhausted before an application for review can be entertained. On the one hand, it might be argued that where Parliament has provided a particular remedy, that remedy ought to be pursued in the first instance. On the other hand, the nature of the alternative statutory remedy may be quite different from judicial review. In particular, appeal is concerned with the merits, not the legality, of the decision. Its non-exercise should not preclude a challenge based upon the lawfulness of the decision.

Older authorities suggest that some freedom of choice was open to the litigant in selecting his or her remedy. However, the weight of recent authority suggests that, as a normal rule, an applicant should exhaust alternative statutory remedies. It is only exceptionally that such remedies can be by-passed in an application for judicial review.

In *Cooper v Wilson* (1937), a police officer successfully challenged his dismissal by the Watch Committee by way of judicial review even though he had not exercised his statutory right of appeal to the Home Secretary. In *Reg v Governor of Pentonville Prison ex parte Azam* (1974), the applicants challenged their detention as illegal immigrants by way of writs of *habeas corpus* despite the availability of a statutory appeal (which could only be exercised from outside the United Kingdom). The Court of Appeal looked to the suitability of the statutory remedy in deciding whether the decision could be challenged by way of review. Lord Denning stated:

Once the Secretary of State gives directions that a man is to be removed on the ground that he is an illegal entrant, the man is given a right of appeal to an adjudicator on the ground that ... he is not in law an illegal entrant ... He cannot appeal so long as he is in the United Kingdom ... He can only appeal after he has been removed ... Such an appeal would not seem to be a very beneficial remedy if a mistake has been made.

These provisions as to appeal give rise to a question of the first importance. Do they take away a person's right to come to the High Court and seek a writ of *habeas corpus*? I do not think so. If Parliament is to suspend *habeas corpus*, it must do so expressly or by clear implication.

It would appear here that the litigant was to be allowed total freedom of choice in selecting a remedy. It is difficult to envisage any situation where the alleged illegal immigrant would not choose to challenge his or her detention by *habeas corpus* rather than by the statutory procedure which could be activated only

once the appellant had left the United Kingdom. It looks very much here as if the procedure provided by statute is being rendered obsolete.

In *R v Hillingdon Borough Council ex parte Royco Homes* (1974), in a challenge to a condition attached to planning permission, a rather more restrained approach was taken. This was, however, an application for *certiorari* rather than *habeas corpus* and it may be that the courts would be especially reluctant to allow any limitation whatsoever on *habeas corpus* in securing one's release from unlawful detention (and *habeas corpus* is *not* discretionary). In *Royco Homes*, Lord Widgery CJ stated:

... there is power in appropriate cases for the use of the prerogative orders to control the activity of a local planning authority ... I see no general legal inhibition on the use of such orders, although no doubt they must be exercised only in the clearest case and with a good deal of care ...

In particular, it has always been a principle that *certiorari* will go only where there is no other equally effective and convenient remedy ...

... in a very large number of instances it will be found that the statutory system of appeals is more effective and more convenient ...

... An application for *certiorari* ... is speedier and cheaper than the other methods, and in a proper case, therefore, it may well be right to allow it to be used in preference to them. *I would however define a proper case as being one where the decision is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law.*

In *R v Gatwick Airport Immigration Officer ex parte Kharrazi* (1980), Lord Denning MR was less restrictive. He stated:

If there is a convenient remedy by way of appeal ... then *certiorari* may be refused and the applicant left to his remedy by way of appeal. But it has been held on countless occasions that the availability of appeal does not debar the court from quashing an order by prerogative writs ... It depends on the circumstances of the case.

In the instant case, Lord Denning considered the remedy by way of appeal to be 'useless'.

On the other hand, in *R v Chief Constable of Merseyside Police ex parte Calveley* (1986), police officers dismissed from the force after a disciplinary hearing conducted by the Chief Constable exercised their statutory right of appeal and also applied for judicial review on the ground that delay prior to the disciplinary hearing constituted a breach of natural justice. Here, May LJ asserted that the normal rule was that an applicant for judicial review should first exhaust whatever other rights he has by way of appeal and that judicial review should only be granted where there was an abuse of process. He concluded, however, that the delay in the instant case amounted to such an abuse. May LJ cited the House of Lords' decision in *R v IRC ex parte Preston* (1985). There, Lord Templeman had asserted that judicial review should not be granted where an

alternative remedy is available. Lord Scarman had stated that 'a remedy by way of judicial review is not to be made available where an alternative remedy exists. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided ... statutory appeal procedures ... it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision'.

In *R v Hallstrom ex parte Waldron* (1986), Glidewell LJ in the Court of Appeal suggests what exceptional circumstances might be. Whilst it was not possible to formulate a detailed set of circumstances in which judicial review might be granted when an alternative remedy is available, the following should be taken into account:

- whether the alternative statutory remedy will resolve the question at issue fully and directly;
- whether the statutory procedure would be quicker or slower than judicial review;
- whether the matter depends on some particular or technical knowledge which is more readily available to the alternative statutory body.

The remedies available by way of judicial review may themselves be available in combination or in the alternative. Here again the court will have a discretion as to which of the remedies it considers appropriate to the case. For example, in *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities* (1986), a declaration was granted that there had been inadequate consultation with the local authorities before regulations for housing benefit had been formulated. However, Webster J refused *certiorari* on the ground that the principal objection was the lack of consultation rather than the substance of the regulations which had been acted upon and been in force for some time.

7.3 Exclusion of alternative remedies

A further question is whether the availability of a statutory remedy may *exclude completely* the availability of alternative remedies. This argument is different from (and even more restrictive than) the above argument of exhaustion of statutory remedies as a *pre-requisite* to accessing judicial review.

The availability of a statutory right of appeal will not, *per se*, exclude judicial review. However, the applicant may have a choice between alternative remedies both of which have the same objective, for example both of which are concerned with the merits of the decision. In such a case, the argument is certainly stronger that the remedy provided by statute should be exhausted in the first instance. Indeed, it might even be thought that Parliament intended to exclude resort to the other remedies entirely. This will be the case where

Parliament has expressly excluded resort to other remedies (though exclusion of resort to an alternative right of appeal will not be successful to exclude resort to judicial review) or where other remedies are excluded by necessary implication. However, clear language is required and there exists a presumption of statutory interpretation that the subject's right of access to the courts is not to be eroded except by clear language or necessary implication. In *Pyx Granite v Minister of Housing and Local Government* (1960), Lord Simonds stated:

It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is ... a 'fundamental rule' ... It must be asked, then, what is there in the Act ... which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then, an alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and ... the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away.

Again, the court can exercise its discretion (where such exists) and refuse a remedy where it believes that an alternative remedy is more appropriate (see *Stepney Corporation v John Walker & Sons* (1934) *cf R v Paddington Valuation Officer ex parte Peachey Property Co Ltd* (1966)).

On the effect of statutory clauses in excluding judicial review, see below.

In view of the established principle that access to alternative remedies can be excluded only by express words or necessary implication, it is perhaps all the more surprising that, pursuant to the 1977 reforms of remedies in administrative law, the courts themselves developed the so-called 'exclusivity principle' of public law remedies (see *O'Reilly v Mackman* above, pp 168–69), ie that where there is a live issue of public law, the applicant must proceed by way of the application for judicial review and not by action in private law. However, an attempt was made to reassert the established principle in *Wandsworth LBC v Winder* (see above, pp 171–72).

7.4 Exclusion of judicial review

7.4.1 Introduction

The availability of judicial review to control the decisions of the administration may be limited by Parliament. It should be remembered, however, that there is a presumption against ousting the jurisdiction of the courts and this is one area where the presumption is clearly on display. As confirmed by Lord Denning MR in *R v Medical Appeal Tribunal ex parte Gilmore* (1957) 'the remedy by *certiorari* is never to be taken away by any statute except by the most clear and explicit words'. Attempts to limit judicial control may take various forms.

The impact of the provision of a statutory remedy (such as a statutory appeal procedure) on the availability of alternative remedies, including judicial review, has been noted above.

The existence of a discretion itself will limit control since the essence of a discretion is to confer some flexibility on the decision-maker in the exercise of the discretion. A discretion may be phrased objectively or subjectively. For example:

- ‘if the minister has reasonable grounds/cause to believe ...’, as in *Liversidge v Anderson* (1942) – although this objectively phrased power was actually construed as subjective;
- ‘if the minister thinks fit’, as in *Roberts v Hopwood* (1925);
- ‘if the minister in any case so directs’, as in *Padfield v Minister of Agriculture* (1968);
- ‘if in his opinion’, as in *R v Secretary of State for the Environment ex parte Hammersmith and Fulham LBC* (1990).

The exercise of a subjective discretion should, in theory, be more difficult to control. Its very essence is that it refers to an individual’s subjective state of mind, whereas an objective discretion incorporates an element of, for example, reasonableness within the stated limits of the discretion. Both of these may be considered to be *indirect* attempts to exclude judicial review of administrative action.

Parliament, however, is on occasions persuaded to attempt more draconian methods to exclude judicial review in the form of *direct* exclusion clauses. These may simply be blatant attempts to exclude the jurisdiction of the courts by the use of such phrases as ‘the minister’s decision shall be final/conclusive’ or ‘the minister’s decision shall not be called into question in any court of law’. Alternatively, they may take the form of attempts to limit the availability of review by reference to either substance and/or to time, ie the grounds of review may be limited or the time allowed in which to mount a challenge may be limited. Such clauses are variously described as ‘exclusion’, ‘finality’ or ‘ouster’ clauses.

From the viewpoint of the decision-makers, in particular members of central (or local) government influenced in decision-making by policy considerations, the less the potential for judicial intervention the stronger and more trouble-free their positions will be. In support of this position might be argued the cost, in terms of time and money (but also in terms of political reputation), in challenges to decided policy. Further, there may be a need for finality and consistency in such matters. In certain situations, for example the compulsory purchase of land to provide an amenity for the public or a section of it (such as a school or a hospital), the need for finality is clear. It would be somewhat unsatisfactory were such a decision to be challenged successfully once the building

works had progressed. On the other hand, the need for finality should not form a cloak for dishonesty in decision-making and it would generally be unacceptable if a victim were to be left entirely without a remedy of any form. The conflict of needs here is clear. The courts have to draw the balance.

As is so often the case in administrative law, the interplay between the supremacy of Parliament, the separation, or balance, of powers and the rule of law is evident. As stated by Denning LJ in the *Gilmore* case (below): 'If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.'

The executive, through Parliament, may on occasions be seen to be struggling to identify ways in which it can, should it so wish, confer absolute power on the decision-maker. The courts can be seen to be struggling to ensure that this goal remains unachievable in the fight to protect the individual from potential abuse. The emphasis of the courts is well represented by Lord Atkin's statement in *Ras Behari Lal v King-Emperor* (1933) that 'Finality is a good thing but justice is a better'. As stated by Craig (*Administrative Law*, 3rd edn, 1994, Sweet and Maxwell):

Ever since Coke, Holt and Mansfield laid the first foundations for judicial review, the legislature has attempted to prevent those principles from being applied. Various formulae have been inserted into legislation with the intent of precluding judicial intervention. Little success has attended these efforts as the courts have time and again restrictively construed the legislation.

The methods used by Parliament to exclude judicial review of administrative action and the extent to which the courts have been willing to accept their effectiveness will now be reviewed.

7.4.2 Indirect ouster

Numerous examples of subjectively worded and objectively worded statutory discretions and the courts' response to such have been referred to throughout the consideration of judicial review of administrative action. No further consideration is required here.

7.4.3 Direct ouster

A decision shall be final/conclusive

Such a clause will not be effective to exclude judicial review. The courts here have distinguished *appeal* from *review* and found that such a clause applies to the former only.

In *R v Medical Appeal Tribunal ex parte Gilmore* (1957), s 36(3) of the National Insurance (Industrial Injuries) Act 1946 provided that 'any decision of a claim

or question ... shall be final'. An assessment of the tribunal for sight loss was challenged on the basis of error of law on the face of the record. The tribunal had assessed aggravation to sight impairment at 20% whereas industrial injuries regulations required the loss to be assessed at 100% since the applicant had already lost sight in the other eye. The Court of Appeal granted *certiorari* to quash the tribunal's decision. Denning LJ asserted that, whilst sufficient to exclude appeal, the words of the statute did not exclude review. He stated:

... the court never allowed those statutes to be used as a cover for wrongdoing by tribunals. If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end ... Parliament only gives the impress of finality to the decisions of the tribunal on condition that they are reached in accordance with the law.

In *Fullbrook v Berkshire Magistrates' Courts Committee* (1970), s 35 of the Local Government Superannuation Act 1937 provided that any question concerning the rights and liabilities of an employee should be determined initially by the local authority and then, if the employee was dissatisfied, by the minister whose decision would be final. The plaintiff was deprived of his superannuation benefits. When he challenged this decision by applying for a declaration, claiming that he had been denied a hearing, the defendants relied on s 35. They failed. The court found that, while s 35 might well exclude original jurisdiction to grant a declaration, the plaintiff was invoking the supervisory jurisdiction of the courts – the power to declare void action which was *ultra vires*. This jurisdiction was not abrogated by the finality clause.

It appears that such a clause will be effective, therefore, to preclude appeal but not review. It was even suggested by Lord Denning in *Pearlman v Keepers and Governors of Harrow School* (1979) that only an appeal on the facts would be excluded and not an appeal on the law. However, in *Re Racal Communications Ltd* (1981), this restriction was rejected by the House of Lords.

In *Tehrani v Rostron* (1972), the effectiveness of such a clause was curtailed even further. Here, the Court of Appeal held it was not effective to preclude appeal by case stated where the matter *could* have been dealt with by way of judicial review.

... shall not be called into question in any court of law

Such a clause will not serve to protect a decision taken in excess of jurisdiction. The term 'in excess of jurisdiction' requires some explanation here. Prior to the decision of the House of Lords in the *Anisminic* case (below) a distinction was made between errors 'outside' and errors 'within' jurisdiction. Only the former would be subject to challenge. Wade and Forsyth (*Administrative Law*, 7th edn, 1994, Oxford University Press) give the example of the Home Secretary's power to deport an alien. Whether an alien should be deported would be a matter for the Home Secretary. However, it would not be within the minister's

power, as stated, to determine whether a person was an alien. If the minister made an order deporting someone who was not within the legal meaning of 'alien' (a question for the court to determine) he would be acting outside jurisdiction. Errors within jurisdiction could be as to fact or law. Situations, however, were not always so clear cut in determining when an error fell within or outside the decision-maker's jurisdiction. The importance of the distinction is now much diminished. Indeed, it is commonly argued that the decision in *Anisminic* has shattered the distinction with the result that all errors are outside jurisdiction.

In *Anisminic v Foreign Compensation Commission* (1969) itself, the Foreign Compensation Commission was given the task of considering claims made on a fund of some £27.5 million established to compensate those affected by the confiscation of property by the Egyptian government in 1956. *Anisminic Ltd* was one of those so affected. Under the Foreign Compensation (Egypt) (Determination of Claims) Order 1962, a claim could be established if:

- the applicant was the person referred to in the relevant part of Annex E of the order as the owner of property or their successor in title; and
- that person or anyone who became the successor in title of such person before March 1959 were British nationals on 31 October 1956 and 28 February 1959.

The Commission interpreted this to mean that a claimant *and* its successors in title had to be British and so rejected *Anisminic's* claim (as the group to which *Anisminic* had sold its interest was non-British). Section 4(4) of the Foreign Compensation Act (FCA) 1950 provided that: 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.' The Court of Appeal had found unanimously that this provision protected the Commission's decision from judicial supervision.

The House of Lords addressed the following questions:

- whether the nationality of a 'successor in title' was relevant where the claimant was the original owner of property as mentioned in Annex E;
- whether the Commission's error caused them to exceed their jurisdiction or whether it was an error within jurisdiction;
- whether, if the error was made in excess of jurisdiction, it was protected by s 4(4) of the FCA 1950.

The opposing arguments were put by Lord Reid as follows:

The respondent maintains that these were plain words only capable of having one meaning. Here is a determination which is apparently valid: there is nothing on the face of the document to cast any doubt on its validity. If it is a nulli-

ty, that could only be established by raising some kind of proceedings in court. But that would be calling the determination in question, and that is expressly prohibited by the statute. The appellants maintain that that is not the meaning of the words of this provision. They say that 'determination' means a real determination and does not include an apparent or purported determination which, in the eyes of the law, has existence because it is a nullity. Or, putting it another way, if you seek to show that a determination is a nullity you are not questioning the purported determination; you are maintaining that it does not exist as a determination. It is one thing to question a determination which does exist: it is quite another thing to say that there is nothing to be questioned.

The House of Lords allowed the appeal by a 3:2 majority. All their Lordships agreed that s 4(4) would not protect a determination made in excess of jurisdiction. A majority held that the Commission had exceeded its jurisdiction. Its decision was *ultra vires* and so void. Consequently, it was not a 'real determination' at all but a 'purported determination'. As the 'determination' was void and of no effect, it had no existence and there was no 'determination' to which s 4(4) could apply.

Wade says of the *Anisminic* decision that 'it shows clearly the great determination of the courts to uphold their long-standing policy of resisting attempts by Parliament to disarm them by enacting provisions which, if interpreted literally, would confer uncontrollable power upon subordinate tribunals' (*Administrative Law*, 7th edn, 1994, Oxford University Press). On the other hand, however, it might be argued that this decision makes a nonsense of the assertion by the courts that they interpret legislation in such a way as to merely uphold the intentions of Parliament. In *Anisminic*, the House of Lords appeared to have diminished the distinction between errors within and outside jurisdiction to a point where all errors of law were outside jurisdiction. Arguably, the exclusion clause was designed to protect at least some errors of law, otherwise what would be the point of its existence? The House of Lords has rendered such a clause of absolutely no effect.

Parliament did, on this occasion, respond to what it might have legitimately perceived to be a usurpation of the judicial function. In the Foreign Compensation Act 1969, whilst providing for a right of appeal to the Court of Appeal on questions relating to the jurisdiction of the Foreign Compensation Commission, it also provided that 'anything which *purports* to be a determination' shall not be called into question in any court of law.

In *Re Racal Communications* (1981), s 441(3) of the Companies Act 1948 provided that a decision of a High Court judge on an application 'shall not be appealable'. The Court of Appeal held that a decision of the High Court was reviewable if it went to jurisdiction. However, this approach was rejected by the House of Lords on the ground, *inter alia*, that the jurisdiction of the Court of Appeal was itself appellate only and so it *could* not deal with an original application for judicial review (ie the Court of Appeal was itself acting outside jurisdiction!).

In *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* (1981), the applicants sought to have a decision of the Malaysian Industrial Court in favour of the Union quashed on the basis of error of law on the face of the record. Section 29(3) of the Malaysian Industrial Relations Act 1967 provided that 'subject to this Act, an award of the court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any court of law'. Here, the Privy Council held the clause to be effective to exclude review for errors of law within jurisdiction while errors outside jurisdiction were not excluded from review.

No civil proceedings ...

In *Ex parte Waldron* (1986), the Mental Health Act 1983 contained provisions to protect doctors from legal action pursuant to them exercising powers under the Act, including powers of compulsory detention and treatment. Section 139(2) of the 1983 Act provided that 'No civil proceedings shall be brought against any person in any court in respect of any such act without leave of the High Court ...'. This provision was held to exclude civil actions in tort but not, in the absence of express words, access to judicial review. Ackner LJ further justified this construction by reference to the fact that the applicant was challenging the circumstances of her compulsory admission to hospital which was outside the jurisdiction of the statutory appellate body, the mental health review tribunal.

No certiorari

A clause which expressly purports to restrict the specific remedy of *certiorari* has not been allowed by the courts to protect a decision from jurisdictional error.

In *Pearlman v Governors of Harrow School* (1979), the Housing Act 1974 conferred power on the county court to decide whether installation of central heating constituted an 'improvement made by the execution of works amounting to a structural alteration'. Schedule 8 para 2(2) provided that a determination by the court 'shall be final and conclusive' and s 107 of the County Courts Act 1959 provided that 'no judgment of county courts ... shall be removed by appeal, motion, or *certiorari* or otherwise into any other court'.

Lord Denning MR asserted that, even if s 107 did apply (and, in his opinion, it did not), it would only exclude *certiorari* for error of law on the face of the record and not for an error going to jurisdiction.

However, such a clause will operate to protect a decision from challenge on the basis of error within jurisdiction on the face of the record (when it exists) *only* if contained in a statute passed as from August 1958 (but not if contained in a statute passed before that date) under s 12 of the Tribunals and Inquiries Act 1958 (see below).

... as if enacted/conclusive evidence

A technique which has in the past been used to attempt to protect subordinate legislation from review is a provision that the subordinate legislative order 'shall have effect as if enacted' in the parent Act. This is an attempt to give subordinate legislation the effect of primary legislation, ie that it should be treated as if enacted by Parliament and so subject only to interpretation and not review in accordance with the principle of Parliamentary supremacy. It may be accompanied by a provision that the minister's confirmation 'shall be conclusive evidence' that the order has been duly made within the powers of the Act.

In *Ex parte Ringer* (1909) such a provision was held to render an order unchallengeable. Also, in *Institute of Patent Agents v Lockwood* (1894) such a clause was held by the House of Lords to have this intended effect. However, in *Minister of Health ex parte Yaffe* (1931), the House of Lords held that such a clause would protect subordinate legislation only if it did not conflict with the parent Act.

The use of such clauses was severely criticised by the 1932 Committee on Ministers' Powers (Cmnd 4060) and is now unpopular. However, they may still be found in older legislation.

7.4.4 Time limit clauses

Perhaps a more acceptable method of limiting judicial review within certain contexts is by the use of clauses which limit the period of time within which a decision can be challenged. Certain decisions are of such a nature that finality is required. This is particularly so in the context of, for example, compulsory purchase and planning decisions where the consequence of the decision may well be demolition and/or the construction of buildings. The implications of such a decision being subject to challenge once works have progressed in reliance upon it are obvious. Such clauses, however, also often limit review by reference to stated grounds on which review is permissible. This aspect is more questionable. Such clauses raise two issues:

- whether such a decision can be challenged outside the stated time on any grounds whatsoever;
- whether such a decision can be challenged within the stated time on the stated grounds alone and on no other grounds.

In *Smith v East Elloe Rural District Council* (1956), a challenge to a compulsory purchase order out of time on the ground of bad faith was rejected by the House of Lords. The statute allowed challenge within six weeks on the basis either that the order was not within the powers of the Act or that a requirement of the Act had not been complied with. Lords Reid and Somervell concluded that challenges for fraud could be made at any time and were not precluded by the time clause. The majority, however, held that challenge was precluded after the six weeks. The argument that Parliament cannot have intended to protect a

decision made in bad faith did not persuade the House of Lords. The point was made, in particular, that Mrs Smith continued to have a remedy in the tort of deceit against the officials (should such conduct be established) and, therefore, a remedy lay in damages via an alternative route. Lord Morton went even further and asserted that challenge within six weeks could be mounted only for breach of express statutory requirements and not any unlawful action.

(In *Smith v Pyewell* (1959), proceedings were instituted against the clerk to the local authority.)

In *R v Secretary of State for the Environment ex parte Ostler* (1977), a challenge was again made to a compulsory purchase order out of time. The applicant sought to overcome the time limit by arguing that an agreement had been kept from him. Had he known of this agreement, he would have challenged the decision within the time limit. The Court of Appeal nonetheless upheld the time limit and disallowed the application. Lord Denning MR noted in particular the partial nature of the ouster clause (so distinguishing *Anisminic* on the basis that there was there an attempt to oust the jurisdiction of the court completely), the nature of the proceedings (administrative in *Smith* but more judicial in *Anisminic*) and the fact that works had commenced in reliance on the decision. The reasoning of Lord Denning here might not be thought to be entirely convincing. To accept a limited ouster on the basis that it is not a complete ouster is a strange form of reasoning. The nature of the decision – administrative versus judicial – begs the old question of what is a ‘judicial’ decision and reflects a distinction which Lord Reid had tried to lay to rest, at least in the context of natural justice, in *Ridge v Baldwin* (see above, pp 126–27). There is also at least some force in the argument that Parliament, if asked at the time of the passing of the relevant legislation whether it intended to protect a decision made in bad faith, would have denied such an intent. Perhaps an intellectual rationale should simply not be attempted but the pragmatic response accepted.

In *R v Cornwall County Council ex parte Huntington; R v Devon County Council ex parte Isaac* (1994), the councils had modified definitive maps to show a right of way and a by-way respectively over the applicants’ land. Such modifications were subject to confirmation by the minister and that confirmation had to be preceded by an inquiry or a hearing. An order could be challenged within 42 days of the notice of confirmation, subject to which the validity of an order ‘shall not be questioned in any legal proceedings whatsoever’. An attempt by the applicants to challenge the modifications prior to confirmation failed. The clause was successful in precluding challenge at this earlier stage.

7.4.5 Statutory limitations on exclusion of judicial review

In 1958, the Franks Committee (Cmnd 218) recommended the removal of clauses which ousted judicial review. Now, s 12(1) of the Tribunals and Inquiries Act (TIA) 1992 (replacing equivalent provisions in Acts of the same name of 1958 and 1972) provides:

(a) any provision in an Act passed before 1 August 1958 that any order or determination shall not be called into question in any court; or

(b) any provision in such an Act which by similar words excludes any of the powers of the High Court,

shall not have effect so as to prevent the removal of the proceedings into the High Court by order of *certiorari* or to prejudice the powers of the High Court to make orders of *mandamus*.

Under s 12(3) of the TIA 1992, this provision does not apply to orders or determinations made by a court of law or to time clauses (see above).

7.5 Conclusion

The judicial response to exclusion clauses illustrates graphically the contradictions in administrative law – in particular, the courts' insistence on their assertion that the function of statutory interpretation is to fulfil the intentions of Parliament. The intention of Parliament in many of these cases is to curtail to the highest degree the possibility of judicial intervention. However, this cannot, of course, be publicly stated for fear of incurring allegations of conduct in defiance of the rule of law, itself a principle much used by the courts to justify their interventionist stance. It seems that, however large the sledgehammer used by Parliament, the courts will not allow the nut of judicial review to be cracked. As stated by Craig (*Administrative Law*, 3rd edn, 1994, Sweet and Maxwell):

Whether it would be possible to devise an ouster clause which succeeded in excluding review is less a matter of semantics than of judicial attitude and legislative response.

STATUTORY REMEDIES AND EXCLUSION OF JUDICIAL REVIEW

Statutory remedies

Parliament may provide a complainant with a remedy at the time it invests a body with a decision-making power. Such a remedy may take the form of an appeal which may be general or on a point of law only. Such statutory remedies are often restricted by the statute itself by reference to, for example, the persons to whom the remedy is available, the grounds on which the remedy is available or the time within which the remedy can be applied for.

Exhaustion of statutory remedies

As the remedies available by way of an application for judicial review (with the exception of *habeas corpus*) are discretionary, the courts may exercise their discretion to refuse such remedies if other adequate remedies are available.

Recent authority suggests that, as a general rule, an applicant will be required to exhaust statutory remedies available before pursuing an application for judicial review (*R v IRC ex parte Preston* (1985)).

The remedies available by way of judicial review are themselves available in combination or in the alternative.

Exclusion of alternative remedies

The question here is whether the availability of a statutory remedy may exclude *completely* the availability of alternative remedies (not simply that statutory remedies must be exhausted before an application for judicial review is pursued).

The availability of a statutory remedy will not *per se* exclude judicial review and, in order to preclude access to alternative remedies, the language of the statute must be clear. There is a presumption of statutory interpretation against erosion of the citizen's right of access to the courts.

Exclusion of judicial review

Where power is conferred by statute, the statute may attempt to limit or prevent resort to judicial review. This may be attempted indirectly by conferring a discretion on the decision-maker which is drafted in wide terms (either objective or subjective) or directly by the use of exclusion/ouster/finality clauses.

These have taken a variety of forms:

- a decision shall be final/conclusive;
- shall not be called into question in any court of law;
- no civil proceedings;
- no *certiorari*;
- as if enacted/conclusive evidence.

Time limit clauses

A statute may specify the period of time within which a decision may be challenged, particularly so where the context of the decision requires finality, for example compulsory purchase and planning decisions. The courts have accepted that such clauses may well be effective to preclude judicial review once that time limit has expired even where a challenge is based on the ground of bad faith (*Smith v East Elloe RDC* (1956)).

Statutory limitations on exclusion of judicial review

Section 12(1) of the Tribunals and Inquiries Act 1992 provides that an exclusion clause contained in an Act passed before 1 August 1958 shall not have effect to preclude *certiorari* or *mandamus*. Under s 12(3), this provision does not apply, however, to determinations of a court of law or to time clauses.

PUBLIC INTEREST IMMUNITY

8.1 Introduction

In order to establish the liability of a party to an action or, indeed, to establish one's defence to an action, it may be necessary to request relevant documentation from the opposing party. By the same token, the party holding that documentation may well not wish to comply with a request for its release if the contents impact badly upon them. The legal process by which a party to an action might compel the production of documentation or the answering of questions ('interrogatories') is known as 'discovery'. Issues of discovery need to be settled, so far as possible, prior to the trial of the main action and so may form part of pre-trial or 'interlocutory' proceedings (though they may also be raised in the trial itself). This chapter deals with a means by which applications for the discovery of documents may be resisted by the making of a claim of public interest immunity.

At one time, this concept was termed 'Crown privilege' and was a claim exclusive to the Crown. As noted in Chapter 12, the Crown Proceedings Act (CPA) 1947 reviewed the law relating to the liability of the Crown in contract and tort. Section 28(1) of the CPA 1947 provided that, in civil proceedings to which the Crown is a party, the Crown may be required by the court to make discovery of documents and produce documents for inspection and also to answer interrogatories. However, a proviso to s 28 states that this 'shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure ... or answering ... would be injurious to the national interest'. Further, subsection (2) states that 'any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a minister of the Crown, it would be injurious to the public interest to disclose the existence thereof'. Section 28 thus preserves the old concept of 'Crown privilege', now re-styled 'public interest immunity'.

There is a clear conflict here between two aspects of the public interest:

- the public interest in securing the interests of the state ('state' here should not be a synonym for 'government' or 'administration');
- the public interest in ensuring the fair administration of justice.

The conflict of public interests was clearly stated by Lord Reid in *Conway v Rimmer* (1968):

There is the public interest that harm shall not be done to the nation or the public service ... and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

8.2 History

As stated above, at one stage this concept was styled 'Crown privilege'. This was because the claim for non-disclosure of documents had to be entered by the Crown or on its instruction, albeit not necessarily in proceedings to which the Crown was a party. The case which dominated the law relating to Crown privilege from 1942 until 1968 (when the law was subjected to review in *Conway v Rimmer*) was *Duncan v Cammell Laird & Co Ltd* (1942), a decision described by Lord Woolf in *ex parte Wiley* (1994) (below) as reflecting the 'high water mark of judicial acceptance of the immunity of documents from disclosure'.

8.2.1 *Duncan v Cammell Laird & Co* (1942)

In 1939, a submarine, *The Thetis*, which had been built by Cammell Laird under contract with the Admiralty, sank during tests with the loss of 99 lives. In actions for damages in negligence by representatives and dependants of the deceased, the Admiralty directed Cammell Laird not to produce certain documents, including a number of design documents, reports as to the condition of *The Thetis* when raised and also a notebook of a foreman painter. Without such documents, the claims would be doomed to failure.

The claim of Crown privilege was upheld at every stage of the proceedings, not surprisingly as the national defence might be threatened by disclosure of at least some of the documents sought during a time of war. However, the House of Lords went much further than was necessary to justify its decision to uphold the claim. In so doing, it rendered the courts powerless to challenge claims of privilege, whether justified in reality or not, for the next quarter of a century.

The central issues here were:

- on what basis could a claim of Crown privilege be sustained;
- who was to determine whether such a claim was justified.

On what basis could a claim of Crown privilege be sustained?

According to Viscount Simon LC:

The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the

document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

Duncan v Cammell Laird, therefore, established two grounds on which a claim of Crown privilege might be based:

- the *contents* ground, ie that the contents of the particular document(s) for which privilege was claimed demanded that the documents not be disclosed as being injurious to the public interest;
- the *class* ground, ie that the document(s), the contents of which *per se* would not merit a claim of privilege, belonged to a class of documents which must not be disclosed in the public interest.

It was this second ground which was sweeping in its terms and likely to invite abuse by administrations which operated in a culture of secrecy.

Who should determine whether a claim of Crown privilege was justified?

According to Viscount Simon LC:

The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, eg departmental minutes, to which they belong.

The rationale for this was that a government department knew ‘the exigencies of the public service ... as they cannot be known to the court’.

Duncan v Cammell Laird so established that a claim of privilege entered by a minister in the proper form on the grounds of public interest was conclusive and not open to challenge by the courts. The proper form required the decision to be taken by the minister or, if not convenient or practicable, the permanent head, and that he or she should have personally examined the documents. The claim should ordinarily be entered by affidavit or certificate. Subject to the required form, it was the minister’s exclusive right to determine where the public interest lay, regardless of whether the claim of privilege was based on contents or class.

The danger of such trust being vested in a government officer was clear – that the public (state) interest would become synonymous with the government’s interest. The following words of counsel for the appellants in *Duncan v Cammell Laird* were prophetic:

The wide diversity in nature of the documents ... is such that clearly injustice would be done if there were a universal rule that the opinion of an officer of state was final.

And so it turned out. As stated by Wade and Forsyth (*Administrative Law*, 7th edn, 1994, Oxford University Press): 'It is not surprising that the Crown, having been given a blank cheque, yielded to the temptation to overdraw.' Indeed, it did so to such an extent that the government itself made concessions in 1956 following expressions of judicial unease in *Ellis v Home Office* (1953) and *Broome v Broome* (1955). In a statement by the then Lord Chancellor, Viscount Kilmuir, it was announced that privilege would not be claimed in respect of, *inter alia*:

- witness reports of accidents on the road or on government premises;
- medical reports of civilian employees;
- where the Crown was being sued for negligence;
- papers needed for defence against a criminal charge (see below);
- witnesses' statements to the police.

Further concessions were made in 1962 and 64. (See 197 HL Deb 741 (6 June 1956); 237 HL Deb 1191 (8 March 1962); 261 HL Deb 423 (12 November 1964)).

8.2.2 Judicial criticism

Judicial criticism of the operation of the doctrine flowed in a series of cases.

In *Glasgow Corporation v Central Land Board* (1956), privilege was claimed on the class ground for minutes of meetings and documents passing between the Land Board and district valuers concerning the methods by which charges for land development were calculated. Privilege was entered on the basis that the documents 'belong to a class which it is necessary for the proper functioning of the public service to withhold ...'. The case was, in fact, a Scottish case and in Scots law the court had a discretion to override the Crown's objection to production. On the facts, the House of Lords refused to do so. But Lord Radcliffe took the opportunity to comment:

The phrase 'necessary for the proper functioning of the public service' is a familiar one and I have a misgiving that it may become all too familiar in the future. If it is to become accepted doctrine that this very general phrase covers everything, however commonplace, that has passed between one civil servant and another behind the departmental screen on the special ground that the possibility of its disclosure ... would impair the freedom and candour of official reports or minutes, I do not think it will be a matter of surprise if some future judge in Scotland finds himself obliged to disregard the Crown's objection.

In *Re Grosvenor Hotel (No 2)* (1965), privilege was claimed for correspondence between the British Transport Commission and the Ministry of Transport on the basis that the documents concerned 'the framing of policy of HM Government'. The Court of Appeal denied the conclusive nature of a ministerial objection even if made in proper form, Lord Denning MR questioning the

observations of Viscount Simon in *Duncan* as resting on an 'insecure foundation'. If the court was of the opinion that a ministerial objection was not taken in good faith or that there were no reasonable grounds for thinking that production of the documents would be injurious to the public interest, the court would override the objection and order disclosure. The exercise of this power would be rare but the court had the ultimate power as 'it is the judges who are the guardians of justice in this land'. However, this exceptional power was not exercised.

In *Wednesbury Corporation v Minister of Housing and Local Government* (1965), privilege was claimed on the class ground on the basis of the proper functioning of the public service. The applicants were seeking to establish the terms of reference of inspectors appointed to conduct a local inquiry into objections to a recommendation that five local authorities be incorporated within county boroughs. Again, the Court of Appeal was not prepared to overrule the claim of privilege on the basis that justice did not require it to do so. Harman LJ commented:

It is not unnatural that (the Crown's) servants fight trench by trench to preserve the citadel of immunity which the years have built up for them.

He and the other members of the court, however, approved the statements in *Grosvenor*, of which court he had also been a member.

Judicial intervention and reform eventually came with the landmark decision of the House of Lords in *Conway v Rimmer* (1968).

8.2.3 *Conway v Rimmer* (1968)

A probationary police constable was prosecuted for the theft of a torch, acquitted but dismissed from the force. He brought an action in tort for malicious prosecution against his former superintendent. On an application for discovery of reports made on him by his superiors, the Home Secretary claimed privilege, in proper form, on the class basis. The House of Lords, whilst accepting that privilege could be based on contents or class, overruled *dicta* of Viscount Simon in *Duncan* and asserted a residual power to call for the production of documents for which privilege was claimed on the class basis in order to assess the public interest claim. If it then found that the claim of privilege could not be justified in the public interest, disclosure should be ordered. After inspection of the reports on the probationary police constable, the court ordered that the documents be disclosed.

The term 'Crown privilege' was itself abandoned with the decision of the House of Lords in *R v Leves Justices ex parte Home Secretary* (1973) so emphasising that a claim for non-disclosure was not to be perceived as a Crown prerogative to be exercised in the 'state' interest, but as a necessary safeguard to be exercised in the public interest. It so became 'public interest immunity'.

8.3 The modern application of public interest immunity

The issues to be addressed in a consideration of the modern application of public interest immunity include:

- For what types of document might immunity be claimed on the class ground?
- Who can make a claim for immunity?
- Who determines the public interest?
- Can a claim of immunity be made in the context of a criminal trial?
- Does a minister have a power or is he or she under a duty to claim immunity?
- Can immunity be waived?

The final issue (can immunity be waived) was the central issue in the *Matrix Churchill* case (the arms to Iraq affair) and considered by Sir Richard Scott in his report (below).

8.3.1 For what types of document can immunity be claimed on the class ground?

Even in *Duncan v Cammell Laird*, the House of Lords attempted to restrict the types of document for which privilege might be claimed on the class ground – though the difficulty remained that the decision in *Duncan* did not permit the court to look behind the words of the claim. Viscount Simon LC stated:

It is not a sufficient ground that the documents are 'state documents' or 'official' or are marked 'confidential'. It would not be a good ground that, if they were produced, the consequences might involve the department or government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister ... does not want to have the documents produced. The minister ... ought not to take the responsibility of withholding production except in cases where the public interest would be damnified ...

The public interest in disclosure/non disclosure was therefore, in theory, to be determinative. The public interest would justify a claim of privilege on the class ground:

- (a) where disclosure would be injurious to national defence;

- (b) where disclosure would be injurious to good diplomatic relations;
- (c) where the practice of keeping a class of documents secret was necessary for the proper functioning of the public service.

It was ground (c) that was to become particularly abused and subject to criticism. Privilege came to be routinely claimed for records of discussions within and between government departments on the basis that to allow disclosure would be a threat to candour within the public service.

In *Conway v Rimmer* (1968), Lord Reid concluded that no definition of what classes of documents would justify a public interest immunity claim was possible but a minister would not make a class claim unless of the opinion that disclosure of documents, by virtue of their class nature, would damage the public interest. Once again, the public interest became determinative. In Lord Reid's opinion, fear of candour on the part of civil servants was not a justification for a class claim. However, the fact that documents related to the making of high level policy did justify a claim and there were 'certain classes of documents which ought not to be disclosed whatever their content may be' – for example, Cabinet minutes (until such time as they were of historical interest: see *Attorney General v Johnathan Cape Ltd* (1976)) and '... all documents concerned with policy-making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies'.

The test to be applied was '... whether the withholding of a document because it belongs to a particular class is really necessary for the proper functioning of the public service'.

In *R v Lewes Justices ex parte Home Secretary* (1973), Lord Salmon went so far as to state that, in cases such as Cabinet minutes, dealings between heads of government departments, despatches from ambassadors and police sources of information, the law had long recognised immunity – to such an extent that 'the affidavit or certificate of a minister is hardly necessary'.

On the other hand, in *Air Canada v Secretary of State for Trade* (1983), although the House of Lords refused to order the production of documents for inspection, Lord Fraser commented:

I do not think that even Cabinet minutes are completely immune from disclosure in a case where, for example, the issue in a litigation involves serious misconduct by a Cabinet minister.

In *Burmah Oil v Bank of England* (1980), the House of Lords expressed differing views even on non disclosure to maintain candour in the public service.

In 1975, Burmah Oil made an agreement with the Bank of England, which itself had acted under the direction of the government, to save itself from the full effects of an international oil crisis. Burmah Oil now argued that the sale to the Bank of 78 million stock units as part of that agreement was unconscionable. The Chief Secretary to the Treasury entered an objection on the class

ground, in proper form, to the production of documents as (a) relating to the formulation of government policy by ministers and senior officials or (b) being commercial or financial information communicated in confidence by major businesses. The House of Lords demanded production of the documents for their inspection but then refused disclosure on the basis that this was not necessary to ensure fairness. A majority of the House of Lords doubted the justification of a claim of immunity on the basis of maintaining candour in the public service. Lord Wilberforce in his dissenting judgment stated:

It seems now rather fashionable to decry this (the need for candour in communication between those concerned with policy-making), but ... it has ... received an excessive dose of cold water. I am certainly not prepared – against the view of the minister – to discount the need, in the formation of such very controversial policy ... for frank and uninhibited advice from the bank to the government, from and between civil servants and between ministers ... To remove protection ... could well deter frank and full expression in similar cases in the future.

Another such ground is to protect from inspection by possible critics the inner working of government while forming important government policy. I do not believe that ... it is for the courts to assume the role of advocates for open government.

However, the more representative view was that expressed by Lord Keith:

The notion that any competent or conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so.

There can be discerned in modern times a trend towards more open governmental methods than were prevalent in the past. No doubt it is for Parliament and not for courts of law to say how far that trend should go. The courts are, however, concerned with the consideration that it is in the public interest that justice should be done and should be publicly recognised as having been done. This may demand, though no doubt only in a very limited number of cases, that the inner workings of government should be exposed to public gaze, and there may be some who would regard this as likely to lead, not to captious or ill-informed criticism, but to criticism calculated to improve the nature of that working as affecting the individual citizen.

A majority of the House of Lords, Lord Wilberforce dissenting, demanded production of the documents for inspection but concluded that disclosure was not necessary for the fair disposal of the case.

In *Williams v Home Office* (1981), in a challenge by a prisoner to his detention in a 'control unit', the Home Office claimed immunity for documents as being communications to and from ministers and records of meetings with ministers and/or officials, all being related to the formulation of policy on the control units.

McNeill J considered the *Burmah Oil* case and, whilst not absolutely denying that public interest immunity could be based on candour in the public service, he chose to 'put it on one side' and decide the claim on the ground that the documents related to the formulation of government policy.

Confidentiality

Another class of documents which has attracted frequent claims of immunity is that which contains information received in confidence and, in particular, which might reveal the name of an informant. This has been raised already in the context of the need for candour in the public service. In *Burmah Oil*, discussions had been held 'in confidence' with companies and businessmen. Informers are frequently used by law enforcement agencies – not only the police but also, for example, the Customs and Excise Commissioners and the Inland Revenue Commissioners. Bodies such as the NSPCC also rely on information given in confidence. Such bodies have powers and duties conferred and imposed upon them by statute. The danger here, if confidence were to be removed, would be that such sources of vital information would dry up and the statutory purpose would be frustrated. On the other hand, for instance, many of these bodies have the power to institute criminal proceedings and to withhold documents in a subsequent criminal trial may adversely affect the effective conduct of the defence.

In *Norwich Pharmacal v Customs and Excise Commissioners* (1974), the House of Lords ordered the disclosure by the Commissioners of the names and addresses of importers who were infringing the patent of a chemical compound. Persons in possession of information about a legal wrong in which they, albeit innocently, had become involved, were under a duty to disclose it unless the public interest demanded otherwise. In the circumstances, the duty to make it available overrode the danger that disclosure would lead to importers using false names and so hamper customs administration.

Norwich Pharmacal was followed in *British Steel Corp v Granada Television Ltd* (1981), where the House of Lords ordered disclosure of the identity of an employee of British Steel Corporation (BSC) who had sent Granada TV copies of secret and confidential documents obtained during the course of employment. Granada had used some of the documents, which showed possible mismanagement within BSC, in a televised programme on the steel strike of 1980. Granada had argued that the public interest in the dissemination of information about the strike and BSC's management of its affairs warranted protection of the identity of the 'mole'. However, the court concluded that the public interest in identifying a wrongdoer and affording justice to Granada prevailed. Lord Wilberforce supported the proposition that:

... the media of information, and journalists who write or contribute for them, have no immunity based on public interest which protects them from the

obligation to disclose in a court of law their sources of information, when such disclosure is necessary in the interests of justice.

In *Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* (1974), the appellants challenged the Inland Revenue's assessment to purchase tax on machines made and sold by them. In the course of an investigation, the Commissioners obtained information from customers and other sources. Immunity was claimed for information given both voluntarily and under the exercise of statutory powers. The House of Lords rejected confidentiality as a separate head of immunity in its own right, ie the fact that information was given in confidence would not automatically attract immunity on the class basis. Lord Cross stated:

'Confidentiality' is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest.

However, Lord Cross concluded that the public interest in the efficient working of the Purchase Tax Act 1963 justified immunity. The other members of the House of Lords agreed.

The fact that an Act imposes a duty upon a public body and that disclosure would affect the efficient operation of the Act often emerged as a major influence on the courts in refusing disclosure.

In *D v NSPCC* (1978), an inspector, relying on information received from an informant, called at the home of the parents of a 14 month old girl. In subsequent proceedings by the mother, the Society claimed immunity for documents which revealed the name of an informant on the ground that it was necessary to secure its sources of information. Master Jacob ordered disclosure; his order was reversed by Croom-Johnson J; his order was reversed by the Court of Appeal; the Court of Appeal's order was itself reversed by the House of Lords and disclosure finally denied! The House of Lords concluded that, as with police informers, the public interest protected those who gave information about child neglect to local authorities or the NSPCC, bodies entrusted by statute to safeguard the interests of children.

Lord Hailsham asserted that:

The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop.

In *Gaskin v Liverpool City Council* (1980), the Court of Appeal refused to order inspection of documents relating to the plaintiff who had been in local authority care. The solicitors for the plaintiff, who claimed he had suffered psychological injuries while in care, 'ought not to be allowed to roam through the whole of this young man's file to see if in some way or another they can find a case to support his claim for damages for negligence'.

In *R v Cheltenham Justices ex parte Secretary of State for Trade* (1977), Lord Widgery CJ was prepared, if necessary, to hold that copies of witness statements made to DTI inspectors under statute were protected by immunity in subsequent criminal proceedings. However, the issue was decided on evidential grounds.

On the other hand, in *Campbell v Tameside MBC* (1982), a teacher was assaulted by a pupil. The education authority claimed privilege on the ground of confidentiality for reports on the boy from teachers, psychologists and psychiatrists. In assessing the public interest, the Court of Appeal, after inspecting the documents, concluded that they were of 'considerable significance' and ordered disclosure.

In *Buckley v Law Society (No 2)* (1984), Sir Robert Megarry VC refused to request documents for inspection on the basis that the public interest required the protection of the identity of informants. The Society had, however, disclosed the substance of the documents.

In the context of police investigations, the courts displayed a particular willingness to protect the identity of police informants so as not to endanger the effective investigation of crime. Further, information received in confidence during the course of a police investigation into a complaint of police misconduct formerly under the Police Act 1964 and now the Police and Criminal Evidence Act 1984, came to attract immunity as a matter of course on the class basis.

Police complaints

The confidentiality principle also arises in the context of investigations into complaints on the conduct of the police and whether information received during the course of such investigations should be disclosed in subsequent civil proceedings, usually initiated by the complainant. The decision of the Court of Appeal in *Neilson v Laugharne* (1981) determined that such documents were of a class subject to public interest immunity (though now note the House of Lords' decision in *ex parte Wiley* (1994) below).

***Neilson v Laugharne* (1981)**

In *Neilson v Laugharne* (1981), while the plaintiff was on holiday, the police searched his house for drugs under the authority of a warrant. No drugs were found but the police noticed that the electricity supply had been tampered with. On his return, the plaintiff reported to the police that his house had been burgled and property stolen. The next day, he went with officers to the police station where he was arrested. He was questioned on the abstraction of electricity and the alleged theft. He was not charged. He made a complaint which was investigated under s 49 of the Police Act (PA) 1964 but no action was taken. In his subsequent civil action, a claim for immunity for statements (except that of the plaintiff himself) made during the police investigation of the complaint

was upheld by the Court of Appeal on the ground that disclosure would impede the police in fulfilling their statutory duty of investigating complaints.

Lord Denning MR displayed a particular antagonism towards the applicant whom he considered 'lucky to have got away with it so easily' and who 'should not be allowed to delve through these statements so as to make out a case ...' in his civil action:

Legal aid is being used by complaining persons to harass folk who have only been doing their duty. The complainants make all sorts of allegations – often quite unjustified – and then use the legal machinery to try to manufacture a case. We should come down firmly against such tactics. We should refuse to order production.

Oliver LJ, whilst effectively disagreeing with Lord Denning's approach ('The possibility of groundless claims cannot ... be the touchstone for determining whether relevant documents shall be produced') nevertheless agreed that the claim for immunity be upheld on the ground that '... the true test [is] whether the production of these documents is likely to impede the carrying out of the public statutory purpose for which they are brought into existence'.

The decision in *Neilson* conferred automatic immunity on documents obtained during the course of a statutory police investigation. As a consequence, the solicitor to the Metropolitan Police changed his previous advice that statements made in the course of investigations undertaken pursuant to s 49 of the PA 1964 should be disclosed.

Neilson was applied in *Hehir v MPC* (1982), where the Court of Appeal denied the use of a statement – made by the applicant in the course of a police investigation into a complaint made by him – to show inconsistencies with his evidence in subsequent civil proceedings. It was extended in *Halford v Sharples* (1992), where the applicant alleged that she had been discriminated against in promotion within the police force. The Court of Appeal (Ralph Gibson LJ dissenting) found that immunity on the class basis attached to all documents created in the course of an internal police inquiry whether conducted under statute or as part of internal police procedures.

Neilson was, however, distinguished by the Court of Appeal in *Peach v MPC* (1986) where, after police intervention to control a demonstration, the plaintiff's son had died. During the police investigation into the death, a complaint was made that a police officer had hit the deceased over the head with a truncheon. The police conducted an inquiry under s 49 of the PA 1964. Again, in subsequent legal proceedings against the police, immunity was claimed for documents prepared in the course of the inquiry. The court, in ordering disclosure, concluded that the main purpose of the inquiry under s 49 was the investigation of a violent death and not an inquiry into the conduct of the police.

However, this area is now regulated by the House of Lords' decision in *ex parte Wiley* (see below), which overruled the decision of the Court of Appeal in *Neilson*.

8.3.2 Who can make a claim for immunity?

At one time, only the Crown could enter a claim of Crown privilege, as that very title would suggest. The Crown could do so whether or not it was a party to an action and this remains the case. As the concept of public interest immunity has developed, however, so it has become apparent that a claim for immunity is not the exclusive preserve of the Crown, as illustrated by many of the cases considered above. Immunity may be claimed by any of the parties to the litigation. Indeed, as the rationale for immunity is the protection of the public interest, it has been suggested that, in the absence of a claim being made by the Crown or a party to the action, the court is still under a duty to consider whether documents should be withheld. In *Conway v Rimmer* Lord Reid stated '... it is the duty of the court to do this without the intervention of any minister if possible serious injury to the national interest is readily apparent' and, in *R v Lewes Justices ex parte Home Secretary* (1973), he confirmed this view:

A minister of the Crown is always an appropriate, and often the most appropriate, person to assert this public interest, and the evidence or advice which he gives the court is always valuable and may sometimes be indispensable. But ... it must always be open to any person interested to raise the question and there may be cases where the trial judge should raise the question if no one else has done so.

However, the House of Lords in *Ex parte Wiley* (below) asserted that it was the normal function of the courts only to adjudicate on claims of immunity and not to declare immunity on its own initiative.

8.3.3 Who determines the public interest?

In the first instance, the duty to weigh up the balance of the public interest is that of the minister. However, since *Conway v Rimmer*, the court has been the final arbiter of the public interest, at least where immunity is claimed on the class basis. Lord Reid stated:

... in considering what is 'proper' for a court to do we must have regard to the need, shown by 25 years' experience since *Duncan's* case, that the courts should balance the public interest in the proper administration of justice against the public interest in withholding any evidence which the minister considers ought to be withheld.

In practice, it is still the case that the minister remains the final arbiter where immunity is claimed on the contents basis although, in theory, *Conway v Rimmer* left the door ajar for judicial intervention even here. Lord Reid stated:

It does not appear that any serious difficulties have arisen or are likely to arise ... However wide the power of the court may be held to be, cases would be very rare in which it could be proper to question the view of the responsible minis-

ter that it would be contrary to the public interest to make public the contents of a particular document.

Judicial attitudes to intervention on a class basis may also vary according to the ground on which the class claim is based. In *Air Canada v Secretary of State for Trade* (1983), where the claim of immunity was based on the formulation of government policy, the House of Lords said inspection should not be ordered unless the judge was satisfied that the documents contained material which would give substantial support on a relevant issue and which was necessary to fairly dispose of the case.

8.3.4 Can a claim of immunity be made in the context of criminal proceedings?

In its origins, it was certainly not clear that Crown privilege could be claimed in the criminal sphere. In *Duncan v Cammell Laird*, Viscount Simon raised such application and stated:

The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same.

In the 1956 Statement (see above, p 214) by Lord Kilmuir LC, it was provided:

We also propose that if medical documents, or indeed other documents, are relevant to the defence in criminal proceedings, Crown privilege should not be claimed.

In *Conway v Rimmer*, Lord Reid and Lord Pearce both pointed to a conclusion that Crown privilege did not apply in criminal cases.

The 1981 Attorney General's Guidelines provided that:

... all unused [which was said to include all witness statements and documents which are not included in the committal bundles served on the defence] material should normally be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case.

The Guidelines did, however, provide for a discretion not to disclose, *inter alia*, where the statement 'is, to a greater or lesser extent, "sensitive" and for this reason it is not in the public interest to disclose it ...'. A balance was to be struck between the degree of sensitivity and the extent to which the information might assist the defence. Any doubt should be resolved in favour of disclosure. The Guidelines only applied, however, to material in the possession or under the control of the prosecution, not those held by other government departments.

In *R v Agar* (1990), at the appellant's trial for possession of drugs with intent to supply, the defence was that he had been entrapped by the police acting with

X and the drugs planted by the police. His counsel was informed that X was an informer and the judge ruled that no questions could be put in cross-examination which might elicit this. The appellant appealed on his conviction.

The Court of Appeal held that the public interest in ensuring a fair trial outweighed that in protecting the identity of an informer if disclosure was necessary to enable the defendant to put forward a tenable defence. The conviction was quashed.

However, in *R v Governor of Brixton Prison ex parte Osman* (1991), the applicant, who was held in custody pending his surrender to Hong Kong as a fugitive offender, applied for *habeas corpus*. A claim of immunity entered by the Foreign Office for documents which the applicant claimed would evidence bad faith on the part of the government of Hong Kong was upheld.

Mann LJ addressed the question of whether public interest immunity was claimable in criminal proceedings, having concluded that the *habeas corpus* application did amount to criminal proceedings on the test propounded by Lord Simon in *Amand v Home Secretary and Minister of Defence of Royal Netherlands Government* (1943), ie the matter was one 'the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so ...'.

Mann LJ asserted that there was 'no discernible reason why the immunity should not apply in criminal proceedings'.

As noted by Sir Richard Scott in his report on arms to Iraq, however, although an application for *habeas corpus* may be considered to be 'criminal proceedings', such an application certainly does not amount to a criminal trial – though continued deprivation of liberty will result should the application not succeed.

The conflict between the interests of the state and the interests of the individual is particularly stark in the context of claims for immunity in criminal trials. Whereas in a civil action, immunity may lead to injustice and financial loss, in a criminal trial immunity can, at the very least, lead to an inability on the part of the defence to formulate the most effective case. At the worst, it might result in the acquittal of the guilty or, more likely, the conviction of the innocent. This potential was starkly illustrated in the *Matrix Churchill* case.

Matrix Churchill

In 1992, three directors of Matrix Churchill were prosecuted by Customs and Excise for deception in obtaining licences for the export of machine tools (which were capable of a military use) to Iraq in breach of government Export Control Orders. They argued in their defence that the government knew about, and authorised, the company's dealings with Iraq. Government ministers (Tristan Garel-Jones for the Foreign Secretary, Douglas Hurd, Malcolm Rifkind, the Defence Secretary, Michael Heseltine, the President of the Board of Trade,

and Kenneth Clarke, the Home Secretary) signed public interest immunity certificates to prevent the disclosure of information. The certificate signed by Garel-Jones (which became the model for that signed by Rifkind and a second certificate signed by Clarke) identified that the documents fell into three categories:

- those which identified a confidential informant;
- minutes, notes and letters between ministers and officials relating to the formulation of policy, in particular with regard to relations with, and the export of military and quasi military equipment to, foreign countries;
- material relating to secret intelligence.

The trial judge quashed some of these and the trial eventually collapsed after Alan Clark, a former minister, confirmed that the government had known of the exports as claimed.

The *Matrix Churchill* saga raised serious questions as to whether and, if so, when public interest immunity should be raised in the context of criminal trials and was the subject of a subsequent inquiry and report by Sir Richard Scott, the Vice Chancellor ('Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions', 15 February 1996 (below)).

Approaches in the context of criminal trials

If it is established that public interest immunity does apply in the context of criminal proceedings, there appear to be three avenues of approach towards its application:

- (a) that public interest immunity applies in respect of criminal trials in the same way as in civil trials, ie the same balance is to be sought in determining the public interest;
- (b) that, although a claim of immunity may be made in respect of a criminal trial and the balancing exercise undertaken, the assessment of the public interest would be different from that in a civil trial, ie in balancing the competing public interest arguments, the public interest in securing a fair trial for the accused would hold greater sway as the consequences of conviction would be greater than the consequences in a civil case. In particular, a criminal conviction could lead to loss of liberty;
- (c) that a claim of immunity could never be sustained in respect of a criminal trial (unless the documents, upon examination by the court, were irrelevant to the defence) because the defence must never be precluded from obtaining documents necessary to formulate the most effective defence possible.

The cases suggest that, in the context of criminal trials, *if the documents for which privilege is claimed are relevant and material to the defence* then the balance shifts significantly – if not decisively – in favour of disclosure. In *R v Agar* (above), as noted, the court demanded disclosure in the context of a criminal trial even where this would disclose the existence of an informer.

In *Ex parte Osman* (above), Mann LJ stated:

Where the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed.

At another point in his judgment, Mann LJ was even less equivocal when he stated that public interest immunity ‘cannot prevail if the evidence is necessary for the prevention of a miscarriage of justice. No balance is called for’.

In *R v Clowes* (1992), the defendants were charged with theft and fraud following the collapse of Barlow Clowes companies owing investors £115 million. The defendants, with the support of the prosecution, procured a witness summons requiring the liquidators of the companies to produce transcripts of statements given to them in confidence. The liquidators claimed that the documents were protected by immunity. Phillips J, having determined that the transcripts were material, applied *Ex parte Osman* and engaged in the balancing exercise, which again he found favoured disclosure:

Those giving information to liquidators inevitably accept some risk of dissemination of that information and the competing interests will ... have a relatively limited effect on ... the wells of voluntary information. Turning to the interests of [the defendants] the most significant factor is the gravity of the offences with which they are charged ... it is of particular importance that no unnecessary impediment is put in the way of their ... defence ...

Sir Richard Scott states in his report on the arms to Iraq affair:

In civil cases, the weight of the public interest factors against disclosure may justify a refusal to order disclosure notwithstanding that without disclosure an otherwise sound civil action might fail. But, for the purposes of criminal trials, the balance must always come down in favour of disclosure if there is any real possibility that the withholding of the document may cause or contribute to a miscarriage of justice. The public interest factors underlying the public interest immunity claim cannot ever have a weight sufficient to outweigh that possibility ... a document which might assist a defendant in a criminal trial cannot be withheld on the ground of some greater public interest ... there is no real balance to be struck. The only issue for decision is whether the document might be of assistance to the defence’ (para K16.12).

... in criminal cases, the only question is [or at least should be] whether the documents sought to be withheld might be of assistance to the defendant in defending himself. If they are, they must be disclosed ...

This is not a 'balancing exercise'. The issue does not depend on the weight of the public interest immunity factors that are being invoked' (para G18.79).

The difference between options (b) and (c) is fine. One difference which might be suggested is that the approach of option (c), the premise of which is that the ability to prepare a full defence prevails over all, must, presumably, apply whether the claim for immunity is based upon the class or contents ground.

However, one can envisage circumstances where the public interest in non disclosure of documents on the contents ground must prevail even over the interests of a defendant in a criminal trial. Indeed, there would seem to be support for this proposition also by Sir Richard Scott in his report (at para K6.16) where he states:

Class documents which have no content on which a public interest immunity contents claim could be based and whose relevance makes them *prima facie* disclosable should ... all be disclosed. My main reason for this conclusion is the difficulty of selection of documents of which it can confidently be said that they can be of no assistance to the defence and the risk of a miscarriage of justice if an error in that selection is made. *This difficulty may need to be faced in respect of documents whose contents might if disclosed cause damage to public interests.*

Archbold's *Criminal Practice and Procedure*, 1995, asserts that:

... the public interest in the administration of criminal justice will always outweigh the public interest in protecting the source of police information where the withholding of such information will, or is likely to, lead to a miscarriage of justice.

Sir Richard Scott notes that, in a criminal case, the Crown can always respond to an order for disclosure by discontinuing the prosecution and so rendering disclosure unnecessary.

8.3.5 Does a minister have a power or is he or she under a duty to claim immunity?

In the *Matrix Churchill* case, the Attorney General, Sir Nicholas Lyell, advised the ministers who signed the public interest immunity certificates that they were under a duty to do so. It was his view that if a claim had been previously made on a relevant class basis then the minister no longer had a discretion whether or not to claim immunity. In a letter to Michael Heseltine of 7 September 1992, he stated:

Once a minister accepts that documents fall within a class which should normally be immune from production ... as a matter of public interest, it is the duty of that minister to make the public interest immunity claim ...

The authority which the Attorney General enlisted to justify his understanding of the imposition of a duty was *Makanjuola v Metropolitan Police Commissioner* (1992).

Makanjuola v Metropolitan Police Commissioner (1992)

The plaintiff complained of an assault by a police officer. The complaint was investigated under s 49 of the PA 1964 and proceedings taken before police disciplinary tribunals. In a civil action by the plaintiff, the MPC claimed public interest immunity for, *inter alia*, witness statements taken during the s 49 investigation and transcripts of evidence given at the disciplinary hearings. The Court of Appeal upheld the claim for immunity. Indeed, even the statements of witnesses who would have been prepared to have released them were declared immune from production. Public interest immunity imposed a duty; it did not simply confer a right to claim.

Bingham LJ stated:

Where a litigant asserts that documents are immune from production or disclosure on public interest grounds he is not (if the claim is well-founded) claiming a right but observing a duty ... This does not mean that in any case where a party holds a document in a class *prima facie* immune he is bound to persist in an assertion of immunity even where it is held that, on any weighing of the public interest, in withholding the document against the public interest in disclosure for the purpose of furthering the administration of justice, there is a clear balance in favour of the latter. But it does ... mean: (a) that public interest immunity cannot ... be waived ... one cannot waive duties; (b) that, where a litigant holds documents in a class *prima facie* immune, he should (save perhaps in a very exceptional case) assert that the documents are immune ... since the ultimate judge of where the balance of public interest lies is ... the court ...

Sir Richard Scott in his report disagreed with Sir Nicholas Lyell's interpretation of Bingham LJ's judgment in *Makanjuola* so strongly as to conclude that the advice given did not have 'any sound legal foundation' (para G18.65). He asserted that:

... Lord Justice Bingham was speaking in the context of statements whose disclosure would, in the view of the Police Commissioner who was asserting the public interest immunity claim, have been damaging to the public interest. Nothing in [his] judgment suggests that there is any duty to assert public interest immunity in circumstances where the disclosure to the defendant would not in the view of the Commissioner or minister ... be damaging to the public interest. The existence of the duty to which Lord Justice Bingham was referring cannot be divorced from the view as to the public interest formed by the party whose responsibility it is to protect the public interest. If a minister does not believe that disclosure ... would be damaging to the public interest, how can it possibly be said that he is under a duty to claim public interest immunity for the documents? To decline to claim public interest immunity ... where the minister does not believe that disclosure ... would be damaging to the public interest is not a waiver of duty. Nothing in *Makanjuola* suggests the contrary. There is nothing to waive (para G18.52).

The proposition that a minister who did not think that the public interest required the documents to be withheld ... let alone a minister who thought that the public interest required the disclosure ... was nonetheless obliged to make a claim for public interest immunity ... has no place in the principles of public interest immunity/Crown privilege as enunciated by Viscount Simon [in *Duncan v Cammell Laird*] (para G18.58).

On the extent of a minister's duty in signing public interest immunity certificates, Sir Richard Scott stated:

It is plain that a minister ought not to sign a certificate unless satisfied that the production of the documents or the giving of the information in question would cause significant damage to the public interest ... But, while the 'degree' of public interest in the administration of justice that may argue for the production of the document or the giving of the evidence is a matter for a judge to assess and not for the minister, it does not follow ... that a minister should shut his or her eyes to the fact that there exists a public interest in the production of the document or the giving of the evidence in order to further ... a just result ... (para G10.11)

8.3.6 Can immunity be waived?

The issue here is whether immunity might be waived by:

- the potential claimant for immunity; or
- the person who actually made the statement for which immunity is claimed.

It would seem that immunity cannot be waived where disclosure would, on balance, be prejudicial to the public interest. However, to the extent that prejudice is based on maintaining confidentiality, that confidentiality may be released by the giver of the information. In such cases, once confidentiality is released, the balance of the public interest may no longer be in favour of non-disclosure.

In *Crompton* (above), Lord Cross said of the information givers: '... if any of them is in fact willing to give evidence, privilege in respect of any documents or information obtained from him will be waived.'

Similarly, Lord Denning MR stated in *Campbell* (above):

I know that in the days of the old Crown privilege it was often said that it could not be waived. That is still correct when the documents are in the vital category spoken of by Lord Reid in *Conway v Rimmer* ... This category includes all those documents which must be kept top secret because the disclosure of them would be injurious to national defence or to diplomatic relations or the detection of crime (as are the names of informers). But not where the documents come within Lord Reid's lower category. This category includes those documents which are kept confidential in order that subordinates should be frank

and candid in their reports, or for any other good reason. In those cases the privilege can be waived by the maker and recipient of the confidential document.

However, Lord Donaldson MR in *Makanjuola* (above) attempted to counter this argument as follows:

... I think that the purpose for which public interest immunity applies to witness statements made for the purpose of a s 49 investigation would be frustrated if the makers were liable to be exposed to pressure to consent to disclosure and ... I do not regard consent as displacing that immunity.

8.4 Post *Matrix Churchill*

After the *Matrix Churchill* saga but before the publication of the Scott Report, the House of Lords took the opportunity to review the law relating to public interest immunity in *R v Chief Constable of the West Midlands Police ex parte Wiley*; *R v Chief Constable of the Nottinghamshire Constabulary ex parte Sunderland* (1994). This case again involved information obtained as a result of a police complaints investigation and the use of such documents in subsequent civil proceedings. Indeed, Lord Woolf wished to 'emphasise ... that we are here concerned with public interest immunity in relation to civil proceedings'. The cases and principles referred to above must now be read subject to this decision.

8.4.1 *Ex parte Wiley* (1994)

The applicants had each been acquitted at trials for separate offences when the prosecution offered no evidence. Each complained to the Police Complaints Authority under Part IX of the Police and Criminal Evidence Act 1984. The applicants considered it unfair that they would not be able to use documents arising from the investigations into their complaints in subsequent civil proceedings brought by them. They, therefore, requested the chief constables to give an undertaking that they (the chief constables) would not use or rely on information from those documents. The chief constables refused. The applicants sought judicial review of those decisions. The chief constables asserted that, although public interest immunity prevented them from using information obtained in the course of an investigation into a complaint to assert a positive case or as the basis of cross-examination or a pleading, there was no other restriction. The Court of Appeal held that public interest immunity extended to the use as well as the disclosure of documents which had come into existence as a result of a complaints investigation. Such documents could be used only for the investigation of a crime or disciplinary proceedings and not in civil proceedings.

The House of Lords allowed an appeal by the chief constables, concluding that, where a claim of immunity was well-founded, such immunity extended

only to prevent disclosure of the documents or their contents; it did not prevent the use of knowledge obtained from the documents. However, this result was premised on the House of Lords' finding that documents which came into existence as the result of a police investigation were not entitled to immunity from disclosure.

The House of Lords undertook a general review of the law of public interest immunity, in particular in the context of documents obtained pursuant to a police investigation of a complaint. In so doing, the House of Lords declared the following principles:

- (1) Public interest immunity lies to prevent disclosure of a document which is relevant and material to the determination of issues in civil or criminal proceedings.
- (2) If a document is not relevant and material, it need not be disclosed and public interest immunity will not arise. In case of doubt as to relevance and materiality, the directions of the court can be obtained before trial (Lord Templeman).
- (3) A claim to public interest immunity can only be justified if the public interest in preserving confidentiality outweighs the public interest in securing justice (Lord Templeman).
- (4) The final responsibility for deciding when both a contents and a class claim to immunity should be upheld was that of the courts.
- (5) Documents obtained pursuant to a police investigation of a complaint do *not* attract immunity on the class basis. *Neilson* (1981), *Hehir* (1982) and *Makanjuola* (1992) were overruled. Such documents *might* now attract immunity but only where the public interest so requires. Lord Templeman stated:

... when a document is known to be relevant and material, the holder of the document should voluntarily disclose it unless he is satisfied that disclosure will cause substantial harm ... A rubber stamp approach to public interest immunity by the holder of a document is neither necessary nor appropriate.

- (6) In determining whether immunity was appropriate in a given case of documents obtained pursuant to a police investigation of a complaint, regard might be had to the statutory purpose of the relevant legislation but this was not to be determinative unless Parliament had made this explicit. Lord Woolf stated:

I do not see any objection in having regard to the statutory purpose of the legislation as long as care is exercised not to attach too much importance to this. If the legislation does not provide expressly for immunity for documents created in order to achieve the statutory purpose, the courts should be slow to assume this was required by Parliament.

- (7) Immunity should not be claimed as a matter of course for documents on the contents basis. Such documents should be disclosed where appropriate, ie unless the holder is satisfied that disclosure will cause substantial harm. Lord Woolf stated:

As far as contents of documents are concerned, I cannot conceive that their Lordships in *Conway v Rimmer* would have anticipated that their decision could be used, except in the most exceptional circumstances, so that a department of state was prevented by the courts from disclosing documents which it considered it was appropriate to disclose.

If the purpose of the immunity is to obtain the co-operation of an individual in the giving of a statement, I find it difficult to see how that purpose will be undermined if the maker of the statement consents to it being disclosed.

The recognition of a new class based immunity requires clear and compelling evidence that it is necessary. Yet, as the present case has demonstrated, the existence of this class tends to defeat the very object it was designed to achieve. The respondents ... only launched their proceedings for judicial review to avoid the existence of a situation where their position would be prejudiced as a result of their being given access to material to which the police had access. Their non co-operation was brought about because of the existence of the immunity ... no sufficient case has ever been made out to justify the class of public interest immunity recognised in *Neilson*.

- (8) The administrative burden which would be imposed upon the police (or other authority) of scrutinising documents to see whether a contents claim for immunity could be justified was not sufficient to establish a class basis for immunity.
- (9) It was doubted whether it would be possible to justify a class claim as opposed to contents in respect of some reports, but the door was not closed to the development of new class claims.
- (10) Where government departments are in possession of relevant documents, it was not, except in the most exceptional circumstances, for the courts to impose immunity where no immunity was claimed by the appropriate authority. However, where documents in respect of which public interest immunity could be claimed on a class basis were held by parties other than government departments, the court may have to intervene to protect the public interest and prevent disclosure.
- (11) Public interest immunity cannot be waived once it has been determined that disclosure would not be in the public interest. However, if the purpose of the immunity is to obtain the co-operation of an individual to the giving of a statement, the maker of the statement could consent to it being disclosed.

8.4.2 Criminal trials

In *R v Keane* (1994), an appeal against conviction was dismissed on the ground that the public interest favoured non-disclosure and the material withheld would have been of no assistance to the defence. However, Lord Taylor CJ referred to Lord Esher's *dictum* in *Marks v Beyfus* (1890), where he said that when 'one public policy is in conflict with another public policy ... that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail'. Lord Taylor concluded:

If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.

However, Lord Taylor preferred to speak in terms of balancing the public interest rather than accepting the inevitability of disclosure. On statements by Lord Esher MR in *Marks v Beyfus* and Mann LJ in *Osman* which might suggest that, where the evidence was necessary to prevent a miscarriage of justice, no balance was called for – the evidence *must* be disclosed – Lord Taylor commented:

We prefer to say that the outcome ... results from performing the balancing exercise not from dispensing with it.

In *R v Brown (Winston)* (1994), Steyn LJ endorsed these comments of Lord Taylor.

8.4.3 Sir Richard Scott's recommendations on public interest immunity in criminal cases (para K6.18)

- Documents not within the criteria of relevance established by *R v Keane* (1994) and *R v Brown (Winston)* (1994) need not be disclosed.
- Public interest immunity claims on a class basis should not in future be made. Public interest immunity contents claims should not be made in respect of documents which it is apparent are documents which might be of assistance to the defence.
- Before making a public interest immunity claim on a contents basis, consideration should be given to the use of redactions. The claim can then be confined to the redacted parts of the documents.
- Public interest immunity claims on a contents basis should not be made unless in the opinion of the minister, or person putting forward the claim, '... disclosure will cause substantial harm' (*per* Lord Templeman in *ex parte Wiley*).
- A public interest immunity claim should not be made if the responsible minister forms the opinion that, notwithstanding the sensitivity of the

documents, the public interest requires that the documents should be disclosed.

- Ministers should be given adequate time to reflect on public interest factors when asked to sign a public interest immunity certificate.
- If a disclosure issue in respect of documents the subject of a public interest immunity claim is referred to the judge, the judge should, unless the parties agree on the point, rule first whether the documents are within the criteria of materiality so as to be disclosable.
- If, within the criteria of relevance established by *R v Keane* and *R v Brown (Winston)*, the judge should be asked to decide whether the documents might be of assistance to the defence, it ought not to be withheld from the defence on public interest immunity grounds. The weight of public interest factors is immaterial.
- The defendant should specify the line(s) of defence which it is contended give the document its materiality.
- In the case of documents which, although relevant and *prima facie* disclosable, do not appear to be documents that might assist the defence, the judge may conclude that, in view of the public interest factors, the documents need not be disclosed.

In December 1996, the Attorney General, Sir Nicholas Lyell, made a statement to the House of Commons outlining the government's new approach to public interest immunity. This approach would reflect the principle of 'maximum disclosure consistent with protecting essential public interests'. Immunity would be claimed only when it was believed that disclosure would cause 'real damage or harm to the public interest' (to be equated with Lord Templeman's 'substantial' harm in *Wiley*). The former division into class and contents claims would no longer be applied, although class reasoning might still be applied in some claims. Although it was not possible to describe such damage exhaustively, it might relate, for example, to the safety of an individual, such as an informant, or to a regulatory process; or it may be damage to international relations caused by the disclosure of confidential diplomatic communications. Public interest immunity certificates would in future set out in greater detail the damage likely to be caused by disclosure (unless this itself would cause damage).

8.5 Conclusion

Crown privilege originated as a means whereby the Crown (ie government) could prevent the disclosure of documents in the public interest. A claim for non-disclosure might be based on the contents of the particular document(s)

for which privilege was sought or on the basis that the document(s) belonged to a class which should not be disclosed. The public interest was to be determined by the government and, if made in proper form, ie by a minister or permanent secretary by affidavit or certificate, a claim for immunity would be conclusive. Executive abuse eventually led to judicial intervention with the courts asserting a residual right to examine documents for which privilege was claimed to assess whether the claim could be sustained in the public interest.

The concept of Crown privilege has now become part of a much broader principle of disclosure/non-disclosure in the public interest. As the public interest is the determining factor, the claim for immunity is no longer exclusive to the Crown. In assessing the public interest, a balance has to be drawn – the public interest in non disclosure versus the public interest in the fair administration of justice. In drawing such balance, a variety of factors are to be taken into account. In criminal trials, a significant, if not conclusive, factor is the ability of the defence to secure justice for the accused.

PUBLIC INTEREST IMMUNITY

A claim of public interest immunity serves to prevent the disclosure of documents or the answering of interrogatories. It can, therefore, prejudice the ability of the other side to pursue a cause of action. At one time, such a claim was available only to the Crown and was commonly referred to as Crown privilege. This restriction no longer exists.

On what basis could a claim of Crown privilege be sustained?

In *Duncan v Cammell Laird* (1942), the House of Lords established two grounds on which a claim could be based:

- contents;
- class.

Who determined whether a claim of Crown privilege was justified?

Duncan v Cammell Laird established that a claim of Crown privilege made in proper form on the grounds of public interest was conclusive and not open to challenge. This, however, was open to executive abuse and became subject to judicial criticism. Judicial intervention and reform eventually came with the landmark decision of the House of Lords in *Conway v Rimmer* (1968).

The modern application of public interest immunity

The issues to be addressed in considering this include:

For what types of document can immunity be claimed on the class ground?

According to *Duncan v Cammell Laird*, the public interest would justify a claim of privilege on the class ground where:

- disclosure would be injurious to national defence;
- disclosure would be injurious to good diplomatic relations;

- non-disclosure was necessary for the proper functioning of the public service.

In *Conway*, Lord Reid concluded that no definition of what classes of documents would justify a public interest immunity claim was possible. Public interest was, therefore, the determinative issue.

Information received in confidence and, in particular, that which might reveal the name of an informant, has been the subject of claims for immunity. Confidentiality also arises in the context of investigations into complaints on the conduct of the police. The Court of Appeal has determined that such documents are a class subject to public interest immunity (*Neilson v Laugharne* (1981)). This area is, however, now regulated by the House of Lords' decision in *R v Chief Constable of the West Midlands Police ex parte Wiley* (1994) (below).

Who can make a claim for immunity?

At one time, only the Crown could enter a claim of Crown privilege and this was regardless of whether the Crown was in fact a party to the action. As the concept of public interest immunity has developed, however, it is no longer the exclusive preserve of the Crown. Immunity can be claimed by any of the parties to an action.

Who determines the public interest?

In *Conway v Rimmer* (1968), the House of Lords (overruling *Duncan v Cammell Laird* (1942) on this point) established that the court is the final arbiter of a claim for public interest immunity. However, this power was to be residual and it would be most unlikely that the court would intervene where a claim was made on the *contents* ground.

Can a claim of immunity be made in the context of criminal proceedings?

In its origins, it was unclear whether Crown privilege could be claimed in the context of a criminal trial. The consequences of allowing such claims would be severe. It might be that an accused would be hindered in preparing a defence. More recently, cases have suggested that a claim of public interest immunity is permissible in such a context, for example *R v Governor of Brixton Prison ex parte Osman* (1991). The conflict of interests was manifested in the *Matrix Churchill* case.

Does a minister have a power or is he or she under a duty to claim immunity?

A further issue raised in the *Matrix Churchill* case was whether a minister could be under a *duty* to sign a public interest immunity certificate. The Attorney General, relying on *Makanjuola v MPC* (1992), was of the view that such a duty existed. Sir Richard Scott, however, in his subsequent report into the 'Arms to Iraq' affair disagreed. In *ex parte Wiley*, the House of Lords undertook a general review of the law of public interest immunity. It concluded that such a claim does lie in civil *or* criminal proceedings. A claim can be justified only if the public interest in preserving confidentiality outweighed that in securing justice. Further, documents obtained in a police investigation of a complaint would not attract immunity on the class ground. They may attract immunity only where the public interest demanded so. Subsequently, in *R v Keane* (1994), Lord Taylor CJ concluded that if the material for which immunity was being claimed might prove the defendant's innocence or avoid a miscarriage of justice then the balance was resoundingly in favour of disclosure.

Can immunity be waived?

The issue here is whether immunity can be waived by either the potential claimant for immunity or by the person who actually made the statement for which immunity is claimed. Immunity cannot be waived where disclosure would be prejudicial to the public interest. Where that prejudice is, however, based on maintaining confidentiality that confidentiality can be released by the giver of the information.

EXTRA-JUDICIAL AVENUES OF REDRESS

9.1 Introduction

We have dealt so far predominantly with access to the courts to challenge governmental action. Access to a judicial remedy is, however, formal, expensive and often slow. It may also be inappropriate as being something of a sledgehammer to crack a nut. Often, instances of governmental bad practice do not have earth shattering consequences. However, the consequences will be of significance to the individual(s) affected who may wish to seek a remedy short of a full blown application for judicial review. It may also be the case that an instance of bad practice is not actually illegal *per se*. It is merely bad administration. Of course, the person(s) affected may have a political avenue which might be followed – in particular, a complaint to his or her MP or even to the minister responsible for the department complained against. Such remedies are, however, somewhat indirect. They are also most unlikely to lead to anything other than an apology and, possibly, a change of practice for the future.

Further remedies have, therefore, been introduced to supplement, and provide for the deficiencies of, the judicial and political controls over the administration. The most important of these supplements are the Parliamentary Commissioner for Administration (commonly referred to as the Parliamentary Ombudsman) and the system of tribunals and inquiries. More recently still, the Citizen's Charter has required the setting of standards for public services and the provision of complaints procedures for dissatisfied customers. The judicial, political and other avenues of redress are not mutually exclusive – although the Parliamentary Commissioner cannot investigate where the complainant has a right of appeal, reference or review before a court or tribunal unless he is satisfied that it is not reasonable to expect the complainant to resort to these remedies (see, for example, *R v Commissioner for Local Administration ex parte Croydon LBC* (1989)). In *Congreve v Home Office* (1976), for example, Mr Congreve was not only successful in his application before the courts. His complaint was also upheld by the Parliamentary Commissioner.

9.2 The Parliamentary Commissioner for Administration

9.2.1 Background

The Parliamentary Commissioner for Administration ('Parliamentary Commissioner') was established by the Parliamentary Commissioner Act

(PCA) 1967. This followed the publication of a report in 1961 by Justice ('The Citizen and the Administration: the Redress of Grievances: the Whyatt Report') which itself drew upon the experience of ombudsmen which were well-established in other jurisdictions, most notably the Scandinavian. The introduction of the Parliamentary Commissioner was delayed by fears that the introduction of such an office would adversely affect the MP/constituent relationship and impact upon the constitutional convention of individual ministerial responsibility to Parliament. However, the Labour Party committed itself to consider the introduction of the office in its manifesto prior to the 1964 general election.

The Parliamentary Commissioner is appointed by the Crown and holds office during good behaviour until the age of 65. He or she (all Parliamentary Commissioners to date have been male) may be removed from office on an address from both Houses of Parliament or if incapable for medical reasons (s 1 of the PCA 1967). The early Parliamentary Commissioners were drawn from the ranks of the civil service. It has been suggested that such appointees had the advantage of knowing how government departments work and would not be met with suspicion from departments under investigation. On the other hand, it might be suggested that such appointees might not view established procedures with an objectively critical eye. More recent appointments have been drawn from the ranks of lawyers.

The remit of the Parliamentary Commissioner is stated in s 5 of the PCA 1967 as being to investigate complaints of *injustice* in consequence of *maladministration* by central government departments (or other authorities to which the Act applies) in the exercise of the administrative functions of the department (or authority). This remit is phrased in the PCA 1967 as a conferment of power on the Parliamentary Commissioner ('the Commissioner *may* investigate ...') rather than a duty. Since the introduction of the Parliamentary Commissioner, a host of such offices have been created, including the Health Service Commissioner (established by the National Health Service Reorganisation Act 1973), the Commissioners for Local Administration (established by the Local Government Act 1974) and the Prison Ombudsman (established pursuant to a recommendation of Lord Woolf in his report into the riots at Strangeways Prison in 1990). The Maastricht Treaty also provided for the establishment of a European Parliamentary Ombudsman. There is a separate Parliamentary Commissioner for Northern Ireland (Parliamentary Commissioner (Northern Ireland) Act 1969). The creation of ombudsmen has also become very popular as a means of self-regulation in the private sector with ombudsmen operating, *inter alia*, in the fields of insurance, banking, pensions and legal services. (The Legal Services Ombudsman was established as recently as 1990 by the Courts and Legal Services Act.)

9.2.2 Terms of reference

Under s 5 of the PCA 1967, the Parliamentary Commissioner is given power to investigate complaints of ‘*injustice* sustained in consequence of *maladministration*’ in consequence of action taken in the exercise of the administrative functions of a government department or other authority to whom the Act applies. Section 12(3) specifically provides that the Parliamentary Commissioner cannot investigate the *merits* of a decision taken without maladministration.

Neither ‘injustice’ nor ‘maladministration’ is defined in the PCA 1967. ‘Injustice’ has been said to cover ‘not merely injury redressible in a court of law’, but also ‘the sense of outrage aroused by unfair or incompetent administration, even where the complainant has suffered no actual loss’ (de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th edn, 1995, Sweet and Maxwell). ‘Maladministration’ is clearly a broader concept than illegality. A decision may be taken within the legal parameters of the decision-maker, in terms of both substance and procedure, but nevertheless be tainted by maladministration. ‘Maladministration’, it would seem, is concerned with the procedure rather than the merits of decision-making. In *R v Commissioner for Local Administration ex parte Eastleigh Borough Council* (1988) Lord Donaldson stated that:

... administration and maladministration ... is concerned with the *manner* in which decisions ... are reached and the *manner* in which they are or are not implemented. Administration and maladministration have nothing to do with the nature, quality or reasonableness of the decision itself.

Parker LJ quoted from the judgment of Eveleigh LJ in *Ex parte Bradford Metropolitan City Council* (below) where he had said that:

If the commissioner carries out his investigation and in the course of it comes personally to the conclusion that a decision was wrongly taken, but is unable to point to any maladministration other than the decision itself, he is prevented ... from questioning the decision.

In the debates on the Parliamentary Commissioner Bill, Richard Crossman defined maladministration as ‘bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on’. The Crossman catalogue is commonly cited by academics and was drawn upon by the Court of Appeal in its consideration of the meaning of maladministration in *R v Local Commissioner for Administration for the North and East Area of England ex parte Bradford Metropolitan City Council* (1979). Having there cited the Crossman catalogue, Lord Denning MR went on to say that the meaning of ‘maladministration’ was ‘clearly open-ended, covering the *manner* in which a decision is reached or discretion is exercised; but excluding the *merits* of the decision itself or the discretion itself’. He continued:

In other words, if there is no maladministration, the ombudsman may not question any decision taken ... He must not go into the merits of it or intimate any view as to whether it was right or wrong ... He can inquire whether there was maladministration or not. If he finds none, he must go no further.

In his Annual Report for 1993, the Parliamentary Commissioner included within maladministration a 'failure to mitigate the effects of strict adherence to the letter of the law where that produces manifestly inequitable treatment'. In practice, and in response to exhortations from the Parliamentary Select Committee on the Parliamentary Commissioner, the Commissioner has interpreted the word in broad terms to encompass situations where the quality of the decision is such as to clearly suggest that the procedure must have been bad. As far back as 1967/68 the Select Committee had suggested that the Commissioner should be prepared, where a decision appeared to be 'thoroughly bad in quality', to infer 'from the quality of the decision itself that there had been an element of maladministration in the taking of it'.

The departments and other authorities subject to the Parliamentary Commissioner's jurisdiction are listed in Schedule 2 of the PCA 1967. The Parliamentary and Health Service Commissioners Act 1987 brought a number of quangos within the Parliamentary Commissioner's jurisdiction also. Well over 100 departments and authorities are now listed ranging from the Foreign and Commonwealth Office and the Treasury to the Red Deer Commission and Plastics Processing Industry Training Board.

Schedule 3 of the PCA 1967 identifies matters which are not subject to investigation. Many of these exceptions are rooted in foreign affairs (for example, action certified by a minister as affecting relations between the UK and another government or international organisation; action taken outside the UK), other matters regarded as being within the domain of the executive (for example, extradition and the surrender of fugitives; action taken in the investigation of crime or for the security of the state, exercise of the prerogative of mercy), government contractual or commercial transactions, employment or service under the Crown, and the grant of honours. The most criticised of these exclusions has, in fact, been that of government contractual and commercial transactions, despite governments' claim that to subject such transactions to investigation would place it at a disadvantage with the private sector. This is hardly a compelling argument for not opening up government transactions to investigation where there has been a complaint of maladministration – in particular where the complaint relates to maladministration in the conferment of government contracts where there is considerable scope for abuse of power. Schedule 3 also excluded the commencement or conduct of civil or criminal proceedings before any court of law in the United Kingdom. This had precluded the Commissioner from investigating the actions of court staff exercising the administrative functions of the court. Section 110 of the Courts and Legal Services Act 1990 and s 1 of the Parliamentary Commissioner Act 1994, however, made insertions to Schedule 3 of the PCA 1967 which made it clear that

protection was to be conferred only where the action by the member of staff of a court (or tribunal) was taken at the discretion or on the authority of a person acting in a judicial capacity or in his or her capacity as a member of the tribunal. With the introduction of the government's policy on open government (see Cmnd 2290, 1993) in 1994, the Parliamentary Commissioner was also given jurisdiction to interpret the Code of Practice on Access to Government Information in disputed cases and to receive and investigate complaints of unjustified non-disclosure.

9.2.3 Procedure

A complainant (who, under s 6(1) of the PCA 1967, can be an individual or group of persons) cannot approach the Parliamentary Commissioner directly. In the first instance, he or she must direct a written complaint to an MP (though not necessarily his or her own MP). Nor, in fact, can an MP complain to the Parliamentary Commissioner without having first received a complaint from an individual or group. This 'filter' is an unusual characteristic of the British ombudsman. Such a feature is not to be found in ombudsmen in other jurisdictions. Nor is it any longer a feature of other ombudsmen in the United Kingdom, though it used to be the case that a complaint to one of the Commissions for Local Administration had to be preceded by a complaint to a local councillor. (However, if the councillor then declined to refer the complaint, the complainant could go direct to the Commission.) The rationale for the restriction was, in theory, to maintain the relationship between the constituent and his or her MP and to recognise the concept of individual ministerial responsibility, ie the *political* avenues of control. The PCA 1967 was rather sensitive to recognise that the complaint may be resolved through political channels without the need to resort to the Parliamentary Commissioner. It was also considered that there may be a danger of the Parliamentary Commissioner being flooded with complaints without such a filter operating. This filter system was to be reviewed after five years of operation. It still operates.

The filter restriction has a significant impact on the operation of the Parliamentary Commissioner. A member of the public may not want to complain via his or her own MP, who may be of a different political reflection and/or perceived as unsympathetic to the complainant/complaint. As noted above, a complainant is not restricted to his or her own MP. However, this assumes a knowledge on the part of the complainant of the names of MPs who may be sympathetic to the complainant/complaint. The need for a complaint to be referred also restricts the ability of the Parliamentary Commissioner to mount investigations on his own initiative whereas such investigations are a significant part of the work of ombudsmen in other jurisdictions. Once a specific complaint has been received, however, the Parliamentary Commissioner has on occasion made general recommendations to improve the workings of a department/authority.

It is difficult to assess the impact of the filter on the number of complaints received by the Parliamentary Commissioner. The question of how many individuals or groups would be prepared to complain direct but not via an MP is unanswerable. Some indication may, however, be taken from the experience of the Commission for Local Administration (the local government ombudsmen). Before 1988, a similar filter system operated there also with members of the public having to complain in the first instance to a local councillor (although the complainant could send his or her complaint direct to the Commission for Local Administration (CLE) if the councillor refused). In 1988, this restriction was relaxed and applications direct to the Commission allowed. This led (so it seems) to an increase of applications to the Commission for England of some 44% for 1988/89 and a further increase of 24% for 1989/90. It is certainly the case that complaints referred to the Parliamentary Commissioner comprise a very small proportion of all complaints made to MPs (which have been estimated at some 250,000–300,000 per annum). It is also the case that ombudsmen in some other jurisdictions without the filter receive substantially more complaints. Moreover, direct access is allowed to the National Health Service Commissioner. However, the absence of a filter is not the necessary – nor even, it is suggested, a likely – explanation for the low number of complaints referred to the Parliamentary Commissioner. It may be that the role of the ombudsman in other jurisdictions is much better publicised and known amongst the general population. It may be that in Great Britain alternative remedies are more effective and so resort to the Parliamentary Commissioner is unnecessary (though it is suggested that this explanation is less likely).

The rigours of the filter system have been mitigated to some small extent by the practice of the Parliamentary Commissioner referring complaints received directly from a member of the public to the complainant's MP, so affording the opportunity to the MP to refer back for investigation. So long as the filter is retained, however, the effectiveness of the Parliamentary Commissioner will be very much in the hands of MPs and their willingness to refer complaints on. This clearly assumes a knowledge on the part of MPs of the role and powers of the Parliamentary Commissioner. The number of MPs making referrals has steadily increased from 359 in 1988 to 460 in 1992 (though in 1993 the number decreased to 429). However, in the First Report from the Select Committee on the Parliamentary Commissioner (1993/94), it was noted that 45% of MPs reported that they seldom or never referred complaints to the Parliamentary Commissioner. On the other hand, to remove the filter would undoubtedly lead to the Commissioner's Office spending considerably more time determining whether applications are within the Parliamentary Commissioner's jurisdiction and rejecting those which are found not to be so. A compromise solution may be to insist that the complainant refer his or her complaint in the first instance to an MP and, if dissatisfied with the outcome, then to allow direct access to the Commissioner.

A complaint must be made within 12 months of when the complainant had notice of the matter which is the subject of the complaint (s 6(3) of the PCA 1967). The Commissioner may accept a complaint outside this limitation period if he considers that there are special circumstances. If the Commissioner proposes to conduct an investigation then, under s 7(1) of the PCA 1967, he must give an opportunity to comment upon any allegations in the complaint to the principal officer of the department or authority concerned or to any other person who is alleged in the complaint to have taken or authorised the action complained of. Investigations are to be conducted in private; the Commissioner may obtain information from such persons and conduct such inquiries as he thinks fit; the Commissioner decides whether to allow legal representation. (All these provisions are contained in s 7(2) of the PCA 1967). Under s 8 of the PCA 1967, the Commissioner has the power to demand information and/or the production of documents from the department or authority concerned and to demand the attendance of and to examine witnesses. Information cannot be denied to the Commissioner on the basis of official secrecy, although the Commissioner cannot demand Cabinet papers. The Crown cannot claim public interest immunity (see Chapter 8) to prevent the production of documents or the giving of evidence in an investigation.

The Commissioner's powers on a finding of maladministration are limited. He cannot make an order for compensation (though he can recommend a payment which a department may choose to make *ex gratia*) and he cannot quash a decision or substitute a fresh decision. His powers are very much dependant on a reporting system. He is required to send a report on a complaint (or his reason for declining to investigate) to the referring MP. Where an investigation is conducted, the Commissioner must also send his report to the department or authority concerned and to any person alleged to have taken or authorised the complaint. If the Commissioner finds injustice as a consequence of maladministration and that injustice has not been or will not be remedied, he may lay a special report before Parliament. Such a report has proved necessary, however, on a few occasions only. He is required to lay an annual report before Parliament and may from time to time lay such other reports as he thinks fit (s 10 of the PCA 1967). The Parliamentary Commissioner's findings and recommendations are clearly not legally enforceable.

The number of complaints referred to the Commissioner has, until recently, generally been somewhat fewer than 1,000 per annum but appears now to be on the increase (548 in 1971, 1,259 in 1978, 945 in 1992; 1,706 in 1995). As a norm, between 25 and 30% of referrals are accepted for investigation. The most common reasons for rejection are either that the complaint did not involve an administrative action or that the complainant had a right of appeal which had not been exhausted. Generally, between 40 and 50% of complaints investigated are upheld. The Parliamentary Commissioner has a staff of around 90. On average, an investigation takes some 15 months to complete. Not surprisingly, there is usually a backlog of cases.

The complaints referred to and investigations conducted by the Parliamentary Commissioner have not in general disclosed major instances of maladministration on the part of government departments. Many of the complaints are to do with the efficiency of administrative procedures such as delay (on the Parliamentary Commissioner's handling of complaints of delay, see McMurtie, 'The Waiting Game – The Parliamentary Commissioner's Response to Delay in Administrative Procedures' [1997] PL 159), a failure to answer correspondence, the giving of inadequate advice and general mishandling. The most complained against departments are the DSS and the Inland Revenue. Notable cases include:

- the *Sachsenhausen* case in 1967, where the Parliamentary Commissioner criticised practices relating to the payment of compensation to victims of Nazi war atrocities;
- the *Court Line* affair in 1974, where the Parliamentary Commissioner criticised ministerial statements which gave reassurance to the public on the financial viability of Court Line. The holiday firm subsequently became bankrupt;
- the *Congreve* affair in 1976 on the threat to withdraw TV licenses;
- the *Barlow Clowes* affair in 1988, where the investment company had been allowed to operate (as it turned out, fraudulently) without a licence for some ten years by the Department of Trade and Industry. The Parliamentary Commissioner's report led to *ex gratia* payments of £150,000 to investors.

More recently, in 1995, the Parliamentary Commissioner conducted an investigation of complaints about the handling of the Channel Tunnel Rail Link which had caused homes to be blighted. The Commissioner found that there had been maladministration and made recommendations which were supported by the Select Committee. The department, however, initially refused to accept the finding and to implement the recommendations. It agreed to reconsider the issue of a compensation scheme only when confronted with the prospect of a House of Commons debate. (On the *Channel Tunnel* case, see James and Longley, 'The Channel Tunnel Rail Link, the Ombudsman and the Select Committee' [1996] PL 38.)

9.2.4 Accountability of the Parliamentary Commissioner

It may that a complainant is actually dissatisfied with the work of the Parliamentary Commissioner, in terms of either the process (eg the time taken to complete an investigation or the 'fairness' of the procedure) or the outcome (eg a decision taken not to investigate a complaint or to discontinue an investigation or the Commissioner's findings and/or recommendation once an investigation has taken place). A complainant may well feel aggrieved if his or her

complaint is rejected – either on the merits or because it is considered to be outside the Commissioner’s jurisdiction. Scrutiny of the work of the Parliamentary Commissioner may take two forms – political and judicial.

Political accountability

The work of the Commissioner is subject to Parliamentary scrutiny. As noted above, the Parliamentary Commissioner is required to produce an annual report to be submitted to Parliament. There is also a Parliamentary Select Committee on the Parliamentary Commissioner. Neither of these, however, provides a direct channel of communication for a dissatisfied complainant.

Judicial accountability

It seems clear that the office of Parliamentary Commissioner fulfils the requirements necessary to constitute it a public body subject to judicial review. Not only is the source of its power statutory (though, as noted in Chapter 1, it is not the source of power which is determinative of a body’s public law character) but the nature of its power is such as to affect individual rights. The difficulty is not in establishing that the Parliamentary Commissioner is subject to judicial review, but the extent to which and the grounds upon which the courts will be prepared to review the Commissioner’s actions or failure to act.

The discretion conferred upon the Parliamentary Commissioner is very broadly stated. Under s 5(1) of the PCA 1967, the Parliamentary Commissioner ‘may’ investigate. Section 5(5), in particular, provides:

In determining whether to initiate, continue or discontinue an investigation under this Act, the Commissioner shall, subject to the foregoing provisions of this section, act in accordance with his own discretion; and any question whether a complaint is duly made under this Act shall be determined by the Commissioner.

Further, under s 7(2) of the PCA 1967, ‘the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case’.

In *Re Fletcher’s Application* (1970), the Court of Appeal held that the Parliamentary Commissioner could not be compelled to investigate, or continue to investigate, a complaint. The Appeal Committee of the House of Lords refused leave to appeal ‘... on the ground that there was no jurisdiction to order the Commissioner to investigate a complaint because s 5(1) of the PCA 1967 ... conferred on him a discretion whether to investigate or not’. In *R v Commission for Local Administration in England ex parte Newman* (1997), the Court of Appeal noted *Re Fletcher’s Application* in refusing an application for judicial review of a decision of the Commission for Local Administration (whose discretion under the Local Government Act 1974 is stated in equivalent terms to that of the PCA 1967). Kerr LJ noted that the use of the word ‘may’ did not necessarily exclude

all forms of judicial review (eg on the grounds of *Wednesbury* unreasonableness) and that 'there may well be extreme cases in which judicial review would not be excluded on the basis of more recent authorities'. However, this was not such a case.

Decisions of the Commissioners for Local Administration were held to be subject to review in *R v Commissioner for Local Administration ex parte Eastleigh Borough Council* (1988) (albeit that it was here being alleged that the Local Commissioner had contravened the requirements of the PCA 1967 in that he had questioned a decision taken without maladministration and had made a report when it had not been established that the complainant had in fact suffered injustice as a consequence of maladministration) and *R v Commissioner for Local Administration ex parte Croydon LBC* (1989). Decisions of the Parliamentary Commissioner may also be subject to judicial scrutiny via judicial review, as established in *R v Parliamentary Commissioner for Administration ex parte Dyer* (1994).

R v Parliamentary Commissioner for Administration ex parte Dyer (1994)

The applicant complained via an MP that her claims for benefit had been mishandled by the DSS. The Parliamentary Commissioner upheld the complaints investigated and the department issued an apology and made an *ex gratia* payment of £500 to cover expenses incurred. The Commissioner's report sent to the MP under s 10 of the PCA 1967 stated that he regarded the Department's response as satisfactory. The applicant was not so satisfied. She applied for judicial review of the Commissioner's refusal to re-open the investigation on the grounds that:

- he had not investigated all her complaints;
- whereas he had given the department the opportunity to comment on his draft report (as required by s 10(2)), he had not given her that same opportunity;
- he had refused to re-open the investigation once she had pointed out his failure to investigate all her complaints;
- his view that he did not have the power to re-open the investigation was wrong.

The Commissioner argued that:

- the court had no jurisdiction to review an exercise of his discretion under the PCA 1967 (see s 5(5) above). The fact that a complaint had to be referred by an MP (s 5(1)(b)), that he had to report back to the referring MP (s 10(1)) and, in certain circumstances, to each House of Parliament (s 10(3)), that he had to lay an annual report before Parliament (s 10(4)), that he could be removed only on an address from both Houses of Parliament (s 1(3)) and

that he was answerable to the Select Committee, indicated an intention that he was to be responsible to Parliament alone; alternatively

- that review was limited to exceptional cases of abuse of discretion by analogy with the House of Lords decision in *Nottinghamshire County Council v Secretary of State for the Environment* (1986) (see above, pp 58–59).

The court rejected both of these submissions by the Commissioner. As to the first submission, Sedley J considered that there was ‘nothing about the Commissioner’s role or the statutory framework within which he operates so singular as to take him wholly outside the purview of judicial review’. As to the second, there was ‘no parallel whatever between, on the one hand, decisions regarding the formulation and implementation of national economic policy ... and, on the other hand, decisions of the Commissioner regarding the matters appropriate for investigation and the proper manner of their investigation’. In principle, therefore, the Commissioner’s decisions were subject to review. However, given the width of the Commissioner’s discretion under s 5(5) (when determining whether to initiate, continue or discontinue an investigation the Commissioner shall ‘act in accordance with his own discretion’) and s 7(2) (‘the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances’) of the PCA 1967, the court would not readily interfere with an exercise of the Commissioner’s discretion. Further, ‘bearing in mind too that the exercise of these discretions inevitably involves a high degree of subjective judgment, it follows that it will always be difficult to mount an effective challenge on what may be called the conventional ground of *Wednesbury* unreasonableness’. Sedley J paused to wonder whether, in reality, the end result was much different from that in the *Nottinghamshire* case where the decisions were held not to be subject to review on the ground of irrationality ‘short of the extremes of bad faith, improper motive or manifest absurdity’. The Commissioner could select the complaints to be investigated. Nor did his failure to send the applicant a copy of his draft report amount to a breach of natural justice/fairness since it was the department, not the complainant, being investigated. Further, the Commissioner was correct in his view that he did not have the power to re-open an investigation once his final report had been sent to the referring MP without a fresh referral by an MP.

An application for leave to appeal from the decision of the Divisional Court was refused by the Court of Appeal. In refusing leave, Neill LJ commented that the Parliamentary Commissioner was primarily responsible to Parliament and that the control which could be exercised by the courts was ‘very limited indeed’. Although there might be a case where ‘it was plain that the complaints had not been dealt with at all’, the fact that the Commissioner thought it right to select particular complaints could not be the subject of investigation. For a critique of the decision of the Divisional Court in *Dyer*, see Marsh, ‘The Extent

and Depth of Judicial Review of the Decisions of the Parliamentary Commissioner for Administration' [1994] PL 347.

An application for judicial review to quash a decision of the Commissioner was successful in *R v Parliamentary Commissioner for Administration ex parte Balchin* (1996).

***R v Parliamentary Commissioner for Administration ex parte Balchin* (1996)**

The applicants' home, 'Swans Harbour', was valued at some £400,000. The property was subject to a legal charge taken as security for loans to the applicant's building company. The property was blighted by a proposed road development. The local council had refused to purchase Swans Harbour as no part of it was actually needed for the development and there was, in such a case, no statutory duty to purchase. Compensation would be payable once the effects of the development could be established. It was clear, however, that the property would be rendered virtually unsaleable and that the applicant's bank would no longer extend him credit on such a security. Following a public inquiry, the Inspector recommended confirmation of the route. However, he expressed a hope that the applicant's plight would be looked upon 'sympathetically' by the council. The minister confirmed the scheme. The minister's decision letter noted the Inspector's call for sympathetic consideration of the applicant's case but that those matters were for the council and not for him. The county council, however, proved to be intransigent. It expressed concern at the financial implications of a decision in favour of the applicant. Also, when the applicant's bank had enquired in 1992 as to whether the council had considered acquiring Swans Harbour under a new alternative statutory power – a power to which the department had not drawn the council's attention – the council had simply responded that the exercise of such a power would be most unlikely. A complaint was referred to the Parliamentary Commissioner, the ground of the complaint being that the minister had been guilty of maladministration in confirming the order in the face of the Inspector's advice without first seeking an assurance that realistic compensation would be payable. The Commissioner concluded that the minister and his department had not been guilty of maladministration. He appeared to accept that, even if the department had drawn the new statutory power to the council's attention, the council's decision would have been the same. He also stated that it was not for him to consider the acts of the council which were outside his jurisdiction.

In an application for judicial review of the Parliamentary Commissioner's decision, the court considered, in particular, the argument that the Commissioner's conclusion that there was no maladministration in the minister's failure to link his decision on confirmation to the county council's attitude to compensating the applicants was based upon a misapprehension of the minister's lawful power. The Divisional Court concluded that the Commissioner

had failed to consider the relevant fact of the council's attitude in order to decide whether the department should have drawn the council's attention to the new power to acquire blighted property and perhaps also to its obligation to consider exercising it. Sedley J stated:

Whether the department's undoubted failure to tender such advice amounted to maladministration and whether, if it did, it caused injustice to the Balchins remains entirely a question for the Commissioner. My decision is limited to holding that in declining to consider the ostensible propriety of Norfolk County Council's negative attitude to its compensatory powers and its amenability to correction by the department, the Commissioner omitted a potentially decisive element from his consideration of whether the Department of Transport had caused injustice to the Balchins by maladministration in its dealings with the county council.

Whereas the Parliamentary Commissioner for Administration is clearly a public body, this cannot necessarily (or even usually) be said of ombudsmen established as part of the process of self-regulation in the private sector. This is well-demonstrated by *R v Insurance Ombudsman ex parte Aegon Life Assurance Ltd* (1994), where the powers of the Insurance Ombudsman Bureau had originally been derived from a contractual relationship with its members, albeit that it had subsequently been brought within a statutory regulatory framework under the Financial Services Act 1986. The Insurance Ombudsman was held not to be a public body and any action against it lay exclusively in private law. (See further Chapter 6 on the public/private law dichotomy.)

9.3 Reform of the Parliamentary Commissioner

As noted above, the main restriction on the effectiveness of the Parliamentary Commissioner is almost undoubtedly the MP filter and the consequent inability of the individual to access the Commissioner directly. Should the filter be removed, however, it would be necessary to publicise the office of Parliamentary Commissioner more widely. There is little use in the existence of an avenue of redress if the victim of governmental action is not aware of it. On the assumption of a significantly increased workload in such circumstances, it may be necessary to review the lengthy, rather 'Rolls Royce' procedure to be followed in conducting an investigation and/or the level of manpower support in the Parliamentary Commissioner's office. It is also suggested that the jurisdiction of the Commissioner be reviewed to include the initiation of investigations without the need for a prior complaint.

The Select Committee on the Parliamentary Commissioner in 1994 made 36 recommendations to 'broaden the scope of the ombudsman's work, secure greater access to and publicity for it, and to ensure that the office secures adequate funds and resources' (See Giddings and Gregory, 'Auditing the Auditors:

Responses to the Select Committee's Review of the United Kingdom Ombudsman System' [1995] PL 46). The Committee was of the view, however, that the MP filter be retained!

In recent years, the Parliamentary Commissioner's role as overseer of good practice on the part of central government has, in fact, been augmented. In 1991, he was given some power to ensure that government departments adhere to principles contained in the Citizen's Charter (below). As noted above, in 1994, he was given power to receive complaints of non compliance with the Code of Practice on Access to Government Information ('the Code'). To date, the United Kingdom has no freedom of information legislation as such (though some statutes such as the Data Protection Act 1984, the Access to Personal Files Act 1987 and the Access to Health Records Act 1990 have made inroads in specific areas). Part II of the Code itself identifies a list of some 15 exemptions from open access, including defence, security and international relations, law enforcement and legal proceedings and information given in confidence. The tradition of secrecy within government will not be swept aside overnight, but is likely to be eroded gradually. In his annual report for 1995, the Commissioner noted that some staff in local DSS offices were unaware of their obligations under the Code. He also expressed general disappointment that:

... even within departments, knowledge of the Code's obligations can fall off quite rapidly as one moves away from those officials who have specific responsibilities in connection with information release; also there is a tendency in some departments to use every argument that can be mounted, whether legally based, Code based or at times simply obstructive, to help justify a past decision that a particular piece of information should not be released instead of reappraising the matter in the light of the Code with an open mind.

The Commissioner was nevertheless 'encouraged to see signs of a change in the attitude to the release of information which the Code has produced' (in particular, in the Treasury, the Inland Revenue and the DSS). The level of general publicity the Code has received might also be criticised. Nor is a code of practice a real substitute for legislation. (The enactment of a Freedom of Information Act is Labour Party policy.) Nor, it might be argued, are the ombudsman's powers of investigation any substitute for enforcement powers. It is not suggested, however, that the ombudsman be given enforcement powers in this context as this might serve to jeopardise his good working relationship with government departments on which the effectiveness of his work as Parliamentary Commissioner seems so much to depend. It is suggested that a special tribunal might be established for this purpose.

9.4 The National Health Service Commissioner

The office of Health Service Commissioner was established by the National Health Service Reorganisation Act 1973 (see now the Health Service Commissioners Act 1993). The office is, in fact, held by the Parliamentary Commissioner performing a dual function. No filter operates – the complainant has direct access. The Commissioner's jurisdiction covers maladministration and failure in the provision of a service. Clinical judgment is not covered.

9.5 The Commissions for Local Administration

The Commissions for Local Administration (one for England with three commissioners and one for Wales) were established under the Local Government Act 1974. Originally, a filter system operated and a complaint had to be referred in the first instance to a local councillor. However, the Local Government Act 1988 allowed a complainant direct access. The Local Government and Housing Act 1989 allows the Commissions to issue codes of good administrative practice.

9.6 The Citizen's Charter

The idea that citizens have 'rights' as consumers and that 'government' must meet certain standards in serving its customers was recognised in the Citizen's Charter White Paper which was published in 1991. The stated aim of the Charter was to improve standards in services to the public provided by central or local government, the NHS and public utilities. Improvements to customer service were to be achieved through the publication of standards, the provision of incentives, the provision of additional information and enhancement of complaints procedures. An office of Minister for the Citizen's Charter was created by John Major when elected Prime Minister. The Charter is not itself enforceable as such. The Parliamentary Commissioner was given power to ensure adherence to Charter standards and the Charter has some statutory support of its principles. The Competition and Service (Public Utilities) Act 1992 requires public utilities to have proper complaints procedures. Insofar as the public utilities are now privately owned, the statutory regulators are to play a role in securing compliance with Charter principles. The Charter also proposed payment of compensation for a failure in the provision of certain services such as the railways.

(On the Citizen's Charter and the 'marketisation' of the provision of public services, see Barron and Scott, 'The Citizen's Charter Programme' (1992) 55 MLR 526.)

9.7 Tribunals

9.7.1 Nature and development

Tribunals are effectively an alternative procedure to the court system for enforcement of legal rights. Enforcement of one's rights through the courts is expensive, time-consuming, formal and, for many ordinary people, stressful. Modern tribunals developed very much alongside the increase in governmental intervention and the growth of the welfare state. It was anticipated that not only would a formal court process often be inappropriate for the resolution of such disputes between the citizen and the state, but also that the courts simply would not be able to deal with the volume of complaints and appeals likely to be generated. Also, utilisation of the ordinary courts would be expensive for the state – not only in terms of defending actions but also in the provision of legal aid for qualifying applicants. On the other hand, the aggrieved citizen needed to be given the opportunity to challenge governmental decision-making and the opportunity of redress. Tribunals were conceived to provide a cheap, informal and speedy forum for the resolution of disputes, untrammelled by technical procedural rules and, indeed, by lawyers. This is reflected in the unavailability of legal aid for applications before tribunals (except before such tribunals as the Employment Appeal Tribunal which, in real terms, should be regarded as a court of law). Tribunals are, however, clearly judicial in nature. Their function is to find the facts and to apply the law in the resolution of disputes. They are not concerned with issues of policy. Just like the courts, they are in theory independent from executive interference.

A host of tribunals now exists dealing with a host of issues, including entitlement to a variety of state benefits, immigration appeals, mental health review, rent assessment, unfair dismissal and redundancy. Normally, they are created by statute. Occasionally, as with the Criminal Injuries Compensation Board, they are established under the prerogative. They decide hundreds of thousands of case each year. (For example, in 1992, the General Commissioners of Income Tax decided 353,199 cases, and the Traffic Commissioners 419,693 cases.) Their jurisdiction – depending on the subject matter – is not restricted to disputes between the citizen and the state but operates in the private sector also. Certain tribunals may award significant amounts of compensation. Occasionally, as with the mental health review tribunals, their decisions can affect the liberty of the individual.

The decisions of tribunals themselves may be subject to appeal if a right of appeal is conferred by statute. Appeal may lie to an appellate tribunal, a court (s 11 of the Tribunals and Inquiries Act (TIA) 1992 confers a right of appeal from listed tribunals to the High Court on a point of law) or sometimes to a minister. On occasions, no right of appeal is provided by statute. However, tribunals are also subject to the general supervisory jurisdiction of the High Court by

way of judicial review. They must act within the four corners of their legal power and according to the principles of natural justice/fairness.

Some 'tribunals' are of such high status that they should, in fact, be regarded as courts of law. In particular, the Employment Appeal Tribunal is presided over by a High Court judge and legal aid is available to appellants in the normal way. The position of tribunals was put very much on a statutory footing by the Tribunals and Inquiries Act (TIA) 1958 (which followed the Report of the Committee on Administrative Tribunals and Inquiries – The Franks Report 1957). Current statutory regulation is contained in the TIA 1992.

The membership of tribunals will vary according to their nature. Chairmen or women will usually be legally qualified (as stated above, tribunals are judicial in nature and determine questions of law) and will be appointed by the Lord Chancellor. Normally, the chair will be assisted by two lay members, one drawn from each side of the fence. So, for example, an industrial tribunal will have one member drawn from employers organisations and one from trade unions.

In a review of the operation of tribunals, the Committee on Administrative and Enquiries (the Franks Committee) 1957 recommended that their operation should be based upon principles of openness, fairness and impartiality in the following terms:

... openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of departments concerned with the subject matter of their decisions.

These principles were to be achieved by, *inter alia*, tribunal hearings being held normally in public, allowing legal representation, requiring that decisions be reasoned and given in writing and providing rights of appeal.

9.7.2 The Tribunals and Inquiries Acts

The original TIA 1958 has been consolidated into the TIA 1971 and, most recently, the TIA 1992. The TIA 1958 established the Council on Tribunals (whose membership now includes the Parliamentary Commissioner). The Council's general remit is to keep under review the 'constitution and working' of tribunals specified in Schedule 1. The Franks Committee had recommended that the Council should, apart from its general supervisory role, be responsible for the appointment of members of tribunals. This proposal, however, was not implemented although the Council may make recommendations to the appropriate minister on tribunal appointments. The Council must report annually to the Lord Chancellor (its Scottish Committee to the Lord Advocate) who lays the report before Parliament. Past annual reports have raised such issues as the

right of representation, the availability of legal aid, the giving of reasons for decisions and the proliferation of tribunals. The Council will accept and investigate complaints. It must be consulted on procedural rules for the listed tribunals (s 8 of the TIA 1992) and has recently produced Model Rules of Procedure for Tribunals (Cmnd 1434) which operate as a yardstick against which proposed rules can be tested. The statutory procedures of tribunals which deal with quite different subject matters, however, will continue to be variable. The TIA 1958 also conferred a right of appeal to the High Court on a point of law only from certain tribunals (s 11 of the TIA 1992) and a right to reasons for decisions if requested on or before the giving or notification of the decision (s 10 of the TIA 1992). Such reasons are 'to form part of the decision and accordingly to be incorporated in the record'. They are thus subject to review for error on the face of the record (see *R v Northumberland Compensation Appeal Tribunal ex parte Shaw* (1952)). A statutory duty to give reasons will normally be considered to be a mandatory procedural requirement. Quite apart from the TIA 1992, the procedural rules for a number of tribunals themselves provide for the giving of reasons whether or not a request is made. As noted in Chapter 5, where, as here, reasons are required by statute, such reasons must be proper, adequate and intelligible (see *Re Poyser and Mills Arbitration* (1964)).

The TIA 1971 also restricted the operation of exclusion clauses contained in Acts passed before 1 August 1958 which purported to exclude the supervisory powers of the High Court (see now s 12 of the TIA 1992; see further Chapter 7).

9.7.3 Procedure

As noted above, procedural rules for tribunals will vary according to the nature of the tribunal. The procedure to be followed will be contained within the relevant statute and/or regulations made under the statute. These may provide for an oral hearing which might be held in public or private (normally in public), the calling and cross-examination of witnesses, the right to legal representation, the duty to give reasons for decisions etc. A balance needs to be drawn here between procedural technicality and procedural fairness. The *raison d'être* of tribunals was to provide accessible justice for the individual. Tribunal procedure, therefore, must be sufficiently simple to ensure accessibility whilst at the same time being adequate to ensure fairness. The availability of legal representation demonstrates the difficulty of maintaining such a balance. On the one hand, tribunal procedure should be simple and informal. On the other, tribunals are judicial bodies which deal with issues of law. The procedural rules of many tribunals allow representation (including legal representation) as of right. In others, legal representation *may* be allowed. Occasionally, procedural rules restrict legal representation. As noted above, legal aid is rarely available for representation (it is available for legal advice and assistance) except before the most prestigious of 'tribunals' which might, in fact, be more properly regarded as courts. In situations where the dispute is most often between the

citizen (often with very limited resources) and the state (with what may appear to be infinite resources) there may be a danger of an appearance of inequality here. Normally, parties to tribunal proceedings bear their own costs although some tribunals have the power to award costs.

Industrial tribunals – a procedural example

The procedure to be followed in the case of industrial tribunals and the Employment Appeal Tribunal is contained in the Industrial Tribunals (Constitution and Rules of Procedure) Regulations 1993 (SI 1993/2687). Industrial tribunals have considerable jurisdiction in the legal regulation of the employer/employee relationship and illustrate the delicate balance to be drawn between on the one hand a procedure which is relatively speedy and accessible for the applicant and, on the other, a procedure which reflects the judicial nature of the decisions taken and which sufficiently protects the parties and secures fairness for both sides. The essential features of the procedure in the case of a complaint of unfair dismissal (part of the jurisdiction of industrial tribunals) are as follows:

- (1) Application to be commenced within three months of termination of employment unless this was not 'reasonably practicable'.
- (2) Action commenced by way of an 'originating application' to the Central Office of Industrial Tribunals. The applicant must state personal details, relief claimed, alleged reasons for dismissal and remedy sought. The Central Office refers the application to a Regional Office for processing.
- (3) Employer given 14 days to 'enter an appearance', ie state whether he accepts that the employee was dismissed, on what grounds, and whether he intends to defend.
- (4) Either party may request further and better particulars and the tribunal may order further particulars or discovery.
- (5) Application referred to the Advisory Conciliation and Arbitration Service (ACAS). ACAS officers must attempt conciliation at the request of either party or where there is a reasonable prospect of success.
- (6) If conciliation fails, the tribunal may hold a pre-hearing review at the request of either party or on its own initiative. The tribunal may take written and oral submissions but cannot hear witnesses. If the tribunal concludes that either party has 'no reasonable chance of success' it may issue a costs warning.
- (7) If the parties continue, the case is set down for hearing before the tribunal. Each side has the right to call witnesses, give evidence, cross-examine and address the tribunal in conclusion. Legal representation is allowed. Strict rules of evidence do not apply.

- (8) The tribunal delivers its decision for which it must give reasons, normally *in summary form only*. Full reasons must be given if the application was concerned with (a) equal pay, sex or race discrimination; (b) where a party requests full reasons orally at the hearing; or (c) makes a written request for full reasons within 21 days of the record of the summary reasons being sent; or (d) where the tribunal considers that summary reasons would be inadequate.
- (9) A party may apply to the chair for review, on specified grounds, of the tribunal's decision within 14 days of the decision being sent. The application must be in writing and state the reasons why the tribunal's decision is considered to have been wrong. If accepted, the application is considered by the tribunal itself which may vary or revoke its decision or remit it to another tribunal for re-hearing. Alternatively, the party may appeal to the Employment Appeal Tribunal (EAT) on a point of law within 42 days of the tribunal's decision being sent. Notice of appeal is served on the respondent who must reply if he intends to contest or who may cross-appeal. The EAT relies primarily upon the written decision of the tribunal and reaches a decision by simple majority.
- (10) Appeal lies from the EAT on a point of law to the Court of Appeal and from there to the House of Lords.

9.8 Inquiries

We are here concerned predominantly with the statutory public inquiry which has become a feature in certain areas of the governmental decision-making process. It is a particular feature of the legislation regulating town and country planning and the compulsory acquisition of land. The purpose of the public inquiry is to give an opportunity to those citizens concerned by governmental decision-making (often involving policy issues) an opportunity to represent their views – for example, on the siting of a proposed motorway or power station. It is essentially part of the consultative process which precedes the making of the decision itself. The most common form of inquiry is the planning inquiry presided over by an Inspector (appointed by the minister).

In theory, the public inquiry is part of the process of open and fair governmental decision-making. In practice, it is perceived by some as something of a facade (see, for example, *Franklin v Minister of Town and Country Planning* (1947), though this decision preceded the procedural reforms of the TIA 1958). Such a perspective is understandable, even if mistaken. The ultimate decision on major policy issues – for example, to confirm a scheme for a motorway or a compulsory purchase order – will be for the minister. (The minister may delegate his decision-making powers under the Town and Country Planning Acts and his Inspectors now often take the decisions on everyday planning appeals

etc.) The function of the Inspector's report is to inform and recommend accordingly. In reaching his decision, however, the minister is not bound by his Inspector's recommendation (see *Nelsovil v Minister of Housing and Local Government* (1962)). The minister will have to add governmental policy to the pool of considerations. It is not for the inquiry to determine what government policy should be but to make the minister aware of all sides so that he or she is fully informed in reaching the final decision. However, it is sometimes the very policy – the need for nuclear power or more motorways *per se* – which is objectionable.

The issue of the restrictions which could properly be made by an Inspector on challenges (in this case to a proposed motorway scheme) rooted in policy was considered by the House of Lords in *Bushell v Secretary of State for the Environment* (1981). At the inquiry stage, the Inspector had allowed objectors to the proposed scheme to criticise the methodology used by the government department for predicting future traffic needs in a locality (which would inform the decision as to which stretch of motorway was to be built next) and to call expert witnesses to support their criticisms. He had not, however, allowed them to cross-examine departmental representatives on the methodology. On a challenge to the minister's confirmation of the proposed scheme, the issue was whether the methodology used as the basis for policy decisions could be challenged at a public inquiry or whether it was itself to be regarded as 'policy'. Lord Diplock, in rejecting the challenge, stated:

'Policy' as descriptive of departmental decisions to pursue a particular course of conduct is a protean word and much confusion ... has ... been caused by a failure to define the sense in which it can properly be used to describe a topic which is unsuitable to be the subject of an investigation as to its merits at an inquiry at which only persons with local interests affected ... are entitled to be represented. A decision to construct a nationwide network of motorways is clearly one of government policy ...

At the other extreme the selection of the exact line to be followed through a particular locality ... would not be described as involving government policy ... it affects particular local interests only ...

In between these extremes, however, was the 'grey area', ie the decision, based on traffic need, as to which stretch of the motorway was to be built next. It was on the methodology used for determining these 'local' needs that the objectors had wished to cross-examine. Lord Diplock was of the view that methodology could be regarded as an essential element in the policy of determining priorities in the construction of future stretches of a motorway. In any case, challenges to methodology were not appropriate for investigation at the stage of local inquiry where the Inspector's consideration was limited by the material presented to him. He concluded:

... the use of the concept of traffic needs ... *assessed by a particular method* as the yardstick by which to determine the order in which particular stretches of the national network of motorways be constructed was government policy in the relevant sense of being a topic unsuitable for investigation by individual inspectors upon whatever material happens to be presented to them at local inquiries held throughout the country ...

In his dissenting judgment, Lord Edmund Davies considered that matters of policy involved 'the exercise of political judgment' which did not include '... matters of fact and expertise ... merely because a department of government relies on them'.

This very distinction between policy and local needs serves to explain why the minister's decision may not follow his Inspector's recommendation, even though the minister does not re-hear the evidence. The minister, of course, remains politically accountable to Parliament for the merits of his or her decision and to the courts for its legality.

The procedure of inquiries will be regulated by the relevant statute. In any case, procedural fairness before inquiries is assured by the application of the principles of natural justice/fairness. The standard statutory procedure is:

- to advertise the proposal locally;
- if objections are duly received, to hold a public local inquiry;
- to refer the Inspector's report to the minister who takes the final decision;
- to advertise the minister's decision locally;
- to allow six weeks in which to challenge the minister's decision on specified grounds, after which time the minister's decision will be 'final' and 'shall not be questioned in any legal proceedings whatsoever' (see *Smith v East Elloe RDC* (1956)).

The parties will normally be legally represented (although, as with tribunals, legal aid is available only for advice and assistance and not for representation) and able to call, examine and cross-examine witnesses. Costs may be awarded by the minister or his Inspector.

Just as with tribunals, the Council on Tribunals plays a role in the context of inquiries. It is to be consulted by the Lord Chancellor on the formulation of procedural rules for inquiries (s 9 of the TIA 1992). The TIA 1992 similarly provides for reasons to be given (when requested) for the minister's decision. In practice, reasons are given in the minister's decision letter whether requested or not. Before the recommendations of the Franks Committee on Tribunals and Inquiries, the Inspector's report to the minister would not be published. This was justified by reference, *inter alia*, to the old chestnut of frankness within the civil service. Not surprisingly, it often left objectors at the inquiry with a suspicion of secrecy and unfair treatment. Where not required by statutory rules of procedure, there is now a standard practice for the Inspector's report to be

published with the minister's decision letter. As with tribunals, reasons must be proper, adequate and intelligible. However, recent judicial decisions have discouraged highly legalistic challenges to reasons given (see, eg, *South Lakeland District Council v Secretary of State for the Environment* (1992) and *Save Britain's Heritage v Number 1 Poultry Ltd* (1991)). Normally, inquiries are held in public; exceptionally, they may be held in private where, for example, issues of national security are involved.

9.9 Conclusion

There is certainly room in the process of protecting the citizen from bad decision-making on the part of government for extra-judicial avenues of complaint which emphasise speed, informality and cheapness. However, not all the avenues established themselves meet these requirements. Investigation by the Parliamentary Commissioner, for example, is a very lengthy process as, indeed, a public inquiry can be (though maximum delay may well be a desired objective here). Such methods should not be viewed, however, as substitutes for recourse to the courts. In particular, recent developments in terms of the Citizen's Charter and the Code on Access to Government Information should not be allowed to distract from greater constitutional reform such as freedom of information legislation.

EXTRA-JUDICIAL AVENUES OF REDRESS

In addition to judicial review, there exist supplementary remedies for the citizen against the state. In particular, a number of 'Ombudsmen' have been established in different fields, both public and private.

The Parliamentary Commissioner for Administration

The Parliamentary Commissioner was established in 1967 under the Parliamentary Commissioner Act. His or her function is to investigate complaints of injustice in consequence of maladministration in the exercise of administrative functions. The Commissioner cannot investigate the merits of a decision taken without maladministration. Neither 'injustice' nor 'maladministration' is defined in the Act. The 'Crossman catalogue', however, is commonly cited. It defines maladministration as including 'bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on'. Although the Parliamentary Commissioner cannot investigate the merits of a decision without maladministration, he or she might infer maladministration from the thoroughly bad quality of a decision.

Certain matters are not subject to investigation. Many of these exceptions are rooted in foreign affairs or are regarded as being within the executive domain. Government contractual and commercial transactions are also excluded.

Procedure

A complainant cannot access the Parliamentary Commissioner directly; he or she must submit a complaint in the first instance to an MP who acts as a 'filter'. The rationale for this restriction was to preserve the relationship between constituent and MP and to recognise the *political* avenue of control via individual ministerial responsibility. Where a complaint is made direct to the Parliamentary Commissioner, the practice is to refer it to the constituent's MP in the hope that, if appropriate, the complaint will then be referred back. A complaint must be made within 12 months of when the complainant had notice of the matter which is the subject of the complaint.

If, after conducting an investigation, the Parliamentary Commissioner finds maladministration, his powers are limited. He cannot make an order for compensation or quash a decision. His or her powers are essentially limited to reporting to Parliament and making a recommendation as to the action appropriate to remedy the complaint.

In general, the Parliamentary Commissioner's reports have not disclosed major instances of maladministration. Notable exceptions include the *Sachsenhausen* (1967), *Court Line* (1976), *Congreve* (1976), *Barlow Clowes* (1988) and the *Channel Tunnel Rail Link* (1995) cases.

Accountability of the Parliamentary Commissioner

The Parliamentary Commissioner is accountable politically and in law. Politically, the Parliamentary Commissioner's work is subject to Parliamentary scrutiny through the annual reporting system. In law, he or she is a public body subject to judicial review. The discretion conferred upon the Parliamentary Commissioner under the 1967 Act is, however, phrased in broad subjective terms and the courts have allowed a wide discretion to operate. Nevertheless, decisions of the Parliamentary Commissioner are subject to review as evidenced by *R v Parliamentary Commissioner for Administration ex parte Dyer* (1994) and *R v Parliamentary Commissioner for Administration ex parte Balchin* (1996).

Reform of the Parliamentary Commissioner

Reforms to the office of Parliamentary Commissioner which might be considered include:

- removal of the MP filter;
- greater publicity;
- simplification of the procedure;
- the power to initiate an investigation;
- review of the exclusions on jurisdiction.

The National Health Service Commissioner

This office was established by the National Health Service Reorganisation Act 1973. No filter system operates. The Commissioner's jurisdiction covers maladministration and failure in the provision of a public service. Clinical judgment is not covered.

The Commissions for Local Administration

These offices were established under the Local Government Act 1974. A filter system originally operated through a local councillor but a complainant has been allowed direct access since 1988.

The Citizen's Charter

This was created by John Major when Prime Minister. It is not enforceable as such. The Parliamentary Commissioner, however, was given power to ensure adherence to Charter standards and the Charter has some statutory underpinning.

Tribunals

Tribunals were developed to provide cheap, accessible and speedy justice. A host of tribunals now exists dealing with issues such as entitlement to state benefits, immigration, mental health reviews, rent assessments, unfair dismissal and redundancy. Most are created by statute. The decisions of tribunals may be subject to appeal. Tribunals are also subject to judicial review. The procedure of tribunals should be characterised by openness, fairness and impartiality.

The Tribunals and Inquiries Acts

The Tribunals and Inquiries Acts (1958, 1971 and 1992) established and empowered the Council on Tribunals. The general remit of the Council is to keep under review the constitution and working of specified tribunals. It reports annually to the Lord Chancellor. It must be consulted on procedural rules for the tribunals and has produced Model Rules. A right of appeal on a point of law lies to the High Court from certain tribunals and reasons for decisions must be given if requested on or before the notification of the decision itself.

Procedure

Procedural rules for tribunals will vary and will be contained within the statute establishing the relevant tribunal and/or regulations made under the statute. A balance needs to be drawn between simplicity and accessibility on the one hand, and fairness on the other. Legal aid is rarely available for representation before tribunals although legal representation may be allowed either as of right or at the tribunal's discretion.

Inquiries

The statutory public inquiry has become a feature of certain areas of governmental decision-making, in particular in the fields of town and country planning and compulsory purchase. The intention is to provide citizens with an opportunity to represent their views. The ultimate decision on policy issues

will, however, be for the minister (*Bushell v Secretary of State for the Environment* (1981)). A minister will not be bound by the recommendation of the inspector who presided over the inquiry.

The procedure of any particular inquiry will be regulated by the relevant statute. Procedural fairness is, in any case, assured by the principles of natural justice/fairness. It is now standard practice for the inspector's report to be published with the minister's decision letter. Reasons for decisions must be proper, adequate and intelligible.

EUROPEAN ADMINISTRATIVE LAW I – THE EUROPEAN COMMUNITY

European Community law confers rights upon individuals which are enforceable against both the state and individuals. Consequently, where any judicial review proceedings involve a matter of Community law, this legal order comes into play. Since judicial review is concerned with the rights of the individual as against public bodies, this chapter will concentrate on the rights of the individual against the state. As the European Coal and Steel Community (ECSC) and European Atomic Energy (Euratom) Treaties are confined to the specific areas of coal and steel and atomic energy, this chapter will focus on the law arising under the European Community Treaty (EC Treaty) as amended by the Single European Act and the Treaty on European Union (TEU). All references in this chapter to Articles refer to the EC Treaty unless otherwise stated.

The chapter is divided into three parts:

- an overview of underlying principles of EC law;
- judicial review of Community Acts;
- EC law and judicial review.

PART 1

UNDERLYING PRINCIPLES OF EC LAW

10.1 Introduction

The EC Treaty is essentially an agreement between Member States. As with other international agreements it would, therefore, seem that it should not have any effect internally in the United Kingdom. The Treaty was, however, given that effect by the European Communities Act 1972. Further, the European Court of Justice (ECJ) has made clear that EC law has an effect not only as between Member States but also on the individuals of those states. The fact that individuals have rights arising out of European Community law was asserted in the landmark case of *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) where the court stated:

... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights are not only where they are expressly granted by the EC Treaty, but also by reason of obligations which the Treaty imposed in a clear defined way upon individuals as well as upon Member States and the institutions of the Community.

10.2 The sources of rights

There are essentially three sources of EC law, and thus rights for the individual.

10.2.1 Primary legislation

The Treaties

The sole source of primary EC legislation is the Treaty of Rome 1957 as amended by the Single European Act 1986 and the Treaty on European Union (TEU) 1992. The Treaty of Rome is now referred to as the EC Treaty.

10.2.2 Secondary legislation

These include: regulations, directives and decisions (which are all binding), recommendations and opinions (which have no binding force).

Regulations

According to Article 189, regulations 'shall have general application' and 'shall be binding in their entirety and directly applicable in all Member States'. They are published in the Official Journal and specify the date on which they are to take effect. If no date is specified, they take effect 20 days after publication (Article 191). Member States do not take action in order for them to have effect, ie they become part of the national legal system automatically without the need for any separate national implementation measure. In fact, the ECJ has made it clear that Member States must *not* pass any measure which purports to transform a Community regulation into a national law since the regulation is part of the national legal order.

In *Variola v-Amministrazione Delle Finanze* (1973), the question was 'whether a provision of a regulation could be introduced into the legal order of a Member State by internal measures which produced the contents of the Community provision in such a way that the subject matter is brought under

national law'. The Court stated that Member States were under an obligation not to introduce any measure which might affect the jurisdiction of the court to pronounce on any question. It stated:

The direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law. By virtue of the obligation arising from the Treaty and assumed ratification, Member States are under a duty not to obstruct the direct applicability inherent in regulations and other rules of Community law. Strict compliance with this obligation is an indispensable condition of simultaneous and uniform application of Community regulations throughout the Community ...

Directives

According to Article 189, a directive is 'binding as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Directives, therefore, become law in a Member State as a result of some action on the part of the Member State. The form and method of implementation is left to the discretion of the Member State. The directive only stipulates the objective to be achieved. By Article 191 (as amended by Article G(63) TEU), directives must be published in the Official Journal if they address all Member States. The date by which implementation action by a Member State is required is specified in the directive and, if not, then it is 20 days after publication.

Decisions

According to Article 189, 'a decision shall be binding in its entirety upon those to whom it is addressed', which may be a Member State, an individual or a company. A decision takes effect when the addressee is notified (Article 191(3)).

Recommendations and opinions

According to Article 189, recommendations and opinions 'shall have no binding force'. They are not, however, immune from the judicial process since it may be argued that they are in substance measures which are subject to challenge.

10.2.3 General principles of law

General principles are a kind of unwritten law of the Community and may perhaps be compared to the common law of the English legal system. There is no specific reference to them in the Treaty, although there are articles which may be interpreted as providing a basis for them. Article 164 requires the ECJ to 'ensure that in the interpretation and application of this Treaty the law is

observed'. The argument here is that the reference to the word 'law' indicates something over and above the Treaty itself, ie general principles. Article 173 sets out as a ground of challenge 'infringement of the Treaty or of any rule of law relating to its application'. The phrase 'any rule of law' has been taken to indicate something other than the Treaty and the Court has, therefore, used infringement of general principles of law as a ground upon which to annul Community Acts. Article 215(2) (as amended by Article G(78) TEU) states that the tortious liability of the Community shall be determined in accordance with 'the general principles common to all Member States'. One purpose of introducing general principles was to avoid conflict between laws which might be regarded as having a special status in Member States and Community law; for example, the law contained in a written constitution which is usually regarded as being the highest form of law. In this way, the Court was able to guarantee the application of Community law in all Member States.

Although the source of these general principles may be found in the national legal systems of the Member States and in international treaties, they are now principles of Community law and are enforced as such. This was made clear in the *Internationale Handelsgesellschaft* case (1970), where the Court stated that Community measures which offended a Member State's constitution could still have effect. However, since fundamental human rights were part of the general principles of Community law protected by the Court, the validity of the particular measure in question must be considered in the light of this. A further importance of general principles is that it is not only Community Acts which are measured by reference to them, but also Acts of the national legal systems of the Member States which give effect to Community law. In the context of national law, however, it is usually the national courts which will apply general principles after a reference under Article 177. It is possible for them to be applied by the ECJ. The list of principles is not fixed in the sense that it is possible for more to be added. Principles already adopted by the court include equality, fundamental rights, legal certainty and proportionality.

Equality

The principle of equality is mentioned in several of the Treaty articles. Article 6 (as amended by Article G8 TEU) prohibits discrimination on the grounds of nationality. Article 119 requires that men and women should receive equal pay for equal work. The ECJ has developed the principle of non-discrimination and equality. This requires that there should be no arbitrary discrimination in that similar situations must be treated in the same way unless there is objective justification for not doing so. In *Wagner* (1983), Community rules provided for the reimbursement of storage costs in respect of sugar in transit between two approved warehouses in the same Member State but not between different Member States. The Court held that this was not discrimination since it could

be objectively justified. The difference in treatment was the result of supervision requirements.

Fundamental rights

Article F(2) TEU requires respect for fundamental rights. The initial recognition of fundamental human rights as a general principle of Community law, however, seems to have been a result of the Court's objective of ensuring the effectiveness of Community law itself. In pursuing this objective, the court has developed the doctrine of supremacy of Community law over national law. A problem faced by the Court in enforcing this doctrine was that some Member States had written constitutions which are their highest form of law and against which the validity of all legislation is tested. Therefore, although such Member States were prepared to accept that ordinary legislation would be subject to the doctrine of supremacy, there was also a feeling that since their constitutions were the highest law, then Community law should also be tested against them. Should any conflict arise, the constitution would prevail. This was particularly problematic for the Germans who, given their history, were keen that the protection of fundamental human rights enshrined in their constitution should not be subject to Community law. Thus, there was potentially an enormous problem for the ECJ in ensuring the effectiveness of Community law. If effectiveness was to be ensured, supremacy of Community law was necessary in order to ensure its uniform application. Failing this, the aims and objectives of the Community could not be guaranteed. The solution was for the Court to declare that fundamental human rights were part of the Community legal order. As such, Community law itself was subject to them and any Act which contravened fundamental human rights would be annulled by the Court for this reason. In this way, the Court was able to negate any argument a Member State may have that Community Acts offended against its constitution.

The source of the general principle of fundamental human rights, therefore, is the national law of Member States. However, the Court does not admit to applying national law in the context of a Community law matter. Instead, it has stated that the principle is only 'inspired' by the national laws of Member States and, once a fundamental human right is accepted as a principle, it is applicable as Community law. A good example of fundamental rights being inspired by national law is *Transocean Marine Paints Association v Commission* (1974). This concerned an exemption under Article 85(3) granted by the Commission which contained a proviso as to notification of links with members of the Transocean Marine Paints Association and others in the paint sector. The challenge to this decision of the Commission was successful on the ground that Transocean Marine Paint had not been given the opportunity of having its view heard as regards the proviso. The ECJ stated:

A person affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of the condition to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission.

The right to a hearing was not already a procedural right recognised in Community law. It was, however, recognised in English law as one of the principles of natural justice (see Chapter 5). As such, this right might be regarded as English law's contribution to the law of the Community. One interesting point about the introduction of the principle is that it was not raised by either of the parties to the case. Instead, it was introduced by Advocate General Warner and, as such, provides a good example of the useful function that can be played by the Advocate General.

The fact that this general principle is applicable as a matter of Community law and not as one of national law was made clear in the *Internationale Handelsgesellschaft* case (1970). This concerned the control of the market in certain agricultural products as part of the Common Agricultural Policy (CAP). A system had been introduced whereby exports were only permitted with an export licence. When the exporter applied for the licence, he had to deposit a certain amount of money which would be forfeited should he fail to complete his export during the time his licence was valid. The applicants claimed that the whole scheme was invalid as it offended against fundamental human rights. They argued that the scheme offended against the German principle of proportionality which only allows public authorities to impose obligations on citizens which are necessary for achieving the objective in question. In response to a reference from the German court, the ECJ stated that the validity of Community measures could not be measured against rules of national law since this could only be done by reference to Community law. Thus, even if a Community measure offended against the fundamental human rights contained in a Member State's constitution, it would still have effect. However, the Court went on to state that fundamental human rights were part of the general principles of law protected by the Court. Thus, the validity of the Community measure must be considered in this light.

In *Nold v Commission* (1974), the Court went a step further in finding that fundamental human rights might be inspired not only by the national law of Member States but also by international treaties. This concerned a Commission decision adopted under the ECSC Treaty which provided that wholesalers could not buy Ruhr coal direct from the selling agency unless they had agreed to buy a set minimum amount. Nold was not able to meet this requirement and, therefore, had to buy through an intermediary. He claimed that the scheme was a breach of his fundamental human rights which related to property rights and freedom to pursue an economic activity. In Article 33 ECSC annulment proceedings, the court recognised fundamental human rights as principles of Community law. It stated, however, that these rights were not

absolute. They were subject to limitations 'justified by the overall objectives pursued by the Community'. The Court recognised that the source of the principles may be in international treaties when it stated:

Similarly, international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

It is in this way, that the Court has been able to give effect to the European Convention on Human Rights in the Community law context (see below, *Johnston v Chief Constable of the Royal Ulster Constabulary* (1986) – the right to an effective remedy under Article 13 ECHR). That the rights guaranteed in the European Convention on Human Rights should be protected as general principles of Community law has now been given effect to in Article F(2) TEU.

Since fundamental human rights are inspired by the laws of Member States and international treaties, the question arises as to when the ECJ will recognise such rights. It does not seem to be the case that any right which is constitutionally protected in one or more Member States will automatically be protected as a general principle of Community law. It seems that what is required is that the right does not conflict with the fundamental aims of the Community. In this case, even if the right is only constitutionally protected in one Member State, it can still be protected by the court as a general principle. Where the right sought is controversial, however, the court has taken the view that each Member State must decide for itself (*Society for the Protection of the Unborn Child v Grogan* (1991)).

It should be noted that fundamental human rights will not only be used to judge the validity of Community Acts; they are also applicable in a number of other instances. Member States, through their courts, will be bound by them in interpreting Community Acts. In *Johnston v RUC* (1984), the applicant challenged the decision of the Chief Constable of the RUC not to renew her contract to serve on the reserves on the ground that female officers were not to be armed. The bases of the decision were national security and protecting public safety and public order. The applicant argued that Article 6 of the Equal Treatment Directive 76/207 was breached in that there was no provision for her to claim by judicial process that she had been wronged. The ECJ ruled that the judicial control stipulated in Article 6 reflected a general principle of law underlying the constitutional traditions common to the Member States and that the principle was laid down in the European Convention of Human Rights in Articles 6 and 13. As fundamental human rights are recognised as being part of Community law, national courts through their obligation under Article 5 will be required to consider them in any matters arising before them relating to Community law. They will not be bound where the matter is outside Community law (*Kaur v Lord Advocate* (1981)). Member States will also be bound by general principles when implementing Community measures into national law. In *Wachauf* (1989) the applicant was a tenant farmer in Germany

who requested compensation under German law for the discontinuance of milk production when his tenancy expired. German law was based on a power contained in Regulation 857/84 which provided for compensation for the discontinuance of milk production on the condition that, where the application was made by a tenant farmer, the consent of the lessor in writing was required. The landlord withdrew his consent and compensation was refused. The ECJ held that depriving the applicant of compensation would be contrary to fundamental human rights in that it had the effect of depriving him of the 'fruits of his labour'. It went on to state that '... since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements'.

Legal certainty

Those subject to the law must be certain as to their rights and obligations. As such, an ambiguity must be resolved in favour of the individual. In *Administration des Douanes v Societe Anonyme Gondrand Freres* (1981), which concerned charges imposed on taxpayers, the court stated:

The principle of legal certainty requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly.

There are two concepts related to the principle of legal certainty – legitimate expectation and non-retroactivity. Legitimate expectation protects an individual who has acted in reliance upon a Community measure taken. Non retroactivity requires that a new rule cannot be applied to a transaction which has been completed before the rule came into being. Legislation is presumed not to be retroactive. However, although retroactivity in general is prohibited, it will be allowed where the purpose of a measure cannot otherwise be achieved. This is itself subject to the legitimate expectations of those concerned. In *Decker* (1979), the court stated:

Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected.

What does this mean for the temporal effect of the judgments of the court? A judgment will apply retrospectively unless there is reason for it not to do so and the court may itself preclude a judgment having retrospective effect. For example, in *Defrenne v Sabena (No 2)* (1976), the court ruled that the judgment should only take effect prospectively to avoid the massive liability that was likely to follow from retrospective application.

Proportionality

This principle was 'inspired' by German law and demonstrates that Community fundamental human rights are derived from the Member States. The principle first made its impact on Community law in *Internationale Handelsgesellschaft* (1970). The Court there stated that the 'individual should not have his freedom of action limited beyond that degree necessary for the public interest'. The principle entails notions of balance between means and ends. In *Fronançais SA v FORMA* (1983), the court stated the question to be asked in the following terms:

Do the means adopted to achieve the aim correspond to the importance of the aim and are they necessary for its achievement?

What is required is an examination of the aim and method of achievement and whether the method is proportionate to the aim. A good example of the operation of the principle is *R v Intervention Board ex parte Man (Sugar) Ltd* (1985). This concerned the nationally administered but Community regulated sugar market. As required, Man submitted its tenders for the export of sugar outside the Community to the Intervention Board and lodged securities, in the sum of £1,670,370, with a bank. Man should have applied for its export licence by 12 noon on 2 August 1983 but, as a result of internal staff difficulties, was four hours late. Consequently, the Intervention Board declared the securities forfeit. Man claimed that this penalty was disproportionate. A small error (four hours delay) had resulted in a huge sanction (the loss of over £1 million). Man sought judicial review of the authorising legislation arguing that its disproportionate nature rendered it invalid. The matter was referred to the ECJ by the English court under the Article 177 procedure. The ECJ found that the part of the legislation which allowed for the forfeiture of the entire security as a penalty for the delay was indeed disproportionate and invalid.

10.3 How individual rights can be acquired and enforced in EC law

Community law gives rise to individual rights which may be relied upon in the national courts. Such rights are described as being directly effective.

10.3.1 The creation of rights for individuals

Since the EC Treaty is an international agreement, it needed domestic legislation for it to be enforceable in the UK courts. This was achieved with the passing of the European Communities Act (ECA) 1972. As a result, the EC Treaty became directly applicable as part of UK national law. As Lord Denning MR stated in *Bulmer v Bolinger* (1974), 'any rights and obligations created by the EC Treaty are to be given legal effect in England without more ado'.

As such, the EC Treaty was capable of forming rights and obligations enforceable by individuals before UK national courts. The term 'directly applicable', therefore, means not only that EC law takes effect in the internal legal systems but also that it can create rights for individuals. This concept resulted in some confusion. The position was further confused by courts using the terms 'directly applicable' and 'directly effective' interchangeably. To avoid such confusion, writers have since tended to use the term 'directly effective' to describe those provisions of EC law which give rise to individual rights/obligations enforceable in the national courts. The issue of whether a provision has direct effect, and so gives rise to enforceable individual rights, is vitally important. If it does, national courts are required to give effect to the right. Indeed, if there is a conflict between a directly effective provision of Community law and national law, national courts are required to give the Community provision priority.

Which provisions are capable of giving rise to direct effect in the UK is governed by the ECA 1972, specifically s 2(1), which provides:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the UK shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

Section 2(1) of the ECA 1972, therefore, provides for the direct applicability of Community law. However, it is not clear which provisions will be directly effective. According to Article 189, regulations are directly applicable. It was thought, therefore, that direct applicability was a prerequisite for direct effect, the logical conclusion being that only regulations were directly effective. However, this has proved not to be the case. The European Court of Justice, exercising its jurisdiction under Article 177, has found that Treaty articles, directives and decisions may all have direct effect. The approach of the Court was the result of a desire to ensure a legal system which would allow the effective development of the Community. It took the view that to achieve the aims of the Community, uniform and effective laws were needed. This could only be achieved by conferring rights and obligations on individuals. Failure to do so would weaken Community law and the Community itself.

10.3.2 The direct effect of Treaty articles

This was first raised in *Van Gend en Loos* (1963). This case concerned the direct effect of Article 12 and its conflict with an earlier Dutch law. The question for the Court was whether nationals, on the basis of Article 12, could claim individual rights which the courts must protect. It was argued by the Netherlands,

and other Member States who joined in, that the EC Treaty was no different from other international treaties and that it could not, therefore, create such rights. Treaty articles were addressed to Member States and, as such, they could only form rights and obligations as between Member States. Further, that in any event the EC Treaty provided enforcement mechanisms in Articles 169 and 170. The Court stated that Article 12 was directly effective. The EC Treaty did not only create rights and obligations as between Member States; it also imposed obligations on individuals and gave them legal rights. Individuals could, therefore, invoke Article 12.

The Court clearly saw direct effect as a way of ensuring the uniform application of Community law. But it also recognised that there were practical limitations. If the same Community goals were to be pursued in all Member States, it was essential that national courts in Member States be capable of appreciating the exact scope and meaning of the provisions of Community law. Therefore, the ECJ set out in *Van Gend* the criteria for the direct effect of Treaty provisions. The obligation should be a clear and unconditional one which was prohibitive. Further, no positive action should be required of the Member State in the sense that there should be no need for legislation to give effect to the Treaty provision.

Van Gend created what can be termed *vertical* direct effect, ie that individuals have rights against the *state*.

Treaty obligations addressed to Member States may also give rise to obligations owed by one *individual* to another, ie *horizontal* direct effect. Horizontal direct effect of Treaty articles was considered in *Defrenne v SABENA (No 2)* (1976). Defrenne was an air hostess employed by SABENA airlines. She complained that male stewards were paid more than female hostesses for an identical job. Article 119 required equal pay for equal work. She claimed, therefore, that SABENA were in breach of Article 119. An Article 177 reference was made asking in what context Article 119 had direct effect. SABENA argued that Treaty articles which had been found to have direct effect concerned the relationship between the individual and the state. Article 119 on the other hand concerned the relationship between individuals and, therefore, could not have direct effect. The Court stated that Article 119 extended to all agreements intended to regulate paid labour and, therefore, did create horizontal direct effect.

10.3.3 The direct effect of regulations

As has already been mentioned, since regulations are of general application and binding in their entirety and directly applicable, they are likely to produce direct effect. This is not, however, guaranteed. They may not fulfil the criteria by, for example, not being sufficiently clear or precise. However, since they are of general application, they may be invoked both vertically (against the state) and horizontally (against individuals).

10.3.4 The direct effect of decisions

According to Article 189, a decision is 'binding in its entirety upon those to whom it is addressed'. The ECJ has, therefore, had little hesitation in holding that decisions give rise to direct effect even though, unlike regulations, Article 189 makes no reference to direct applicability. In *Grad* (1970) the ECJ found that decisions do give rise to direct effect since the effectiveness of these measures would be weakened if nationals of Member States could not invoke them in national courts.

10.3.5 The direct effect of directives

The reasoning of the ECJ for the direct effect of Treaty articles was that the aims and basis of the Community itself would be undermined if individuals could not enforce Treaty provisions in national courts. For regulations, the reasoning was that it was provided for in Article 189. For decisions, it was that they are binding in their entirety upon the addressee and, therefore, should be enforceable if sufficiently clear and precise.

The reasoning was not so clear when it came to directives. According to Article 189, they are 'binding as to the result to be achieved upon the Member States to whom they are addressed but shall leave to the national authorities the choice of form and methods'. On the face of it, since directives are addressed to Member States and implementation is left to them, it would seem that directives could not give rise to direct effect. The ECJ, however, found that directives do give rise to direct effect. The reasoning of the Court is essentially the same as that for Treaty provisions. Directives may be used to implement Community policy. As such, a Member State's failure to implement a directive so as to give full effect to it may eventually result in an undermining of the Community itself.

In *Grad*, which related to the direct effect of a decision, the Court implied that directives could give rise to direct effect. This was confirmed in *Van Duyn v Home Office* (1974). Directives did create vertical direct effect.

Whether directives will give rise to direct effect or not will depend on whether they satisfy the criteria, ie that they are clear and precise, unconditional and leave no room for discretion for implementation. These requirements were set out in *Grad*. A directive gives a time limit for implementation and, once that has expired, it becomes unconditional and leaves no room for discretion. A Member State should not be able to rely on its own failure to implement a directive (similar to the concept of estoppel). As such, prior to the expiration of an implementation date, a directive has no direct effect and cannot be relied upon. But, once expired, the directive may give rise to directly effective rights (*Pubblico Ministero v Ratti* (1979)).

The major remaining question was whether directives could give rise to horizontal direct effect; that is, could they create rights enforceable as between

individuals? For many years, the ECJ had avoided the issue by falling back instead on some other way to resolve issues, for example by relying on Treaty provisions. The question was eventually dealt with in *Marshall v Southampton & South West Hampshire Health Authority (No 1)* (1986). The ECJ stated that, according to Article 189, directives are binding only on the Member States to whom they are addressed. It was not possible to impose obligations as between individuals. Directives did not create horizontal direct effect.

Therefore, whether a directive gives rise to direct effect or not depends on whom the individual wishes to rely on the directive against, ie can the body be said to be a public body or an agent of the state. This gives rise to the question of what is a public body; for example, would the Post Office, which is publicly owned, count as such? In *Foster v British Gas* (1990), the Court attempted to identify what kind of body would be deemed to be public such that an individual could rely on a directive against it. The Court stated that individuals can rely on directives against organisations which were 'subject to the authority or control of the state or had special powers beyond those which result from normal relations between individuals'.

It is argued that this public/private distinction is not sound as it is not consistent with the stated aims of the European Court, ie to ensure the effective protection of individual rights under directives. As long as the public/private distinction exists, there can be no uniformity of application of directives. All that an individual can rely on is a Member State incorporating a directive into national law, so giving rights against other individuals. So long as the distinction is maintained there will not necessarily be uniformity of laws between Member States.

It was hoped that this lottery of individual rights, which depends on against whom an applicant seeks to bring an action when relying on a directive, would be resolved in *Faccini Dori v Recreb SRL* (1994). This concerned a directive which had not, at the time, been incorporated into Italian law so that it could not be relied upon against another individual. Advocate General Lenz urged the ECJ to reconsider its position in *Marshall* and extend the principle of direct effect to allow for the enforcement of directives against all parties, public and private, in the interests of the uniform and effective application of Community law. The Court rejected the opinion and restated its position in *Marshall*.

The position to date then seemed extremely unfair. Whether an individual had any rights depended on whom he or she wished to exercise the right against. If the defendant was an individual, there were no enforceable rights. One way out of this dilemma was the creation of the principle termed 'indirect effect'. This was put forward in *Von Colson and Kamann v Land Nordrhein Westfalen* (1984). The ECJ found that the relevant directive did not give rise to direct effect since it did not meet the requirements of being unconditional and sufficiently precise. To circumvent this problem, the Court focused on Article 5 of the Treaty which requires Member States to take 'all appropriate measures'

to ensure the fulfilment of Community obligations. It found that this obligation was binding on all authorities of Member States, which included the courts. Therefore, national courts were required to 'interpret national law in the light of the wording and purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189'. Thus, the issue of whether or not a directive gives rise to direct effect was no longer relevant; directives could be given effect to by means of interpretation. The Court further stated:

It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of Community law in so far as it is given discretion to do so under national law.

The success of the *Von Colson* principle depends on the extent to which the national courts regard themselves as having the discretion to interpret domestic law to comply with Community law. Member States with written constitutions would feel themselves bound by their highest form of law, their constitution, and the courts of the UK would be constrained by the terms of the European Communities Act 1972. It was thought that s 2(1) of that Act, which provides for the direct application of Community law within the UK, applied only to directly effective EC law. If this was indeed the case, there could be no application of the *Von Colson* principle in the UK.

The cases should now be read in the light of *Marleasing SA v La Comercial Interacional DE Alimentacion SA* (1990). The ECJ was asked whether, in the circumstances, an article of the directive was directly effective. The Court restated its view in *Marshall* and *Von Colson* and went on to state:

... in applying national law, whether the provision in question was adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby with the third paragraph of Article 189 of the Treaty.

In *Marleasing*, no legislation had been passed to comply with the directive. The ECJ was nevertheless of the view that the national court had to endeavour to interpret domestic law in a way which complied with the directive. Therefore, it now seems that there need not be any law introduced to comply with a directive for the *Von Colson* principle to apply. As stated earlier, the principle in *Von Colson* depends on the national courts interpreting national law in such a way as to give effect to Community law. But it seems unlikely that national courts will be prepared to do so where the national measure clearly demonstrates no intention of complying with the directive, particularly in a Member State such as the UK where Parliament is supreme.

In *Kolpinghuis Nijmegen BV* (1987), the ECJ suggested a limitation to the *Von Colson* principle. The Court stated that a national court's obligation to interpret domestic law to comply with EC law was limited by the general principles of law which form part of Community law, particularly the principles of

legal certainty and non-retroactivity. This means that where interpretation of domestic law is contrary to the legitimate expectations of individuals, the *Von Colson* principle will not apply.

The vagaries of direct and indirect effect may now be avoided since the ruling in *Francovich and Boniface v Italy* (1993). The time limit for implementation of the directive had expired and the ECJ ruled, in Article 169 proceedings, that Italy was in breach of its Community obligations in failing to implement the directive. The Court stated that the directive was not sufficiently clear and precise to have direct effect. However, Community law lays down a principle according to which a Member State is liable to make good damage to individuals caused by a breach of Community law for which it is responsible. The principle is, the Court stated, inherent in the Treaty. The full effectiveness of Community law would be affected and the protection of individual rights undermined if an individual could not recover damages for a breach of Community law for which a Member State is responsible. Article 5 required Member States to take all appropriate measures to fulfil obligations under the Treaty. A failure to do so would give rise to an action in damages if three conditions were met:

- the directive confers rights for the benefit of individuals;
- the content of these rights can be determined by reference to the provisions of the directive;
- there is a causal link between the breach of the obligation of the state and the damage suffered by the persons affected.

There is, then, no longer any need to distinguish between public and private bodies. The state will be responsible for non-implementation.

In *Francovich*, a breach of Community law had been established by reason of the Article 169 action. However, a number of questions remained unanswered; for example, was an Article 169 action a pre-requisite for a claim for damages? What if there was inadequate implementation of the directive rather than non-implementation?

Some of these questions were addressed in joined cases *Brasserie du Pecheur SA v Germany and R v Secretary of State for Transport ex parte Factortame Ltd* (1996). The ECJ restated the test in *Francovich* with a slight amendment. The second requirement was reformulated as being 'the breach must be sufficiently serious'. The Court went on to state that there would be a sufficiently serious breach where:

... the Member State or the Community institution concerned manifestly and gravely disregard the limits of its discretion. [The factors to be taken into account in establishing this include] the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or community authorities, whether the infringement and the damage caused was inten-

tional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a community institution may have contributed towards the omission, and the addition or retention of national measures or practices contrary to Community law.

In addition, the Court found that fault was not a pre-condition to liability.

What amounts to a sufficiently serious breach has been considered in a number of cases. In *R v HM Treasury ex parte BT* (1996), the ECJ was quite protective of Member States when it stated:

A restrictive approach to state liability is justified in such a situation, for reasons already given by the court to justify the strict approach to non-contractual liability of Community institutions or Member States when exercising legislative functions in areas covered by Community law where the institution or state has a wide discretion – in particular, the concern to ensure that the exercise of legislative functions is not hindered by the prospect of actions for damages whenever the general interest requires the institutions or Member States to adopt measures which may adversely affect individual interests.

The Court found that the provision in question was sufficiently imprecisely worded so as not to give rise to liability on the part of the state.

In *R v MAFF ex parte Hedley Lomas* (1996), with regard to the second requirement for state liability of a sufficiently serious breach, the court stated:

... where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

(See Steiner and Woods, *Textbook on EC Law*, 5th edn, 1996, Blackstone Press, pp 54–60 for criticism of this case.)

The requirement of sufficiently serious breach has most recently been considered in *Dillenkofer & Others v Germany* (1996), where the Court identified the crux of the matter to be ‘whether a failure to transpose a directive within the prescribed period is sufficient *per se* to afford individuals who have suffered injury a right to reparation or whether other conditions must also be taken into consideration’. The Court noted the position adopted in *BT*, that a breach of Community law is sufficiently serious if a Community institution or Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers, and that adopted in *Hedley Lomas*, as to when a breach is sufficiently serious (see above). It went on:

So where, as in *Francoovich*, a Member State fails, in breach of the third paragraph of Article 189 of the Treaty, to take any of the measures necessary to achieve the result prescribed by a directive within the period it lays down, that Member State manifestly and gravely disregards the limits of its discretion.

Thus, such a breach does give rise to damages if the other two conditions are met. No other conditions need to be taken into account. The Court stated:

In particular, reparation of that loss and damage cannot depend on a prior finding by the court of an infringement of Community law attributable to the state, nor on the existence of intentional fault or negligence on the part of the organ of the state to which the infringement is attributable.

What then is the position if there is a clash between individual rights arising out of Community law and national law? The principle of Supremacy of Community law now becomes relevant. Just as with direct effect, the Treaty itself is silent on the issue of primacy of Community law. So it is worth considering the reasoning of the ECJ in concluding that Community law must be supreme. Again the Court concentrated on the issue of the Member States having set up their own legal system. It also looked again at the spirit and aims of the Community and considered that those aims could not be achieved without there being a uniform application of Community law in all the Member States. This could only be achieved by Community law being supreme.

This reasoning is based on the purpose and general aims and the spirit of the Treaty. Member States freely signed the Treaty and agreed under Article 5 to take all appropriate measures to comply with Community law. The Treaty created its own institutions and gave them power to make laws binding on Member States (Article 189). Member States also agreed to set up an institutional control via the Commission and the ECJ. Further, the Community could not function if Member States were free to act unilaterally in breach of their obligations. If the aims of the Community were to be achieved, there must be uniformity of application. This could not happen unless primacy was accorded to Community law.

10.4 Supremacy of EC law

The conflict between Community law and national law has arisen because of the direct effect of Community law and the extensive area covered by the Treaty. The supremacy of Community law has been a constitutional problem for the Member States, especially for the UK because of the legislative supremacy of Parliament.

The Treaty itself does not state what the position should be where there is a conflict between EC and national law. In national constitutional theory, the question of which law is to take effect is a matter for national law and is determined according to the constitutional rules of a particular state (in particular whether the state is monist or dualist). Where a Member State has a written constitution, primacy will be determined by what that constitution says; alternatively, where statute is needed for incorporation, what that statute says. The UK has no written constitution. Primacy is therefore, determined by the ECA

1972. In the UK a statute has the same status as any other statute and can, therefore, be impliedly repealed, ie where there is a conflict between an earlier and a later statute, the matter will be resolved in favour of the later statute. If this rule is applied strictly, any statute passed after the ECA 1972 which conflicts will, by the doctrine of implied repeal, be the effective one. Therefore, what effect Community law has depends on the type of constitution a Member State has. This could result in a lack of uniformity of Community law and the application of it.

The fact that EC law is supreme over national law was first established in *Van Gend*. There the ECJ reasoned that, if the far-reaching goals set out in the Treaty (ie the creation of a Common Market and an ever closer union among the Member States) were to be realised, then the laws of this single Community would have to be applied to the same extent and with equal force in each Member State. States could not unilaterally introduce changes where uniformity was contemplated by the Community. Community measures could not be subjected to the varying requirements of the respective national laws of the Member States. Thus, the principle of supremacy was born. Much of the case, however, concentrated on the issue of the direct effect of Article 12. In any event, the conflict here was between a Treaty provision and an *earlier* Dutch law and, therefore, made sense on the basis of implied repeal.

The next important case to come before the ECJ was *Costa v ENEL* (1964). The conflict here was between a treaty provision and a *later* Italian law. The Court made it clear that such a law could not prevail over Community law. In response to an Article 177 reference, the Court described the Community as a new legal order in which Member States had limited their sovereign rights. It went on:

The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty ...

The Court went further in *Internationale Handelsgesellschaft* (1970) where it stated that the legal status of national law was not relevant to the issue of whether Community law should take priority. Not even a fundamental rule of a national constitution, which in a country with a written constitution is the highest form of law, could be invoked to challenge the supremacy of Community law. The ECJ gave a strong ruling:

Law born out of the Treaty cannot have the courts opposing to it rules of national law of any nature whatever ... the validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that state's constitution or the principle of a national constitutional structure.

The major problem for national courts was the application of this principle. Even if the principle was accepted, what was the national judge to do when

faced with a conflict? English courts, as we know, could not declare a statute invalid. Where there was a written constitution, only the supreme constitutional court could declare a statute invalid. So the question arose as to whether the national judge should wait for offending legislation to be repealed or declared invalid before giving precedence to Community law.

The solution to this question was suggested in *Amministrazione Delle Finanze Dello Stato v Simmenthal SPA* (1978). Here, the Court stated:

... a national court which is called upon ... to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing ... to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

The reasoning behind the judgment is that, unless Community law is given priority at the moment of its entry into force, there cannot be uniform application of law throughout the Community. Therefore, the national courts must ignore incompatible national legislation.

This position was confirmed in *R v Secretary of State for Transport ex parte Factortame* (1990). Here, the Court stated that national courts are obliged by Article 5 to ensure the legal protection which individuals derive from the direct effect of a provision of Community law. Furthermore:

The full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not a rule of national law, is obliged to set that rule aside.

10.5 The enforcement of Community law

Enforcement takes place at both national and Community levels and, as such, has been described as the 'dual vigilance' of Community law.

There is a shared jurisdiction which relies on co-operation between the national courts and the ECJ under Article 177. In *Parti Ecologiste 'les verts' v European Parliament* (1986), the ECJ stated that the Article 177 procedure, together with Articles 173 and 184 (see below) had 'established a complete system of legal remedies and procedures designed to permit the ECJ to review the legality of measures adopted by the institutions'.

This joint jurisdiction of national courts and the ECJ under Article 177 has been used by the ECJ, as seen, to develop the principles already considered. It serves to ensure:

- legally correct judgments in the national courts;
- the uniform application of the law; and
- access to the ECJ by individuals.

The procedure enables national courts to seek guidance from the ECJ on points of Community law which the national courts then apply to the facts of the case. It is *not* an appeal procedure. It enables the ECJ to give a preliminary ruling on the interpretation or validity of Community law prior to application of the law by the national court.

The jurisdiction is limited to areas of Community law only. The ECJ cannot interpret domestic law, nor even comment on the compatibility of national law with Community law. Further, in interpreting EC law the ECJ will not advise the national court in the actual application of Community law. If asked a question on this, the ECJ will rephrase the question and give a ruling in the abstract. The ECJ tends not to interfere in what to refer or when or how. This is left to the discretion of the national judge. However, this policy of accepting any reference was slightly limited in *Foglia v Novello* (1980). Here the ECJ denied itself jurisdiction and refused to give a ruling. The case concerned a reference by an Italian judge regarding the legality under EC law of an import duty imposed by France on the import of wine from Italy. The reference arose in an action between two Italian parties in contract. The parties agreed that Foglia, who was the producer/seller of the wine, should not bear the costs of duties levied by France in breach of EC law. The duties had been charged to and paid by Foglia who then tried to recover them from Novello. The reference concerned the legality of the French import duty under EC law. The ECJ was of the opinion that the proceedings were artificially created in order to question the legality of France's laws and that it was not a genuine question. The function of Article 177 was to contribute to the administration of justice in Member States and not to give advisory opinions on hypothetical questions. It refused to give the ruling.

The power to refer under Article 177 vests in any 'court or tribunal'. This has been interpreted widely and is a matter of Community, and not national, law. In *Pretore di Salo v X* (1987) the ECJ accepted a reference from the prosecutor/examining magistrate since the reference was made in a judicial capacity. The determining factor, it seems, is the function of the court or tribunal. The name of the body is irrelevant. It need only have a judicial function, ie it must have the power to give a binding determination of the legal rights and obligations of individuals.

Article 177 distinguishes between a court which *must* refer and one which *may* refer. Where a question is raised before a court or tribunal against whose decision there is no judicial remedy in the national courts, ie a court from which there is no right of appeal, then that court *shall* bring the matter before the ECJ. In the UK, this applies to the House of Lords. However, where leave to appeal

from the Court of Appeal to the House of Lords is refused, it might be argued that the Court of Appeal is thereby constituted a court from whose decision there is no judicial remedy under national law. This situation remains unclear.

The decision of the national court whether or not to refer is always discretionary in the sense that a court or tribunal at any level may make the reference if a ruling is 'necessary to enable it to give judgment'. Even if the ECJ has ruled on a similar question in the past, further references are not precluded. The issue of when a ruling is 'necessary' was considered by the ECJ in *CILFIT v Ministry of Health* (1982). Guidelines as to when a ruling is *not* necessary were there said to be:

- (a) that the question of EC law is irrelevant;
- (b) that the provision has already been interpreted by the ECJ; and
- (c) that the correct application is so obvious as to leave no room for doubt.

Guidelines (b) and (c) are sometimes described as the doctrine of *acte clair*. This doctrine has its origins in French administrative law and means that the provision is so clear that no question of interpretation arises.

Once the ECJ has made a ruling, it is referred back to the national court for application. The ruling is binding on the individual case and it must be applied by the national court in that particular case. Courts in subsequent cases can treat the ruling as authoritative and choose not to make a further reference on the point. If, however, the ruling is on the validity of a Community Act and the ECJ rules that the Act is invalid then that ruling is binding on the referring national court and future courts.

The success of the Article 177 procedure depends on collaboration between the ECJ and national courts. This has been a weakness. The decision of when and what to refer rests with the national judge. The individual cannot compel a reference but can only persuade. Further, the ECJ can only give rulings in the context of the questions raised. Therefore, the use of the Article 177 procedure to develop the law depends on references being made by national courts.

PART II

JUDICIAL REVIEW OF COMMUNITY ACTS

10.6 Article 173

Article 173 (as amended by Article G(53) TEU) states:

The ECJ shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the treaty or of any rule of law relating to its application, or misuse of powers.

The court shall have jurisdiction under the same conditions in actions brought by the European Parliament and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same condition, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

There are four conditions required in order to challenge under Article 173:

- the act must be of the right kind – para 1;
- the applicant must have standing – paras 2 and 4;
- the application must be made within the time limit – para 5;
- the challenge must be on one of the grounds set out – para 2.

A point to note immediately is that this procedure allows the validity/legality of the act of the Community to be challenged, albeit on the limited grounds set out in Article 173. This is clearly different from the judicial review procedure in the UK where the court cannot question an Act of Parliament itself because of the principle of Parliamentary supremacy (see above). All the UK courts can do is to consider whether the decision-maker has acted within the power conferred.

10.6.1 The act must be of the challengeable kind

Article 173 states that the ECJ shall review acts adopted jointly by the European Parliament and Council or the Council, Commission and European Central Bank alone, other than recommendations and opinions (hence these two are excluded) and acts of the European Parliament alone which are intended to produce legal effects. Prior to the TEU, Article 173 applied only to acts of the Commission and Council. The ECJ had, however, held that acts of the Parliament were also subject to review under Article 173 if they gave rise to legal effects *vis-à-vis* third parties. In *Parti Ecologiste (Les Verts) v European Parliament* (1986), the ECJ held that the Green Party could challenge the allocation by the Parliament of funds to reimburse costs incurred by political groupings which had participated in the 1984 European elections. This position has now been given effect to by the TEU which has also made acts of the ECB reviewable.

If the author of the act is not one of the institutions set out in Article 173, as amended, it will not be subject to review (see *Parliament v Council and Commission* (1993)). This is not to say that the court will simply accept a statement that the act is of a particular institution. It will consider the content and circumstances in which the act was adopted (see *Parliament v Council and Commission* above).

The question of which acts of the institutions are reviewable also needs consideration. The list contained in Article 173 does not appear to be an exhaustive one. It seems that what is required for an act to be subject to review under Article 173 is that it produces legal effects or has binding force. In *Commission v Council* (1971) (the ERTA case) Member States acting through the Council adopted a resolution, the object of which was to co-ordinate their approach to negotiations for a European Road Transport Agreement (ERTA). The Commission did not like the agreement and challenged it under Article 173 arguing that the matter was within the competence of the Community and not the Member States. The question arose as to whether the agreement was subject to review under Article 173 given that it was not contained within the legislation set out in Article 189. The Commission had to establish that the act was challengeable in substance, albeit it was not in form. The ECJ concluded:

Since the only matters excluded from the scope of the action for annulment open to the Member States and the institutions are 'recommendations or opinions' – which by the final paragraph of Article 189 are declared to have no binding force – Article 173 treats as acts open to review by the court all measures adopted by the institutions which are intended to have legal force.

Parliament v Council and Commission (1993) concerned a decision taken by the Member States meeting in Council to provide humanitarian aid to Bangladesh. Parliament applied to have the decision annulled on the basis that the decision was in reality a decision of the Council which had budgetary implications and,

therefore, should have been adopted under Article 203. Parliament argued that the failure to do so infringed its prerogatives. The Council argued that it was a decision of the Member States and not of the Council and was, therefore, not open to review under Article 173. Advocate General Jacobs noted that the question of whether an act of the institutions was open to review depended upon its contents and effects and not upon the description given to it by the adopting institution. He stated:

In my view, this fundamental principle [that the European Community is a Community based on the rule of law] would be violated if it were accepted that an act is not susceptible to judicial review solely on the basis that it has been characterised as an act of the Member States meeting in Council.

The Advocate General went on to state that the Parliament had failed to establish that the decision was in fact one of the Council and, therefore, the act was not subject to review. These views were followed by the court.

In *Parliament v Council* (the *Fourth Lome Convention* case) (1994), the ECJ found that any act of an institution intended to have legal effects was subject to review irrespective of whether the act was in fact adopted pursuant to a Treaty provision.

10.6.2 When does an act produce legal effects?

How is legal effect defined? What does it mean? Hartley (in *Foundations of EC Law*, 3rd edn, 1994, Oxford University Press, p 344) states:

... an act has legal effect if it alters the legal position of some person. A person's legal position is the sum total of his legal rights and obligations. In other words, to have legal effect an act must produce a change in somebody's rights and obligations.

The *Noordwijks Cement Accord case* (1967) is a useful illustration. The case concerned Article 85 which prohibits restrictions on competition between undertakings which result from agreements between them. Under Regulation 17/62 the Commission has the power to fine undertakings for being in breach. Article 85(3) allows for exceptions to be granted by the Commission. The procedure is set out in Regulation 17/62 and requires the undertakings to notify the Commission to get clearance, if needed. This procedure takes time for the Commission to make its decision (which in business may be valuable). What should the undertakings do during this time? If they do not operate the agreements, they may lose out. If they do, they may render themselves liable to heavy fines. To avoid this dilemma, Article 15(5) of Regulation 17/62 provides immunity from fines from the time of notification to the Commission until the Commission makes its decision. However, Article 15(6) of the same regulation removes the immunity once the undertakings are notified by the Commission, after a preliminary examination, that the agreement appears to violate Article

85. Once the undertakings receive this notification, they render themselves liable to fines if they continue with the agreement. This is what happened in this case. The applicants, therefore, brought an action to quash the decision in the letter from the Commission which had been issued under Article 15(6) of the regulation. The Commission argued that the letter was only an opinion and, therefore, not subject to review under Article 173. The letter only contained a preliminary examination and was, therefore, open to reconsideration. As such, it was not legally binding. The ECJ took the view that the effect of the letter was to remove the immunity provided by Article 15(5) and there was, therefore, an effect on the interests of the undertakings. Their legal position had clearly been changed and the letter was binding on them. It was, therefore, a decision, not merely an opinion, and was subject to review under Article 173.

Acts which are only of a preparatory nature are not subject to review since they are said not to produce legal effects (*IBM v Commission* (1981)).

10.6.3 The legal status of Acts of the institutions

Since there must be an act of an institution to mount a challenge under Article 173, consideration must be given to the status of acts of the Community institutions. In general, an act of a Community institution is valid and has legal effect until such time as it is set aside by the ECJ. In other words, such acts may be described as being voidable. The reasoning for this is the necessity to provide legal certainty. However, it is possible for an act to be void and it will be so when it is patently obvious that it is invalid (*EC Commission v BASF AG* (1994)), for example when the author of the act did not have the power to make it. The reasoning of the ECJ in finding an act void is the necessity to maintain a balance between the fundamental requirements of 'stability of legal relations and respect for legality' (*EC Commission v BASF AG* (1994)). So why is this important in the context of which acts are subject to review under Article 173? The answer is that only *voidable* acts are subject to review. If it is determined that an act is void, then it follows that it has no legal effect and it cannot be the subject of review under Article 173. If an act is void then it is said never to have existed (it is void *ab initio*) and it would be meaningless to subject something which has never existed to review. A second consequence of whether an act is void or voidable relates to the two month time limit for challenge. If an act is determined to be void, then it can be said to have never existed. As such, the time limit does not apply. An invalid act cannot be made valid by the expiration of time.

However, the Court is loathe to find an act non-existent. Hartley (above, at p 355) argues that 'the two cases in which an act would be non-existent are where it is clearly and obviously *ultra vires* or if there are such major procedural defects in its enactment that it could not be said to have been adopted by the authority'.

10.6.4 Standing/*locus standi*

Standing is set out in paras 2, 3 and 4 of Article 173. Paragraph 2 refers to 'privileged' applicants. These are the Commission, Council and Member States. They always have standing irrespective of any interest they may have in a particular matter (*EC Commission v EC Council (Generalised Tariff Preferences case)* (1987)).

Parliament and the European Central Bank have standing for the purposes of protecting their prerogatives under Article 173, as amended by the TEU. Prior to this, the Court gave the Parliament standing for this purpose (*European Parliament v Council (the Chernobyl case)* (1990)). Its reasoning was based on the need to maintain the institutional balance within the Community as laid down in the Treaties. The judgment is interesting not only because it reversed the judgment in *European Parliament v Council (the Comitology case)* (1988) but also because it shows the Court almost rewriting the Treaty. Article 173, until it was amended, clearly did not state anywhere that the Parliament was to have standing

Paragraph 4 contains what are referred to as 'non-privileged' applicants. These are any natural or legal person. Many of the interpretation issues arise in this context. Paragraph 4 contains stringent requirements which need to be fulfilled before an individual or legal person can challenge an act of the institutions. Such a challenge is allowed if:

- the decision is addressed to the applicant;
- the decision, in form of a regulation, is of direct and individual concern to the applicant; or
- the decision, which is addressed to a third person, is of direct and individual concern to the applicant.

According to Article 189, a decision is 'binding in its entirety upon those to whom it is addressed'. Consequently, where the addressee of the decision is the applicant under Article 173, standing is not usually an issue. Problems in this area do arise where the decision is in the form of a regulation or where it is addressed to a third person since, in both these circumstances, the applicant is required to show that it is directly and individually concerned. The case law in this area is complex and the Court does not seem to adopt a common position throughout. In *Extramet Industrie v EC Council* (1991), Advocate General Jacobs examined the criteria required. There are, he suggested, three hurdles to be overcome:

- the act must be a decision in substance;
- where the decision is in the form of a regulation, although not in substance, and where it is addressed to a third person, the applicant must show *individual concern*; and

- where the decision is in the form of a regulation, although not in substance, and where it is addressed to a third person, the applicant must show *direct concern*.

The act must be a decision in substance

It is important to identify whether a particular act is a decision. If it is not, a non-privileged applicant cannot challenge it under Article 173. An individual cannot challenge a true regulation. However, in order to avoid the position where institutions adopt a measure under the title 'regulation' to avoid review under Article 173, what is required is that the act be a decision in substance even though it is a regulation in form. It is clear that a decision masquerading as a regulation is open to challenge. The ECJ has also taken the view that the same applies to directives (see *Federation European de las Sante Animale v Council* (1988) and *Government of Gibraltar v Council* (1994)).

What then is the essential element of a decision? The same test as for identifying a reviewable act applies here (see *Noorwijk Cement* case), ie the legal effect of the act will determine whether it is in fact a decision. In *Confederation Nationale des Producteurs de Fruits et Legumes v Council* (1962) the ECJ determined that 'decision' in Article 173 has the same meaning as it does in Article 189. Article 189 defines a regulation as being 'binding in its entirety' and a decision as 'binding upon those to whom it is addressed'. On this basis it may be said that the distinction between the two is that a regulation is of general application whilst a decision is of limited application. Thus the Court stated:

... a regulation shall have general application and shall be directly applicable in all Member States, whereas a decision shall be binding only upon those to whom it is addressed. The criterion for the distinction must be sought in the general application or otherwise of the measure in question.

Therefore, in determining whether an act is in fact a decision, consideration should be paid to whether the measure is of concern to a specific individual.

In determining whether a measure is a true regulation, the Court will consider whether the legal effects produced apply to a general category of persons or whether they apply to a specific individual. Only if they apply to a specific individual will they be decisions and, therefore, susceptible to challenge under Article 173(4). Where the application relates to a past set of events, the Court considers whether the applicants belong to a fixed, closed category of persons (*International Fruit Company BV v Commission* (1971)).

Individual concern

Where a decision is in the form of a regulation or is addressed to a third person, the applicant must show that the decision is of individual concern. In *Plaumann & Co v Commission* (1963), the ECJ set out the test for determining individual concern. It stated:

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguish them individually just as in the case of the person addressed.

This is quite a narrow test which results in many applicants failing at this stage.

Direct concern

This is a question of causation, ie there needs to be a link between the act and the impact on the applicant and the link must be direct. If there is some intervening event then the applicant will not be directly concerned. An example of an intervening event is where a third person retains some discretion. This is analogous to direct effect which requires there to be no discretion on the part of the Member State. The discretion can be positive or negative. The *International Fruit Co* case (above) is an example of there being no discretion. The Court held that, since the formula laid down by the Commission left no discretion to the national authorities, the applicants were directly concerned. Where a power is exercised first and then confirmed, there will be no discretion and the applicants will be directly concerned (*Toepfer v Commission* (1965)).

10.6.5 Time limits

In addition to satisfying the above requirements, an applicant must also comply with the two-month time limit set out in Article 173(5). The period begins to run from the publication of the measure or the notification of the measure to the plaintiff. In the absence of either of these, the period runs from the day on which the measure came to the knowledge of the applicant.

Under Article 191(1) (as amended by Article G(63) TEU), regulations, directives and decisions must be published in the Official Journal and take effect on the 20th day following their publication. It is from this date that time begins to run. The time limit must be strictly observed since the rationale for it is the interest of legal certainty.

10.6.6 The grounds of challenge

Any challenge under Article 173 must be made on one of the grounds set out in para 2. They are:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the Treaty, or any rule of law relating to its application;
- misuse of powers.

There is, in fact, much overlap between these grounds and applicants are well-advised to plead them all.

Lack of competence

Every act of the Community must have a legal basis; that is, the institution enacting the measure in question must be able to point to the power authorising it to act. The preamble to any legislation should contain the legal basis for it.

It is rare for actions brought on this ground to be successful. There are two reasons for this. The first is the Court's method of interpretation. The court has adopted a purposive or teleological approach, interpreting the powers of the Community in order to allow for the attainment of the objectives of the Community. The second relates to the provisions of the Treaty which confer broad legislative powers (for example Article 100 and Article 235). Article 235 in particular has proved a valuable residual power for legislation. Much legislation, such as that relating to the environment, was issued on the basis of this Article until specific power was conferred either by the Single European Act or the Treaty on European Union. Subsidiarity is also of relevance here in that Member States may claim the Community's lack of competence to adopt a measure on the basis of the principle.

Infringement of an essential procedural requirement

It should immediately be noted that it is the infringement of an *essential* procedural requirement that is required. This is similar to the distinction between a mandatory and directory provision in national judicial review. The aim of the distinction is to maintain a balance between good administration and the rights of the individual. Examples of essential procedural requirements are the right to a hearing (*Transocean Marine Paints v Commission* (1974)), the duty to give reasons (*Germany v Commission* (1963)) and the duty to consult (*Roquette Freres SA v Council* (1980)). The question is how to identify an essential procedural requirement. Hartley suggests that what is required is consideration of the function of the requirement and the likely consequences of non-observance. If failure to observe the requirement affects the final content of the act then it is an essential procedural requirement. Hartley also accepts that this is not the sole test and that it is possible for requirements which have no effect on the final content of the act to be deemed essential. He cites the example of the requirement to give reasons for legislation under Article 190. According to the ECJ, the objective in requiring reasons is (i) to assist individuals in defending their rights, or (ii) to assist the Court in its supervisory function, or (iii) to enable third parties to appreciate the way in which enacting institutions exercise their power. None of these considerations fits into Hartley's test (above). It seems that the core of the test is the consequence of failing to observe a requirement.

Infringement of the Treaty or any rule of law relating to its application

This ground covers *all* rules, including those that are not in the Treaty itself. This is the widest of the four grounds and probably renders the others unnecessary. It is here that general principles of law are most commonly raised.

Misuse of power

This ground is probably equivalent to the English administrative law ground of improper purpose. It relates to a power being used for a purpose other than that for which it was granted. There is some resemblance to the general principle of proportionality. The distinction between the two is that for proportionality the objective is legitimate but the method disproportionate to its achievement, whilst misuse of power concerns the objective itself being improper. Misuse of power, is therefore, very much concerned with a subjective test in that it is necessary to establish the intention behind the exercise of the power. As a result, this ground is not commonly pleaded. There is no need to show bad faith on the part of the authority exercising the power. It is possible to misuse a power innocently.

It also seems that the Court will not annul a measure for misuse of power if it had no effect on the substance of the measure; that is, if the measure would have been valid had there been a proper purpose (see *Fedechar v High Authority* (1956)). If there are proper and improper purposes then, providing that the proper purpose is the decisive one, the measure will not be annulled (*Fedechar*). This seems to suggest that, providing a legitimate *aim* is achieved, then an improper purpose is irrelevant.

The consequence of an action under Article 173 is set out in Article 174:

If an action is well-founded, the ECJ shall declare the act concerned to be void ... In the case of a regulation, however, the ECJ shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive.

10.7 Wrongful failure to act

10.7.1 Article 175

Article 175 (as amended by Article G(56) TEU) states:

Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the ECJ to have the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the ECJ that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

The ECJ shall have jurisdiction, under the same condition, in actions or proceedings brought by the ECB in the areas falling within the latter's field of competence and in actions or proceedings brought against the latter.

As the Article makes clear, the failure must relate to an infringement of the Treaty. There is a clear relationship between this Article and Article 173. It could be argued that where an institution of the Community issues an act and then fails to revoke it upon a request to do so, this amounts to a failure to act which is actionable under Article 175. This would avoid the stringent limitations of Article 173. The Court has, however, made it clear that it is not permissible to use Article 175 in this way. In joined cases *Societa 'Eridania' Zuccherifici Nazionali v Commission* (1969) the Court stated:

The Treaty provides, however, particularly in Article 173, other methods of recourse by which an allegedly illegal Community measure may be disputed and if necessary annulled on the application of a duly qualified party.

To admit, as the applicants chose to do so, that the parties concerned could ask the institution from which the measure came to revoke it and, in the event of the Commission's failure to act, refer such a failure to the court as an illegal omission to deal with the matter would amount to providing them with a method of recourse parallel to that of Article 173, which would not be subject to the conditions laid down by the Treaty.

Although there is a relationship between Articles 173 and 175, one clear difference is that Article 175, para 2 requires the applicant, before beginning proceedings, to request the defendant institution to take some action. The institution then has two months to do so. Only if it fails to do so can the applicant bring the action and this must be done within a further two months. Although there does not appear to be a time limit within which the request must be made to the defendant institution, the Court has made it clear that the request must be made within a 'reasonable' time (*Netherlands v Commission* (1971)). What is required of the defendant institution during the initial two-month period is that it defines its position. Paragraph 2 states that if the 'institution has not defined its position the action may be brought within a further period of two months'. The question arises as to what precisely this means. Does it mean that if, for example, the Commission states clearly its refusal to act, then it may be said to have defined its position and, therefore, an action under Article 175 is not permissible? This question was raised in the *Comitology* case (1988) in

which the Parliament was seeking standing under Article 173. The Court stated that 'a refusal to act, however explicit it may be, can be brought before the court under Article 175 since it does not put an end to the failure to act'. This means that an explicit refusal to act will not constitute a definition of position. This conclusion is inappropriate for two reasons. Firstly, the logical conclusion to be drawn from this would be that only compliance with a request for action would be a definition of position. This cannot be correct. Secondly, there have been cases in which the Court has accepted that refusal to act is a definition of position within para 2 of Article 175 (*Lutticke v Commission* (1966), *Nordgetreide v Commission* (1972)). In both these cases, however, the refusal was a negative act which could have been challenged by the applicant directly. Therefore, it seems that a refusal to act will not be a definition of position only where it cannot be challenged under Article 173.

Just as under Article 173, privileged applicants always have standing under Article 175. Non-privileged applicants only have standing where the institution has 'failed to address' to them 'an act other than a recommendation or an opinion'. So, which acts can be reviewed under this Article? Since the act must be addressed to the applicant, only decisions are reviewable. Regulations are of general application and directives are addressed to Member States. Just as under Article 173, it is the substance and not the form which is important here. An issue with regard to standing is whether the act in question needs to be actually addressed to the applicant or whether, as under Article 173, it is sufficient for the applicant to be individually and directly concerned. The wider requirement of individual and direct concern was supported by Advocate General Dutheillet de Lamothe in *Mackprang v Commission* (1971). The Commission argued that the act had to be actually addressed to the applicant. The Advocate General took the view that there would be anomalies between Articles 173 and 175 if this were to be the case. The Court did not, however, rule on the matter and it was not settled until *ENU v Commission* (1993) where the court took the view that *ENU* were individually and directly concerned and, therefore, had standing. Thus the test for standing under Article 175 is the same as that for Article 173.

The consequence of a successful action is set out in Article 176; the institution is required to take action to comply with the judgment of the Court.

10.8 Indirect challenge (plea of illegality)

10.8.1 Article 184

This ground of challenge, often referred to as the plea of illegality, is probably more accurately described as an indirect challenge. It involves a challenge made to the validity of an act in the course of proceedings not instituted for that particular purpose. Therefore, the object of the proceedings is something other than the annulment and the Court's jurisdiction must arise independently of

this challenge. The act being challenged will not be the subject matter of the proceedings in which the challenge is made.

An Article 184 action can only be directly raised before the ECJ, although Article 184 itself is not specific in this regard. The Court made its position clear in joined cases *Wohrmann v Commission* (1962) and *Alfons Lutticke v Commission* (1962) when it stated:

More particularly, it is clear from the reference to the time limit laid down in Article 173 that Article 184 is applicable only in the context of proceedings brought before the ECJ and that it does not permit the said time limit to be avoided.

If it is raised before a national court, this is so only to the extent that there must then be a reference under Article 177(b) on the validity of the Community act. This is perfectly logical since national courts are not empowered to question the validity of an act of the institutions of the Community. However, because of the reference procedure, it is in fact the national court that makes the final judgment since any ruling from the ECJ is applied by the national court to the facts before it. Therefore, in the final analysis, it may be argued that Article 184 proceedings are, in fact, brought before national courts. Since the Article 177 procedure depends on the national court's willingness to make a reference, then Article 184 can only be raised if the national court is willing to make an Article 177(b) reference. The grounds of challenge are the same as in a direct challenge and the effect of a successful challenge is that the challenged act is not applied to the case in question. Only regulations may be challenged under Article 184 and again it is substance and not form which is all important (*Simmenthal v Commission* (1979)). Where the act is addressed to a third person (eg a regulation addressed to a Member State which authorises the Member State to issue a decision in respect of a particular issue) and the applicant lacks standing to challenge the Act under Article 173, then he may challenge the act under Article 184.

The position where an act is addressed to a third person and the applicant has individual and direct concern and could have challenged under Article 173 but has failed to do so, was set out in *TWD Textiles* (1994). The Court held that no indirect challenge could be made since the company had been informed of the decision by the German government and could have challenged it directly. The position now seems to be, therefore, that a party with standing to make a direct challenge may only challenge indirectly if there is doubt about its standing or if it is not officially informed of the decision in sufficient time to make the direct challenge.

10.8.2 Who can make the challenge?

Since privileged applicants always have standing to seek a direct action under Article 173, the question arises as to whether they can ever make an indirect

challenge under Article 184. In *Italy v Commission* (1966) Italy brought proceedings to quash a Council regulation and made an indirect challenge on two other regulations. The Commission questioned whether a Member State could do this but Advocate General Roemer stated that Member States had the same rights as other applicants. His view was based on two lines of reasoning. First, Article 184 provides that 'any' party can make a challenge. Second, a Member State may not have made a challenge until later when the defect became apparent, but by this time it would be outside the time limit. The position, however, remains unclear since the Court did not deal with the issue. The application was rejected on the basis that the question was not relevant to the issue before the Court.

PART III

EC LAW AND JUDICIAL REVIEW IN THE UK

You will have seen that the position of the UK courts in exercising their supervisory jurisdiction of judicial review is to consider the legality of the decision-making process only and not to consider the merits of the decision. This enables the court to maintain the traditional relationship between the judiciary and the executive and parliament. The aim of this part of the chapter is to consider what effect EC law has had on judicial review and whether this, in turn, has had any effect on the relationship between the organs of state.

10.9 A new judicial review role for the courts in relation to legislation?

As seen earlier, the ECJ has established that the relationship between Community law and national law is that Community law is supreme. The acceptance of supremacy within the UK has not been unproblematic. The central obstacle to acceptance of the principle of supremacy was the fundamental principle of the legislative supremacy of Parliament. The principle has meant that the courts' judicial review jurisdiction does not permit the validity of legislation to be tested. Only the exercise of power conferred by legislation can be supervised to ensure that it is lawful. In the context of Community law, however, it has become apparent that this role has changed.

The UK is a dualist state and, as such, national legislation was needed to give effect to EC law domestically. However, this would not maintain the supremacy of Community law since any statute which came after it could expressly or impliedly override it. So, to what extent does the ECA 1972 provide for supremacy of Community law?

The important sections here are:

- Section 2(1), which provides for the direct applicability of Community law.
- Section 2(2), which provides general power for further implementation of Community obligations by means of secondary legislation, subject to Schedule 2 which prohibits some areas, eg any increase in tax.
- Section 2(4), which provides:

The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and *any enactment passed or to be passed*, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following section of this Act to make Orders in Council and regulations.
- Section 3 provides:

For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by any relevant decision of the European Court or any court attached thereto).

The question is whether this is effective in enabling the UK courts to give priority to EC law on the *Simmenthal* principle, ie to set aside conflicting national legislation; or whether it merely lays down a rule of *construction* which results in domestic law having to be construed *as far as possible* in conformity with EC law.

The traditional view would revolve around the principle of the legislative supremacy of Parliament. This would mean that the ECA could not be entrenched and that, therefore, it would be subject to implied repeal since one Parliament cannot bind a future Parliament. It was said, therefore, that EC law could not be guaranteed. All s 2(4) did was to provide a rule of construction. If the courts were to follow *Simmenthal* and apply Community law in priority to national law, they would be departing from that traditional view. So, what have the UK courts done?

In *Felixstowe Dock v British Transport Docks Board* (1976), which concerned a conflict between an imminent statute and Article 89 of the Treaty, Lord Denning stated:

It seems to me that once the bill is passed by Parliament and becomes a statute, that will dispose of all this discussion about the treaty. These courts will then have to abide by the statute without regard to the treaty at all.

So, an Act of Parliament would override Treaty law.

The next major case in which a conflict arose was *Macarthy v Smith* (1979) which concerned a claim for unlawful dismissal on the grounds of sex in relation to equal pay. Mrs Smith's contract contained a difference from the contract of her male predecessor, ie she was paid less. The employer argued that the Equal Pay Act 1970, as amended by the Sex Discrimination Act 1975, meant that Mrs Smith was only entitled to compare her pay with that of a male employee engaged in like work *at the same time* as her. Mrs Smith argued that Article 119 permitted her to base her claim on a comparison with her male predecessor. In the Court of Appeal, Cumming Bruce LJ and Lawton LJ took the European view and were prepared to give Community law priority. Their reasoning, however, maintained the supremacy of Parliament since it was argued that such priority was based on the ECA 1972. Lord Denning preferred to use s 2(4) as a rule of construction and, therefore, construed the English law (ie the Equal Pay Act 1970) so as to conform with the principle of equal pay for equal work in Article 119. He took a broad view of construction:

We are entitled to look to the Treaty as an aid to construction even more, not only as an aid but as an overriding force. (Moreover) if ... our legislation is deficient or is inconsistent with Community law ... then it is our bounden duty to give priority to Community law.

Lord Denning, therefore, resisted using the word 'primacy'. Instead he used construction on the basis that Parliament intended to conform with her Community obligations. This led him to say:

Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligation under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought then it would be the duty of our courts to follow the statute of our Parliament.

In this way, Lord Denning was able to reconcile the supremacy of Community law with the legislative supremacy of Parliament.

In *Garland v British Rail Engineering* (1983), which concerned the same conflict as in *Macarthy*, the House of Lords adopted the position taken by Lord Denning in *Macarthy* stating that the relevant section must be construed so as to conform with Article 119.

What, then, of the position where there is a clear conflict? In *Macarthy*, Lord Denning had asserted that 'It is our bounden duty to give effect to the Act of Parliament'. In *Garland*, however, Lord Diplock said that national courts must construe domestic law so as to conform 'no matter how wide a departure from the *prima facie* meaning may be needed to achieve consistency'.

The most important recent case regarding supremacy is *R v Secretary of State for Transport ex parte Factortame* (1990). Here, the House of Lords accepted that membership of the EC and the ECA 1972 had altered the rule on legislative supremacy where there is inconsistency between Community law and domestic

law. The applicants were fishing vessel owners. Vessels were first registered in Spain and then re-registered as British vessels. Quota systems under the Common Fisheries Policy meant that the UK government became concerned that inclusion in the UK quota of vessels fishing for the Spanish market would adversely affect the British fishing industry. Therefore, it passed the Merchant Shipping Act 1988 ending applications for re-registration in the UK. The applicants claimed the legislation was contrary to EC law which prohibited:

- discrimination on the grounds of nationality;
- restrictions on imports between Member States;
- prevention of creation of common market in agricultural products;
- prevention of free movement of workers and freedom of establishment of companies;
- prevention of equal treatment for nationals of Member States.

The Divisional Court made an Article 177 reference and made an order of interim relief pending the ECJ's preliminary ruling on the compatibility of the UK law with EC law so that the applicants could continue registering vessels. The Court of Appeal reversed the decision on interim relief on the basis that this would be overriding legislation. In the House of Lords, the relationship between Community law and national law was explained. Lord Bridge stated that the combined effect of ss 2(1) and 2(4) of the ECA 1972 was that the Merchant Shipping Act 1988 was without prejudice to directly enforceable Community rights of nationals of any Member State of the EC. He suggested that if it were to be found that the British Act was in breach of directly effective rights, then these would prevail over contrary provisions of the 1988 Act.

Once the ECJ's ruling relating to the granting of relief was returned irrespective of national obstacles, the House of Lords unanimously granted relief (*R v Secretary of State Transport ex parte Factortame (No 2)* (1991)). Lord Bridge made comment on the relationship between Community law and national law:

... if the supremacy within the EC of Community law over national law of Member States was not always inherent in the EEC Treaty, it was certainly well-established in the jurisprudence of the ECJ long before the UK joined the Community. Thus, whatever limitations of its sovereignty Parliament accepted when it enacted the ECA 1972 was entirely voluntary. Under the terms of the ECA 1972, it has always been clear that it was the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law ... Thus there is nothing in any way novel in according supremacy to rules of Community law in these areas to which they apply and insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

Therefore, the House of Lords simply accorded supremacy to Community law.

The UK courts have shown a clear willingness to accord supremacy to directly effective Community law either by construction or by simply giving priority. However, it has been made clear that if Parliament expressly requires otherwise, then they will uphold Parliament's wishes. So, where the conflict is between directly effective Community law and national law, EC law prevails. What if EC law is *not* directly effective? Would it still prevail? That is, does s 2(4) enable the UK courts to follow the *Von Colson* principle and set national law aside? In *Duke v Reliance* (1988), the House of Lords thought not. Lord Templeman was of the opinion that s 2(1) and (4) applied only to directly effective Community law.

In *Litster v Forth Dry Dock and Engineering Co Ltd* (1990), however, the House of Lords interpreted a UK regulation to comply with Directive 80/777. It suggested that where legislation was introduced specifically in order to implement an EC directive, the UK courts must interpret domestic law to comply with that directive, if necessary 'supplying the necessary words by implication' in order to achieve a result compatible with EC law. Therefore, it seems that, in the absence of evidence that Parliament intended not to comply, priority for EC law should be ensured by way of interpretation of national law even where the EC law is not directly effective

Equal Opportunities Commission v Secretary of State for Employment (1995) is the most recent case of acceptance of the supremacy of Community law. The EOC argued that provisions in the Employment Protection (Consolidation) Act 1978 relating to qualification periods for unfair dismissal and redundancy payments for part-time workers were indirectly discriminatory against women and, therefore, contrary to Article 119 and the equal pay and equal treatment directives. The Secretary of State refused to accept this and wrote to the EOC stating so. The EOC sought review of this decision. The House of Lords took the view that the letter was not a decision and, as such, was not susceptible to review. But as Lord Keith identified, the real issue for the EOC was the provisions in the Act itself. Thus, the real question for the court was whether the EOC could seek a judicial review of primary legislation alleged to be in breach of Community law. The House of Lords stated that there was no constitutional barrier to an applicant before the UK courts directly seeking judicial review of primary legislation alleged to be in breach of Community law. It regarded this as a natural extension of its earlier case law (*Factortame*) and as being, by implication, based on the will of Parliament as expressed in the ECA 1972. Lord Keith stated:

The EOC is concerned simply to obtain a ruling which reflects the primacy of Community law enshrined in s 2 of the 1972 Act and determines whether the relevant United Kingdom law is compatible with the equal pay directive and the equal treatment directive.

10.10 Remedies for breaches of EC law

The idea behind the development of direct effect and the supremacy of Community law by the ECJ was to enable it to comply with its obligations under Article 164 of ensuring that, in the application and interpretation of the Treaty, Community law is observed. The enforceability of Community law would be useless without effective remedies and sanctions for breaches and, therefore, requires effective remedies in national law.

The Treaty contains no express provisions in this respect. Initially, the Court took the view that remedies and sanctions were a matter for national law. In *Rewe Zentralfinanz eG & Rewe Zentral AG v Landwirtschaftskammer für das Saarland* (1976), the applicants were companies which had paid charges in Germany in respect of inspection costs for fruit imported from France. These charges were found to be in breach of Article 12 which prohibits customs duties and measures having equivalent effect to them. The companies, therefore, applied to have the decision imposing the charges annulled and sought repayment of the amounts paid with interest. On appeal, the German Federal Administrative Court found that under national rules of procedure, the time limit for challenging national administrative measures had expired. It therefore referred several questions under Article 177 asking whether Community law required that the applicants be granted the remedy sought. The ECJ focused on Article 5, which requires Member States to take all appropriate measures to ensure compliance with their obligations which arise out of the Treaty. It noted the absence of specific Treaty provisions and stated that it was for the legal systems of each Member State to determine which courts had jurisdiction and the procedure to ensure the protection of the rights of citizens which arise out of the direct effect of Community law. However, it stated that 'such conditions cannot be less favourable than those relating to similar actions of a domestic nature'.

Therefore, the Court's view was that it was for national law to effectively protect the rights of individuals arising from Community law. This was subject to two conditions:

- The remedies and forms of action available to ensure the observance of national law must be available for ensuring the observance of Community law:
... the right conferred by Community law must be exercised before national courts in accordance with the conditions laid down by national rules ... There is, therefore, no requirement that national legal systems be changed in order to provide remedies for breaches of Community law.
- The national procedures should not render the Community right unexercisable:

... the position would be different only if the condition and time limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.

Ferwerda v Produktschap voor Vee en Vlees (1980) is an example of this. The applicants had been overpaid under a Community regulation. They sought to resist a claim to repay, which had been requested by the authority under another provision of the regulation, by invoking the principle of legal certainty available at national law. The Dutch court referred several questions to the ECJ asking whether the provisions of the regulation which allowed this claim for refund of overpayment overruled the legal certainty principle available in national law, and also whether the principle was part of Community law. The ECJ stated that such disputes (ie reimbursement of amounts collected for the Community) are a national law matter if there was no relevant Community law. It then said that the national court's obligation in this respect arose out of Article 5 and this meant that the national courts were under an obligation to provide legal protection for rights which arose out of Community law. It restated that it was for national legal systems to determine the courts with jurisdiction and procedures but 'such procedures may not be less favourable than those in similar procedures concerning internal matters and may in no case be laid down in such a way as to render impossible in practice the exercise of the rights which the national courts must protect'.

The problem with leaving it to the legal systems of each Member State to provide remedies and sanctions for breaches of Community law is that it may mean that there are potentially 15 different methods available. This may result in a lack of uniformity in the application of Community law. Given the Court's view that uniform application of Community law is vital for the Community itself, it would seem that this was a position to avoid. However, as Advocate General Warner noted in *Ferwerda*, the answer to this objection is that the Court 'cannot create Community law where there is none. That must be left to the Community's legislative organs'.

It was, however, becoming clear that leaving it to the national law of Member States, albeit subject to the conditions set out, was not sufficient to ensure the full enforcement of Community law. Some principles of Community law would have to be considered by national courts when determining issues of enforcement of Community law within national legal systems. In *Sagula, Brenca & Bakhouché* (1977), criminal proceedings had been brought in Germany against non-German Community nationals on the grounds that they had resided in Germany without the appropriate residence permits and documents. The German court referred questions on the interpretation of Directive 68/360 (which relates to the free movement of persons and residence) and Article 7 (non-discrimination) (now Article 6 since the TEU) and Article 48 (free movement of persons). It wanted to establish whether applicable penal provisions of German law were compatible with Community law. The ECJ

noted that, under Article 189, it was for the Member States to give effect to directives and that the choice of form and method was for Member States. It was also for Member States to ensure observance and they could, therefore, implement penalties. However, 'penalties imposed must not be disproportionate to the nature of the offence committed'. Therefore, there was now a third requirement that penalties be proportionate to the breach.

Von Colson & Kaman v Land Nordrhein Westfalen (1984) introduced the requirement that there must be adequate and effective securing of Community rights. It will be remembered that the case concerned the adequacy of compensation available (which was only travel expenses to the interview) and breach of the sex discrimination directive. The ECJ noted that it was for Member States to choose solutions suitable for achieving the objective of sanctions for breach (in this case the prohibition on discrimination). However, it stated that:

... if a Member State chooses to penalise breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as for example the reimbursement only of the expenses incurred in connection with the application.

There was here a potential conflict. On the one hand, the Court had been clear that there was no obligation to create new remedies. On the other hand, there was now the requirement that there must be effective remedies. In *Von Colson*, there was, in fact, national legislation which could have been used to provide more substantial compensation than that available under the national law giving effect to the directive. But given the requirement of effective remedies, what would the national court have been required to do had there been no such legislation? Would it, in having to comply with the requirement of an effective remedy, have had to ignore that national law (which would have provided inadequate compensation and, therefore, an ineffective remedy) and create a new remedy? The question was not clearly addressed. It was, however, in *R v Secretary of State for Transport ex parte Factortame Ltd* (1990). This was the second in a number of cases relating to the registration of fishing vessels in the UK under the Merchant Shipping Act. The reference from the House of Lords concerned the need to grant a remedy not available in national law – interim relief against the Crown. The ECJ emphasised the requirement of effectiveness and gave the principle priority over national law. The national court, therefore, would have to ignore national law and create a new remedy. The judgment is a far-reaching one in that national courts would have to go beyond providing that which was available for breaches of national law. The effect in the particular case was to make available for a breach of Community law a remedy not available at national law – interim relief against the Crown. *Factortame* indicates, therefore, that national courts must set aside national rules which are the only obstacles to the grant of a remedy to protect directly effective Community rights.

What where the national rule does not bar a remedy, ie it is not an absolute obstacle but only a hurdle, so detracting from the effectiveness of the remedy? *Marshall v Southampton & South West Area Health Authority (No 2)* (1993) addressed the issue. This case arose out of the assessment of damages for the breach of Community law found in *Marshall (No 1)* where it was held that Mrs Marshall could rely on the equal treatment directive against her public body employer. It was then for the national court to assess the level of compensation. The industrial tribunal assessed the damages at £18,405, which included £7,710 in interest. Under the Sex Discrimination Act 1975, however, there was a maximum compensation limit of £6,250 and it was not clear whether the industrial tribunal had the power to award interest. The House of Lords referred questions to the ECJ asking whether a person discriminated against on the grounds of sex by a public body was entitled to full compensation for any damage sustained. Further, whether Article 6 of Directive 76/207 (which requires Member States to provide measures whereby persons who feel themselves to be wronged can pursue their claim by judicial process) could be relied on by an individual against the national legislation which, although intended to give effect to the directive, in fact placed limits on the amount of compensation. The ECJ stated that the obligation contained in Article 6 of the Directive implied that whatever the measures, they should be effective to achieve the objective of the directive (to put into effect in Member States the principle of equal treatment for men and women) and should be capable of being effectively relied upon by claimants before national courts. It noted, as it did in *Von Colson*, that the choice of measure was one for the Member States. However, whatever the measure was, it had to be 'such as to guarantee real and effective judicial protection and have a real deterrent effect on the employer'. Therefore:

When financial compensation is the measure adopted in order to achieve the objective indicated above, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules.

The Court found that the fixing of an upper limit on the level of compensation could not constitute a proper implementation of Article 6 since such a limit may not necessarily be consistent with the requirement of ensuring real equality through adequate compensation for loss and damage sustained. Thus, where national legal systems provide remedies but impose restrictions upon them, the national court must assess whether the remedy is nevertheless really effective. If the restriction prevents its effectiveness then, following *Factortame*, the national court will have to provide an effective remedy even though it may not exist for a similar breach of a national law.

The Court has moved some way in addressing the conflict of remedies being a matter for national legal systems and the requirement that any such remedies must be tested for their effectiveness by creating a so-called Community remedy. Joined cases *Francovich and Bonifaci v Italy* (1991) concerned

the failure by Italy to implement Directive 80/987 on the protection of employees in the event of the insolvency of their employer. Both applicants were owed money by their insolvent employer. No steps had been taken by Italy to ensure that they would receive payment. They brought actions against the Italian state claiming that the state was liable for the amount either by reason of the rights arising out of the directive or by way of an action against the state for damages. The ECJ held that the provisions of the directive were not sufficiently clear and precise to give rise to direct effect. However, the directive clearly intended to confer rights on individuals which the applicants had been deprived of because of the state's failure to implement it. It found that the full effectiveness of Community rules would be impaired and the protection of rights granted would be weakened if individuals were not able to obtain compensation when their rights had been infringed by a breach of Community law for which the Member State could be held responsible. It stated:

The possibility of compensation by the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the states and consequently individuals cannot, in the absence of such action, enforce the rights granted to them by Community law before the national courts.

It follows that the principle of state liability for harm caused to individuals by breaches of Community law for which the state can be held responsible is inherent in the system of the treaty.

It went on to state that 'it is a principle of Community law that the Member States are obliged to pay compensation for harm caused to individuals by breaches of Community law for which they can be held responsible'.

10.11 Judicial review as a means of challenging breaches of EC law

It is for the national legal systems of Member States to provide remedies and sanctions for breaches of Community law subject to the conditions set out. The question is whether such a breach is a matter of public law so that it must be pursued by means of judicial review. The issue was addressed in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* (1986). The case arose out of the ban on the importation of turkeys from France into the UK. In *Commission v UK* (1982) in an Article 169 action the UK had been found to be in breach of Article 30. As a result, the French turkey producers and distributors brought an action claiming damages for the losses suffered as a consequence of the ban. The Court of Appeal noted that Community law required that a remedy must be available for breach of rights conferred but that the precise nature of the remedy was not prescribed. The majority (Oliver LJ dissenting) held that the action should have been brought as a judicial review since this was a mere breach and

the remedies available in judicial review would provide 'adequate protection'. Damages would be available only if the power exercised was abused. This position must now be reconsidered in the light of the ECJ's rulings in *Francovich* and *Brasserie*.

10.12 The impact of EC law on national judicial review

Following the principle of national treatment (see above), the rules and procedures of judicial review for national matters apply equally to matters concerning Community law. The ECJ has also made it clear that remedies for breaches of Community law must be effective. Therefore, the question arises as to whether the judicial review procedure provides an adequate and effective remedy in the context of breaches of Community law. Does the judicial review procedure need to be modified in order to ensure effective remedies are provided?

The first issue to be considered in national judicial review is that, for an issue to be subject to review, it must be a matter of public law, ie it must concern the exercise of a public law power by a public body. The question of how one determines a public body exercising public law powers has been a contentious one. In *R v Panel on Takeovers and Mergers ex parte Datafin* (1987), the House of Lords stated that although the source of the power may assist, this was not always decisive. It will be necessary to look at the nature of the power. It stated:

If the body in question is exercising public law functions or if the exercise of its function have public law consequences, then that may be sufficient to bring the body within the reach of judicial review.

The decisions of some bodies, however, are not open to review on the basis that the relationship between the parties arises in contract and therefore, is a private law matter (see *R v Disciplinary Committee of the Jockey Club ex parte The Aga Khan* (1993)). These distinctions between public and private law may give rise to problems in the context of national law in providing an adequate and effective remedy. Many decisions affecting individual rights conferred by Community law are taken by private bodies and, accordingly, are not susceptible to judicial review. Such decisions must be open to review unless there is an effective private law remedy. If not, it may be said that no adequate national remedy is provided.

O'Reilly v Mackman determined, however, that where the matter is one of public law then it *must* be proceeded by way of the Order 53 RSC 1977 judicial review procedure. Failure to do so would be an abuse of the court process. Order 53 rule 9 allows for an action begun by judicial review to be transferred to a private law action but not vice versa. What would be required is that a new judicial review action is begun. This is likely to be outside the three month time

limit contained in Order 53 and will fail unless 'good reason' for the delay is shown. An action may fail, therefore, no matter how meritorious. Arguably, no effective remedy is provided. However, we have seen that there are strict time limits placed also on actions in European judicial review under Article 173 and that the ECJ has been willing to enforce such limits on the ground of legal certainty. There seems no reason, therefore, why a time limit at national level should be deemed to be standing in the way of an effective remedy for breaches of Community law, provided such limit is objectively justified.

Some decisions, although a matter of public law, are immune from judicial review. For example, in *CCSU v Minister for the Civil Service* (1985), the power exercised was deemed non-justiciable on the grounds of national security. It may also be the case that the statute conferring the power seeks to oust the jurisdiction of the court by way of a finality clause (although the courts have ruled narrowly on such attempts). It may be argued that such immunities are obstacles to the individual seeking to enforce Community rights.

In order to seek judicial review, the applicant must have grounds on which to challenge a decision. In the context of EC law, however, the ECJ has ruled that national courts must take account of the general principles of law. In *R v MAFF ex parte First City Trading* (1996), Laws J considered when general principles of Community law would apply in judicial review. The case related to the legality of the Beef Stocks Transfer Scheme and one issue was whether it had to comply with the general principles of equal treatment and non-discrimination. Laws J distinguished between two positions: (i) a purely domestic measure falling within the scope of the application of the Treaty; and (ii) a measure done under the powers or duties conferred or imposed by Community law. The second situation primarily involved measures which Community law required, such as, for example, law which is made to give effect to a directive. Laws J stated that:

In the first situation, the measure is in no sense a function of the law of Europe, although its legality may be constrained by it. In the second, the measure is necessarily a creature of the law of Europe.

Laws J went on to consider the origins of general principles and noted that they were the innovation of the ECJ and were not contained in the treaty. As such 'there is no legal space for their application to any measure or decision taken otherwise than in pursuance of treaty rights or obligations'.

In *R v Ministry of Agriculture, Fisheries and Food ex parte Hamble Fisheries (Offshore) Limited* (1995), Sedley J considered the extent to which Community general principles apply. The case concerned a change introduced by the Minister of Agriculture, Fisheries and Food in the licensing regime relating to the conditions on which fishing for pressure stocks was to be permitted within the context of the Community fisheries policy. The issue in the case was whether the material change in the policy should have been qualified by an

exception on the ground that the applicants had a legitimate expectation that any change in the policy would not be such as to frustrate their process of licence aggregation entitling them to trawl for pressure stock in the North Sea. Sedley J found that legitimate expectations gave rise to substantive as well procedural rights. The real question was fairness in public administration and it was 'difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step'. The view that the matter was entirely a domestic one was rejected by Sedley J as being 'unreal'. Although the discretion exercised was conferred entirely by domestic legislation, the purpose of that legislation and the policy had been to enable the respondent to implement the Common Agricultural Policy (CAP). If each Member State was then to be regulated only by its domestic law in exercising its powers, the CAP itself might be frustrated.

Sedley J then went on to consider European case law on the issue of legitimate expectation and found that what mattered was whether the applicants could demonstrate 'an expectation which is worthy of protection'; that is, 'what makes an expectation legitimate?' so that it is protected in public law. Sedley J found that:

Legitimacy in this sense is not absolute. It is a function of expectations induced by government and of policy considerations which militate against their fulfilment. The balance must in the first instance be for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the court's criterion is the bare rationality of the policy-maker's conclusions.

He accepted that policy was for the policy-maker, but stated that where the fairness of the policy-maker's decision 'not to accommodate the reasonable expectations which the policy will thwart remains the court's concern ... it is ... the court's duty to protect the interests of those individuals whose expectations of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it.

In *R v Chief Constable of Sussex ex parte International Trader's Ferry Ltd* (1995), the general principle of proportionality was considered. The case related to the policing of animal rights protests which were preventing the applicants from transporting their livestock across the Channel. The Chief Constable had informed the applicants that lack of resources meant that the level of policing would have to be reduced to the point that, if the export operations could not be safely accomplished, lorries would be turned back from the port. The applicants applied to have the decision quashed on the grounds that the Chief Constable's decision was in breach of his duty to keep the peace and was a breach of Article 34 as being a measure having an equivalent effect to a quantitative restriction on exports. They failed on the first ground but the court found

that the decision did amount to a breach of Article 34. The Chief Constable was not able to rely on public security as a defence under Article 36. He was unable to prove that the resources available to him were inadequate to enable him within the principle of proportionality to police the port at a level which would enable the export operations to continue.

All these cases show the courts using general principles of Community law in national judicial review proceedings. But there is potentially an anomaly between the grounds available in a purely national matter and one involving issues of Community law. For example, in *Brind*, it was ruled that proportionality was not a recognised ground in its own right. In the context of an EC issue, however, it would be a ground that would have to be considered. Further, fundamental human rights are recognised as being a general principle of Community law. As such, in the context of Community law, an individual may rely on rights arising out of the ECHR. In *Johnston v RUC* (1984) the applicant challenged the decision of the Chief Constable of the RUC not to renew her contract to serve on the reserves on the grounds that female officers were not to be armed. This, it was argued, was based on grounds of national security and protecting public safety and public order. The applicant argued that Article 6 of the Equal Treatment Directive 76/207 was breached in that there was no provision for her to claim by judicial process that she had been wronged. The ECJ ruled that the judicial control stipulated in Article 6 reflected a general principle of law underlying the constitutional traditions common to the Member States and that the principle was laid down in the European Convention of Human Rights in Articles 6 and 13. As fundamental human rights are recognised as being part of Community law, national courts, through their obligation under Article 5, will be required to consider them in any matters arising before them relating to Community law. They will not be bound where the matter is outside Community law (*Kaur v Lord Advocate* (1981)). Again, an individual may have a ground when challenging a matter of Community law that is not available at national law. This has resulted in allegations of the European Convention on Human Rights being incorporated through the back door.

It has also been argued that national judges are being influenced by European methods – ‘our membership of the European Community is profoundly altering the constitutional role of British judges as law-makers widening the scope of judicial review of substance and merits as well as of form and procedure’ (Lester, ‘English judges as Law-Makers’ (1993) PL 269). As we have seen, the traditional approach of the courts has changed as regards the supreme position occupied by statute in that the courts may judicially review Acts of Parliament as against standards required by European law. The principles that must be applied in the context of judicial review have seen the judiciary venture into unknown territory. Lester argues that:

... the ECJ has become increasingly bold and creative in requiring effective national remedies for the individual who suffers as a result of the state's failure as legislator. As the impact of these far-reaching decisions comes to be understood, British judges will increasingly be called upon to act as law-makers, to adjudicate as constitutional judges, as to fashion new remedies for the citizens of Europe within their jurisdiction.

That the courts are willing and able to do this is reflected in the case law already examined.

The judicial review system available in this country does seem to provide an adequate and effective remedy for breaches of Community law. However, it seems that Community law may have an impact on it in that principles *not* normally recognised in the national context *will be* recognised in the Community context. To avoid anomalies, the national system may need to incorporate the stronger rights arising out of Community law. In *Woolwich Building Society v Inland Revenue Commissioner (No 2)* (1993) Lord Goff recognised the double standards. He stated:

I only comment that, at a time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under Community law.

As a result, it may be that with the passage of time Community recognised grounds will inevitably become part of the national judicial review system.

EUROPEAN ADMINISTRATIVE LAW I – THE EUROPEAN COMMUNITY

This chapter set out relevant underlying principles of Community law together with an examination of the impact of Community law on national judicial review.

Part I – An overview of underlying principles of EC law

The sources of rights

There are essentially three sources of EC law and thus rights for individuals:

Primary legislation

The Treaties.

Secondary legislation

- regulations;
- directives;
- decisions;
- recommendations and opinions.

General principles of law

These are a kind of unwritten law of the Community whose sources are in the national law of member states but are applicable as a matter of Community law. The list of principles is not exhaustive and includes:

- equality;
- fundamental rights;
- legal certainty;
- proportionality.

How individual rights can be acquired and enforced in EC law

The effectiveness of Community law requires that it be enforceable not only as between the member states but also by individuals. Such rights are described as being directly effective.

Direct effect

- Treaty articles – horizontal and vertical direct effect;
- regulations – horizontal and vertical direct effect;
- decisions – horizontal and vertical direct effect;
- directives – vertical direct effect (if the conditions in *Publicco Minister v Ratti* (1979) are met).

Indirect effect

This principle, established in *Von Colson* (1984), requires national courts to comply with their obligations under Article 5 of the EC Treaty by interpreting national law to conform with Community law. It was thought that the application of this principle would end the distinctions between vertical and horizontal direct effect. But the application of the *Von Colson* principle depends on national courts feeling able to exercise a discretion to interpret national law to comply with Community law. As a result, limitations were placed on the application of the principle (*Kolpinghuis Nijmegen* (1987)).

Damages against the state

The vagaries of direct and indirect effect were removed in *Fancovich v Italian State* (1993) which established that Member States can be liable in damages to individuals for loss suffered if:

- the directive confers rights;
- there is a sufficiently serious breach of Community law;
- there is causal link between the loss suffered and the obligations of a state.

Supremacy of EC law

The European Court of Justice has made clear that the relationship between Community law and national law is that Community law is supreme. The status of the national law in conflict is irrelevant and national courts are required to give effect to Community law without waiting for the conflicting national law to be set aside by a legislative or other constitutional means.

The enforcement of Community law

This takes place at national and Community level and as such has been described as the dual vigilance of Community law (Article 177).

PART II – Judicial review of Community Acts

Article 173

This is the article by which Community legislation is subject to judicial review. There are four conditions required in order to challenge under Article 173:

- (a) the Act must be of the right kind (para 1);
- (b) the applicant must have standing (paras 2 and 4):
 - the Act must be a decision in substance;
 - individual concern;
 - direct concern;
- (c) the application must be made within the time limit (para 5);
- (d) the challenge must be on one of the grounds set out (para 2):
 - lack of competence;
 - infringement of an essential procedural requirement;
 - infringement of the Treaty or any rule of law relating to its application;
 - misuse of power.

Article 175

Wrongful failure to act.

Article 184

Indirect challenge (plea of illegality).

PART III – EC law and judicial review in the UK

The traditional position occupied by the courts in judicial review is a supervisory one so that the merits of a decision is not open to review. So what effect has EC law had on judicial review and has this had any impact on the nature of the relationship between the organs of state?

A new judicial review role for the courts in relation to legislation?

The principle that Community law is supreme has not been one easily accepted in the UK given the supreme position occupied by Parliament in the constitution.

Remedies for breaches of EC law

The Treaty contains no express provision as regards remedies in national law for breaches of Community law. The European Court of Justice has stated that, in the absence of specific Treaty provision, this was a matter of national law. This is subject to four conditions:

- the remedies and forms of action available to ensure observance of national law must ensure the observance of Community law;
- the national procedure should not render the Community right unexercisable;
- penalties must be proportionate to the breach;
- remedies must be effective.

The ECJ has moved some way in addressing the conflict of remedies being a matter for national legal systems and the requirement that any such remedies must be tested for their effectiveness by creating a so-called Community remedy (*Francovich and Bonifaci v Italy* (1991)).

Judicial review as a means of challenging breaches of EC law

Given that it is for national legal systems to provide remedies and sanctions for breaches of Community law, the question is whether such a breach is a matter of public law which must be pursued by way of an application for judicial review. In *Bourgoin SA v Ministry of Agriculture Fisheries and Food* (1986), the Court of Appeal held that an action for breach of Article 30 should have been brought as an application for judicial review since the remedies available would provide 'adequate protection'. Damages would only be available if a power exercised was abused. This position must now be reconsidered in the light of *Francovich* (1991) and *Brasserie* (1996).

The impact of EC law on national judicial review

The question here is whether judicial review provides an adequate and effective remedy for breaches of Community law. Relevant issues include:

- many decisions affecting individual rights conferred by Community law are taken by private bodies and, therefore, not susceptible to judicial review;
- some matters of public law are immune from judicial review;
- the relevance of general principles of Community law.

Although judicial review seems to provide an adequate remedy for breaches of Community law, in order to avoid anomalies it may need to incorporate the stronger rights arising out of Community law.

EUROPEAN ADMINISTRATIVE LAW II

– THE EUROPEAN CONVENTION ON HUMAN RIGHTS

This chapter would seem to be timely given the current Labour government's intention to incorporate the European Convention on Human Rights. Ministers are, however, split on the method of doing so. It is understood that Lord Irvine, the Lord Chancellor, favours a weak model, based on New Zealand, whereby the judges would not be able to strike down or alter Acts of Parliament. They would merely be able to declare the statute to be in breach and would have to leave it to Parliament to change the law to comply with the court's ruling. Lord Irvine has said 'It must not disturb the supremacy of Parliament. It should not put the judges in a position where they are seen as at odds with Parliament' (*The Guardian*, 5 July 1997). In contrast, it has been reported that the Home Secretary, Jack Straw, and his junior minister, Lord Williams of Mostyn, favour the stronger Canadian Charter which enables the courts to strike down Acts which conflict with the Charter subject to a 'notwithstanding' clause. Whichever model is chosen, the incorporation of the European Convention on Human Rights will be a major constitutional development.

11.1 'Rights' in English law

The starting point must be to consider whether in English law it is correct to talk in terms of rights. Unlike countries with a written constitution, in the UK we cannot point to one single document which contains a positive statement of individual rights. Instead, the position in the UK as regards the 'rights' of individuals may be described as one of residual freedoms; that is, in the UK the individual is free to do anything which is not specifically prohibited by the law. That is not to say that individual liberties are not protected by the law; they are, but not by positive statements in the sense that the law states what the individual *can* do. Instead, there tend to be negative statements in the sense that the law will state when the individual *cannot* be interfered with. For example the Sex Discrimination Act 1975 does not state what can be done; instead it states what one individual cannot do to another.

This position of not having a statement of individual rights is bred out of the constitution itself. The fundamental principle of the British constitution is that of the sovereignty of Parliament. As Dicey stated, Parliament can make or unmake any law and all laws are equal. There is no higher law; only some laws may be more important than others. As such, there are no fundamental laws and Parliament may change any law and intervene in anything. As a result, there cannot in this country be fundamental rights which are safe from interference by Parliament.

In the UK, reliance is placed upon the political process to protect the individual. This reliance is based on the notion that a government seeking to be re-elected will behave responsibly. But no matter how responsibly a party in government may want to behave, the constraints operating upon Parliament itself may mean that legislation is not carefully considered. Badly drafted law is still effective law and must be enforced by the courts. Furthermore, the nature of party politics and the whipping system will mean that even the most ardent backbench critic may be forced to vote in a way that removes individual rights.

The only protection that the individual has then is the law and the courts. The nature of the relationship between the courts and Parliament means, however, that the courts must enforce the will of Parliament. If Parliament chooses to legislate in a way which limits, or even removes, rights then the courts have no option but to give effect to such a statute. The position of the individual in the United Kingdom is, therefore, that there can be no claim to fundamental human rights in the sense of certain rights being inviolable. The individual does, however, have rights arising under the European Convention on Human Rights. Given the limited protection available to the individual before the national courts, it is inevitable that redress will be sought at this international level.

11.2 The legal status of the ECHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed on 4 November 1950 and came into force on 3 September 1953. The UK became a signatory to the ECHR in 1950. The Convention itself was a reflection of an international will to ensure that the atrocities of the Second World War should not be repeated and to provide a barrier against communism. The aim was to create a system which would set off the alarms of the international community should there occur gross violations of human rights so that action could be taken in time to prevent escalation into a further war situation. This has not, in fact, been the actual function served by the ECHR. It has '... instead been used primarily to raise questions of isolated weaknesses in legal systems that basically conform to its requirements and which are representative of the "common heritage of political traditions, ideals, freedoms and the rule of law" to which the Preamble to the ECHR refers' (Bailey, Harris and Jones, *Civil Liberties*, 4th edn, 1995, Butterworths).

The ECHR is an international treaty. It was drafted by the regional European international community under the auspices of the Council of Europe. Membership of the Council of Europe is subject to the pre-condition of ratification of the ECHR. The ECHR is a contract between states under which mutual duties are accepted. In the case of the Convention, these duties consist in the main of recognition that individuals have rights. It is predominantly

concerned with civil and political rights. Economic, social and cultural rights are protected by the European Social Charter of 1961.

The UK has not to date incorporated the ECHR into domestic law by the passing of legislation, although the current Labour government is committed to doing so. As such, it is not directly enforceable before our domestic courts. Although to this extent it has no legal status, both ministers and civil servants are under a duty to comply with its requirements. (See Questions of Procedure for Ministers and Code of Conduct for Civil Servants.) Furthermore, there is a presumption of statutory interpretation that Parliament does not intend to contravene its treaty obligations. Therefore, the Convention is available as an aid to statutory interpretation in cases of ambiguity. In *R v Secretary of State for the Home Department ex parte Brind* (1991), restrictions on the broadcasting of words spoken by supporters and representatives of Sinn Fein and the Ulster Defence Association and other organisations proscribed under the Prevention of Terrorism (Temporary Provisions) Act 1984 or the Northern Ireland (Emergency Provisions) Act 1978 were imposed. The actual spoken words of the speaker could not be transmitted. The case concerned judicial review of the Secretary of State's decision to issue a directive banning the broadcasting of such spoken words. It was argued by the journalists who challenged the decision that this was a breach of Article 10 of the ECHR (freedom of expression). In the House of Lords, Lord Bridge stated:

... it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it.

All that the court could do was to consider whether the minister had acted reasonably. The court would not presume that the legislative intent of Parliament when conferring a discretion was that its exercise should be within the limitations imposed by the Convention. This, according to Lord Bridge, 'would be to go far beyond the resolution of an ambiguity'.

Where a statute is clear, then the principle of Parliamentary Supremacy requires that the courts must give effect to the statute even if this contradicts the Convention. In *Salomon v Commissioners of Customs and Excise* (1967) Diplock LJ stated:

If the terms of the legislation are clear and unambiguous they must be given effect to, whether or not they carry out Her Majesty's treaty obligations.

The validity of statutes cannot therefore be measured against the Convention. Where national statute is unclear, however, the terms of a treaty are relevant to a court in deciding the meaning of ambiguous words. *Waddington v Miah* (1974) concerned the interpretation of a section of the Immigration Act 1971. The

House of Lords referred to Article 7 of the ECHR to support its view that s 34 of the Immigration Act 1971 could not be construed to have retrospective effect.

Although not directly enforceable in the domestic courts, the Convention has been relevant in the development of the common law. In *Attorney General v Guardian Newspaper (No 2)* (1990), Lord Goff stated:

I conceive it to be my duty when I am free to do so to interpret the law in accordance with the obligations of the Crown under this treaty.

Derbyshire County Council v Times Newspapers (1992) concerned a libel action against *The Times*. Reference was made to Article 10 of the ECHR (freedom of expression). Whilst the decision of the House of Lords was based on the common law, without reference to the Convention at all, the Court of Appeal relied heavily on Article 10 in concluding that a local authority could not sue for libel. In the view of the Court of Appeal, to allow a public authority to sue for libel would impose a substantial restriction on freedom of expression. Balcombe LJ stated:

Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of the European Convention on Human Rights.

What we can say then from this brief discussion is that the courts in the UK do not enforce international treaties without the support of national law. The most that they will do is to take judicial notice of them.

11.3 A Bill of Rights for the United Kingdom?

The argument as to whether the UK needs a Bill of Rights is a long running one. Dicey's theories have had much support. His theories on the rule of law and the sovereignty of Parliament are attractive to lawyers and politicians alike. Dicey argued that judge-made law is central to the protection of individual liberties. His view was that judges are the guarantors of civil liberties. This, together with the supremacy of Parliament, was all that was needed. He argued that an independent and impartial judiciary in interpreting statutes and elaborating on evolving case law could protect civil liberties. This view is clearly attractive to the legislature; it maintains the supremacy of Parliament and retains its discretion without having to concern itself with a higher law. The emphasis here then is on the virtues of the common law and the legislative supremacy of Parliament. *Entick v Carrington* (1765) is an example of Dicey's theory in practice.

There is, however, much criticism of Dicey's theories. Constitutional lawyers question his rule of law theory by reference to such legislation as the Prevention of Terrorism Acts; that is, the courts are not able to protect the individual's liberty in the face of an Act of Parliament. They also argue that Dicey

exaggerated the willingness of judges to be innovative and actually protect our freedoms. This they illustrate by cases such as *Duncan v Jones* (1936), where Mrs Duncan was forbidden by the police from holding a street meeting and the court upheld the police's view that they reasonably apprehended a breach of the peace. In this case, Lord Hewart cited Dicey for the proposition that the right of assembly was nothing more than a view taken by the court of the individual liberty of the subject. There was, he found, no right to hold a public meeting. *Malone v MPC* (1979) again demonstrates the courts' unwillingness to be innovative. In an action by Malone alleging that the tapping of his phone was an invasion of his privacy, the court held that he had no remedy since he had no right to privacy. According to Dicey's theory, however, the court should have created such a right for him.

The arguments for and against a Bill of Rights are many. Some were identified in the 1976 report of the Standing Advisory Commission on Human Rights.

Some of the arguments *for* a Bill may be summarised as follows:

- The legislative and common law safeguards are less comprehensive than they are in other countries.
- It would enable the UK to conform with its international obligations and would enable an individual to enforce rights before the domestic courts.
- It would remove certain fundamental values from the realms of temporary party politics into the realm of concrete legal principle applied by the courts. The argument here is that a government of any political persuasion will to some degree sacrifice individual liberties when its own interests are at stake. For example, the Labour Party introduced the Prevention of Terrorism Act 1974 at a time of high public emotion.
- The role of derogation would mean that government would not be unduly hampered.
- There would be a transfer of power to the judiciary thereby helping to separate the powers. This, it is argued, is desirable given the dominance of the executive.
- There would be a reduction in the number of cases taken to the European Court of Human Rights. This would not only enhance our international reputation but also make the process more convenient for the applicant.
- It would be a source of empowerment for the individual in that infringement of rights would be challengeable in the courts. It would enable vulnerable minorities to rely on fundamental rights and would provide them with protection. People would know what their rights were since they would be written down.

The arguments *against* may be summarised as follows:

- The major criticism revolves around the supremacy of Parliament. Parliament is the people's body reflecting the will of the people and society. A Bill of Rights on the other hand will not necessarily reflect a changing society.
- It is naturally uncertain; it must by its very nature be general in its terms. As such, it would be open to interpretation by the courts. The result of this could be that we may find ourselves in a position where the courts strike down progressive legislation as being in conflict with the Bill.
- It would be difficult to reach a political consensus on what should be included.
- It would not be a panacea for all grievances since it would inevitably be limited in content.
- It would not be effective when most needed, particularly if it provided for derogation.
- The judiciary would be placed in the political arena and judges are not appropriate, given their backgrounds, to make political decisions.

For those who argue against a Bill of Rights, entrenchment is the primary argument. Wallington and McBride in *Civil Liberties and a Bill of Rights* (1976, Cobden Trust), argue that 'to fetter future generations may be to frustrate their attempts to improve human conditions. If the political system has not the capacity to meet the demands for change, it may be the political system itself which will crack'. Others argue that encroachment of individual liberties is a political dispute and should be resolved in the political arena and not in the courts. Lord Lloyd of Hampstead has said '... the law cannot be a substitute for politics ... if what we fear is political tyranny, then we must seek to control that by political means'. Griffiths has a political and philosophical objection to a Bill of Rights. His political objections are that rights are many and varied. There are conflicts (eg freedom of speech versus incitement to racial hatred) and, therefore, what we have are only claims to rights and not actual rights. Since we have only claims then they should be discussed in Parliament as this is the place for adjusting and ordering them. The law is only an instrument; it is not a substitute for politics. Government by law is no more than passing political decisions to the judges. Griffiths accepts, however, that there is still a need for reform in that there is a need for open government. It is not, he says, by attempting to restrict the legal powers of government that authoritarianism is eradicated but by open government. His philosophical objections are based on the view that there are no overriding human rights. He says 'to call political claims rights is to mythologise'. The struggle, he argues, is a political one and not a legal or moral one. What is needed, therefore, is reform of the political process and not a Bill of Rights.

There is a consensus that if the UK is to have a Bill of Rights, the most appropriate thing to do would be to incorporate the European Convention on Human Rights. The UK is already party to it and has signified its willingness to abide by it. Both major political parties have accepted the right of individual petition. To transfer into English law obligations that are already binding internationally would be a minor step psychologically and politically. It would also be inconvenient to have two Bills of Rights, one external in the form of the ECHR and another internal. If we are willing to trust the Commission and the European Court to interpret the Convention, then we should be even more (or, at least, no less) willing to trust English judges with the same task.

The judiciary themselves have at times commented upon the incorporation of the Convention. Lord Bingham MR has clearly expressed support for incorporation of the Convention ('The European Convention on Human Rights: Time to Incorporate' (1993) LQR 390). Lord Browne Wilkinson has distinguished between what he describes as 'the full Bill' and a 'half-way Bill' ('The Infiltration of a Bill of Rights' (1992) PL 397). The latter 'would declare the existence of certain fundamental human rights, infringement of which by the executive would constitute a legal wrong. In the absence of clear and precise statutory enactment, it would be presumed that Parliament in passing legislation does not intend to infringe these fundamental rights ... But ... would stop short of giving the courts power to invalidate an Act of Parliament'. He goes on to suggest, however, that the courts could provide a high degree of protection corresponding to that provided by a half-way Bill. He argues that the common law can be developed to achieve the same results: '... if it were to be held that general statutory powers were presumed not to interfere with human rights unless Parliament expressly or by necessary implication has so authorised, for most practical purposes the common law would provide protection to the individual at least equal to that provided by the ECHR.' Lord Browne Wilkinson does however recognise the dangers of the court developing the law on such a case by case basis. It may be that an individual alleging infringement is unmeritorious or holds a view of which the court disapproves and 'In such cases, the lack of merits of the complainant may lead the court to erode his fundamental rights'. He continues 'what is required is to raise the judicial consciousness of the importance of other fundamental rights so that in those cases too the courts will uphold those rights where 'the merits' of the particular case do not encourage such a conclusion'. Sir John Laws ('Is the High Court the Guardian of Fundamental Constitutional Rights' (1993) PL 59) argues that the rights contained in the ECHR are a series of norms already present in the English common law legal system and if they are not they may be integrated into the system by the judges. He argues therefore, against the need for incorporation. The aims can be achieved by developing the grounds of judicial review in the field of human rights so that, for example, in that context 'any decision which overrides a fundamental right without sufficient objective justification will as a matter of law necessarily be disproportionate to the aim in view'. His '... thesis

at the end may be summarised thus: we may have regard to the ECHR (and for that matter, other international texts) but not think of incorporating it. We should apply differential standards in judicial review according to the subject matter, and to do so deploy the tool of proportionality, not the bludgeon of *Wednesbury*'.

There are, however, some problems with the Convention in its current form. Arguably, not every article is as broad as it might be. Most of the Articles contain significant limitations, in particular Articles 8–11 para 2 (see below). There are few absolute rights (the main being Article 3). Further, Article 15 provides for derogation from most of the Articles (with the exception of Articles 2, 3, 4 and 7). There is no general discrimination clause in that Article 14 must be argued in conjunction with another article. Finally, it is said that the Convention is perhaps somewhat outdated. For example, Article 12 provides only for the right to marriage for heterosexuals. In a society that now recognises gay relationships, this would appear to be outmoded.

Advocates for incorporation accept that it would not solve all the problems but it '... would make a distinct and valuable protection of human rights' (Zander, *A Bill of Rights*, 3rd edn, 1985, Fontana) and Lord Bingham has said that 'It would be naive to suppose that incorporation of the Convention would usher in the new Jerusalem. But the change would over time stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice. It would restore this country to its former place as an international standard bearer of liberty and justice'. The extent of the contribution must in the end depend on the judges who would have the function of interpreting and giving effect to it. However, perhaps a Bill of Rights '... would enable the judges more effectively to honour their ancient and sacred undertaking to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will' (Lord Bingham).

11.4 The operation of the ECHR

The UK is party to other international agreements for the protection of human rights, in particular the United Nations International Covenant on Civil and Political Rights 1966. The UK has not, however, accepted the Optional Protocol which allows a right of individual petition to the Human Rights Committee for alleged violations of rights under the ICCPR. Under the ECHR, states may accept the right of individuals to institute proceedings against a state and agree to be bound by decisions of the European Court of Human Rights (Article 25). The UK agreed to do this in 1966 subject to five-yearly renewal. The current right of petition was renewed in 1996. Under Article 34 of the Eleventh Protocol (which the UK ratified on 11 May 1994) this right of individual petition will cease to be optional.

11.5 Making an application

Although, as stated earlier, the ECHR is not directly enforceable before the domestic courts, the UK has recognised the right of individual petition. As such, the ECHR is enforceable by the individual against the state at Strasbourg. Given the limited protection of civil liberties in the UK, the machinery of the ECHR is a valuable means of protecting individual rights.

Article 1 of the ECHR provides: 'The High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this convention.' As such, where a state fails to comply with Article 1, an individual may seek redress at Strasbourg if the right of individual petition is recognised. The machinery for enforcing the Convention in Strasbourg is contained in Article 19 of the ECHR. The Commission and the Court are responsible for ensuring that states party to the Convention comply with their obligations. The Convention may be enforced by state (Article 24) or individual applications (Article 25). In either case the initial application is made to the Secretary General of the Council of Europe who refers the matter initially to the Commission.

The membership of the Commission relates to the number of High Contracting States and is elected by the Committee of Ministers by absolute majority. Each Commissioner serves a six-year term and is eligible for re-election. Qualification for the position of Commissioner is now determined by the Eighth Protocol, which came into force on 1 January 1990 and requires Commissioners to be 'of high moral character and possess the qualifications required for appointment for either high judicial office or be persons of recognised competence in national or international law'. In practice, Commissioners tend to be law professors, judges or lawyers. The first task of the Commission is to determine the admissibility of any application. In considering admissibility, the Commission is acting as a filter for applications.

The Eleventh Protocol, which is due to come into effect one year after all states party to the Convention have ratified it, will establish a single European Court of Human Rights thus merging the Commission and Court into one full-time body. Although the admissibility criteria will remain the same, whether they have been fulfilled will be decided by the Court. The Court will also continue to determine the merits of a case. Interim arrangements have been agreed so that any applications pending before the Commission or Court at the time of the Protocol coming into effect will be dealt with by that body.

Applications may be inter-state or by an individual against a state.

11.6 State applications

With regard to state applications, the Commission may consider 'any alleged breach' of the Convention by another state (Article 24). The obvious political

implications of inter-state applications, however, mean that such actions are few. One example is *Ireland v United Kingdom* (1978) which concerned an allegation of torture of detainees by British security forces in Northern Ireland. There is no need for a state to establish the status of being a 'victim' in an inter-state application. States can, therefore, challenge a law or practice in the abstract in the sense that there is no need to show prejudice arising from the application of the law complained against. In *Ireland v United Kingdom*, the court stated that inter-state complaints were permissible where the breach 'results from the mere existence of a law which introduces, directs or authorises measures incompatible with the rights and freedoms guaranteed'. A proviso was added in that this is so only if the law is sufficiently clear and precise so that the alleged breach is immediately apparent. If it is not, then the admissibility of the complaint must be judged by reference to the actual application of the law complained of.

11.7 Exhaustion of domestic remedies

Both state and individual applicants must comply with Article 26. All domestic remedies must have been exhausted and the application must be made within six months of the final decision. The exhaustion requirement reflects the fact that the responsibility for the protection of human rights rests with states and, therefore, they should be given the opportunity to redress a wrong alleged. The rule requires that all adequate and effective remedies must be pursued. Adequate has been defined as being 'sufficient to provide redress for the applicant's complaint' (Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 1995, Butterworths). Therefore, an applicant may need to petition the Home Secretary (*Golder v United Kingdom* (1975)) or bring civil proceedings or seek a judicial review. Applicants need only pursue 'effective' remedies. Thus, if settled legal opinion is that an appeal to the Court of Appeal or the House of Lords is pointless, there is no need to pursue this avenue. In *McFeely v United Kingdom* (1980), counsel's opinion that no remedy existed under Northern Ireland law as regards complaints of the continuous imposition of disciplinary punishments by the prison governor and general prison conditions and the treatment of prisoners by the prison authorities, was sufficient to meet the exhaustion of domestic remedies requirements. The domestic remedy must also be available in practice. The requirement will be satisfied where it is clear that there is no point in seeking the remedy. *Johnston v Ireland* (1987) concerned the discriminatory legal position of children born out of wedlock. The court rejected the Irish government's argument that the complaint should have been raised before the domestic courts since the government had not established the existence of an effective remedy. There is no need to raise a Convention complaint directly before the domestic courts as long as the substance of the complaint is raised. The court has stated that the exhaustion rule should be applied with 'flexibility and without excessive formalism'

(*Cardot v France* (1991)). In *Castells v Spain* (1992), the Court rejected the government's complaint that the Convention right had not been raised domestically since the papers revealed that the Convention breach had been raised in substance.

The issue of the point of time by reference to which the Commission will assess whether an adequate remedy has been provided has been stated as being the date of the decision on admissibility. In *Campbell and Fell v United Kingdom* (1984), at the time of the decision on admissibility, the UK courts had ruled in *Ex parte St Germain* that an order of *certiorari* was available against the prison Board of Visitors, although at the time of Fell's application this had not been the case. The Court found that it would be unjust to reject the application on the grounds of non-exhaustion since an application for an order of *certiorari* was no longer available. Fell was now out of time to apply for such an order under UK law.

11.8 Time limit

The six-month rule provides a degree of certainty for states. Time runs from the date of the final decision of the domestic court. Applicants can lodge an application with the Commission before domestic remedies have been exhausted, provided that the final decision of the domestic courts is taken before a ruling on admissibility by the Commission (*Ringeisen v Austria* (1986)). Where no remedy is available, then time begins to run from the date of the act or violation complained of. The six-month time limit will not be activated where the violation of the right is not the consequence of a particular act or decision but of a continuing state of affairs. In such a case, the time limit will be activated upon cessation of that state of affairs. (See *De Becker v Belgium* (1958–59) and comment by Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 1995, Butterworths.)

11.9 The applicant must be a 'victim'

In addition to these requirements for admissibility, an individual must also establish that he or she is a 'victim' of a violation (Article 25), the petition must not be anonymous, it must not be substantially the same as a matter already examined by the Commission or which has already been submitted to another procedure of international investigation, must not be incompatible with the provisions of the Convention, must not be 'manifestly ill founded' and must not be an abuse of the right of petition (Article 27).

To come within the meaning of 'victim' in Article 25, an applicant must establish that he or she is directly affected. An applicant may complain about legislation, even if not implemented in fact, if there is a risk that he or she will be directly affected. In *Dudgeon v United Kingdom* (1981), the applicant was held

to be directly affected by the existence of legislation which prohibited private homosexual acts since the alternative to refraining from the prohibited acts was to become criminally liable. In *Campbell & Cosans v United Kingdom* (1982), the applicants were found to be directly affected by virtue of attending a school where corporal punishment was used although they had not, in fact, ever been subjected to it. The Commission has also permitted applications by indirect victims such as spouses and parents. Professional associations and non-governmental organisations may also be victims but if they act on behalf of an applicant then that applicant must be identified and the body must provide evidence that it is authorised to represent the applicant.

11.10 Additional requirements

Individual applicants must also meet the requirements contained in Article 27. According to Article 27(1)(a) the Commission may not deal with anonymous applications. This is not, however, usually a problem given that the name of the applicant must be disclosed on the application form. Paragraph (b) prevents the Commission dealing with applications which are 'substantially the same as a matter which has already been examined by the Commission'. Thus, the Commission may reject an application which has a similar factual basis to one already examined by the Commission. However, it seems that the Commission will in fact only discourage an applicant from doing so and draw the applicant's attention to the previously rejected application. Where an application is rejected, another application may be made only if there is a change in the factual basis of the application. For example, if an application is rejected on the grounds of failing to exhaust domestic remedies, then the application may be reconsidered once the domestic remedies have been exhausted since there will have been a change in the factual basis of the application. (See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, 1995, Butterworths.) Paragraph (b) also prevents the Commission from dealing with applications which have been submitted for settlement under another international agreement (eg the ICCPR). This is to prevent duplication of settlements.

Article 27(2) provides three grounds on which applications may be rejected. An application incompatible with the Convention should be rejected so that a right not protected by the Convention is not admissible. An application with no foundation will be rejected on the ground that it is an abuse of the right of petition. This is a rarely used ground. An application which is 'manifestly ill-founded' will also be rejected by the Commission. This ground is notable since it is the only one which clearly requires an examination of the merits of an application at the stage of admissibility as opposed to the technical procedural requirements of the others. The applicant must establish that there has been a *prima facie* violation of a Convention right. The Commission's use of this ground to reject applications is open to criticism. The Convention's use of the word 'manifestly' would seem to imply an application with no foundation

whatsoever and yet the Commission requires an application to demonstrate a *prima facie* violation. There is clearly a gap between these two requirements; an application will be rejected, it seems, on the ground that the application is ill-founded as opposed to being manifestly so. Further, any application must pass through the admissibility stage in order to proceed and it seems inappropriate that the Commission should be rejecting applications at this stage on essentially merits grounds.

11.12 Friendly settlement or court?

Once the Commission has deemed an application admissible, then under Article 28 it will establish the facts and seek to reach a friendly settlement between the parties. If no friendly settlement is reached then a report is drafted stating the facts and setting out the Commission's opinion as to whether there has been a violation of the Convention. This report is then sent to the Committee of Ministers. The application may then be referred by the Commission, the defendant state, the applicant state or the state of the victim (Article 48) to the Court within three months of the report if the state concerned has accepted the Court's compulsory jurisdiction under Article 46. An individual may refer the application only if the defendant state is party to the Ninth Protocol (which entered into force 1 October 1994). If no referral is made, then the final decision as to violation is made by the Committee of Ministers (Article 32).

If a referral to the Court is made, the individual is not a party to the proceedings although the applicant may put his or her own case to the Court (rule 30 of the Revised Rules of Court 1983). The judgment of the Court is declaratory and final (Article 52) and it is binding (Article 53). Where a breach of the Convention is found then the state concerned is under an obligation to remedy the position. The Court has power to grant 'just satisfaction' to an 'injured party' under Article 50. This has tended to be of a financial nature. Execution of the Court's judgment lies with the Committee of Ministers (Article 54).

11.13 The rights

In summary, the rights contained in the Convention include:

- Article 2: Right to life
- Article 3: Prohibition against torture, inhuman or degrading treatment
- Article 4: Prohibition against slavery or servitude
- Article 5: Right to liberty and security of person
- Article 6: Right to a fair and public hearing
- Article 7: Prohibition against the creation of retrospective criminal offences and penalties

- Article 8: Right to respect for private and family life
- Article 9: Right to freedom of thought conscience and religion
- Article 10: Right to freedom of expression
- Article 11: Right to freedom of peaceful assembly and association
- Article 12: Right to marry and found a family
- Article 13: Right to an effective remedy for breach of Convention rights
- Article 14: Right to enjoy Convention rights without discrimination

11.14 The limitations on the rights

It should be noted that not all these rights are absolute. In para 2 of Articles 8–11, the rights may be subjected to such limitations as are ‘prescribed by law’, ‘in accordance with the law’ and which are ‘necessary in a democratic society’. Any interference must be in pursuance of one of the grounds set out in the relevant Article. Such grounds currently include national security, public safety, the economic well being of the country, the prevention of disorder or crime, the protection of health or morals and the protection of the rights and freedoms of others. These limitation clauses are often described as ‘claw back’ clauses because the right is conferred in para 1 of the respective article and then ‘clawed back’ in para 2.

11.14.1 Definitions: ‘prescribed by law’/‘in accordance with the law’

The Court has held that there is no distinction between the terms ‘prescribed by law’ and ‘in accordance with the law’; they must be read in the same way. In *Silver v United Kingdom* (1983), the applicant, who was a prisoner, complained that his rights under Article 8 had been infringed in that:

- his post had been interfered with by the prison authorities;
- any complaints had to go through the internal prison complaints procedure before a prisoner was given permission to seek legal advice about bringing civil proceedings;
- restrictions had been placed on who he could communicate with.

The Court addressed the issue of whether such interferences were in ‘accordance with the law’ under Article 8(2). With regard to ‘in accordance with the law’ the court stated that this meant that the state must be able to point to some specific legal rule or regime which authorises the act complained of and which the state seeks to justify. In *Sunday Times v United Kingdom* (1979) the *Sunday Times* published articles concerning the drug Thalidomide. Writs had been issued against the manufacturer alleging negligence but, at the time of the publication, although there had been

settlements, none of the cases had reached the point of trial. The Attorney General sought an injunction to restrain publication of the articles on the ground that they would be in contempt of court. The *Sunday Times* claimed that the injunctions infringed the right to freedom of expression contained in Article 10 and were not justified (by a pressing social need). The Court of Human Rights stated that ‘prescribed by law’ included written and common law and ‘the following are two of the requirements that flow from the expression “prescribed by law”. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable’.

Any limitation must be in pursuance of one of the objectives set out in the second paragraph of the relevant article. The permissible grounds of interference are, however, very wide (eg ‘the protection of public order’) so that a state can usually identify a permissible objective. Thus, where an individual complains that the limitation does not pursue a legitimate aim, the allegation in fact is that the state is pursuing a different aim and seeking to justify it by reference to the objectives set out. For example, in *Campbell v United Kingdom* (1992) the applicant alleged that the real reason for opening his letters from his lawyer was to discover their contents. The Court, however, accepted the government’s claim that the interference was for the ‘prevention of disorder or crime’.

11.14.2 ‘Necessary in a democratic society’

Any interference must be ‘necessary in a democratic society’. *Handyside v United Kingdom* (1976) concerned the publication of the *Little Red Schoolbook* for children. The final chapter of the book included a section on sex together with addresses for information and advice. Following complaints, the applicant’s premises were searched by the police and books and publicity materials seized. The applicant was then prosecuted under the Obscene Publications Act 1959 (as amended by the Obscene Publications Act 1964) for having obscene books in his possession for publication for gain. He was found guilty and fined. In addition, a forfeiture order was made for the destruction of the books. He claimed that this was an infringement of the right to freedom of expression under Article 10. The Court found that the interference was prescribed by law and thus the real question was whether the interference was ‘necessary in a democratic society’ for the protection of morals. With regard to the definition of the word ‘necessary’, the Court stated ‘whilst the adjective “necessary” ... is

not synonymous with “indispensable” neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable”, or “desirable”. It went on ‘it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion “necessity” in this context’. In *Olsson v Sweden* (1988), the Court stated: ‘According to the court’s established case law, the notion of necessity implies that an interference corresponds to a *pressing social need* and, in particular, that it is *proportionate to the legitimate aim pursued*.’

11.14.3 The margin of appreciation

Thus, what the court has done with regard to the meaning of ‘necessary in a democratic society’ is to apply a proportionality test; that is, it requires a balance be drawn between a legitimate aim pursued (which must be a pressing social need) and the means used to achieve this aim (the interference). In drawing this balance, however, the Court has left to individual states a so-called margin of appreciation. In *Handyside*, the Court stated: ‘Consequently, Article 10(2) leaves to the contracting states a margin of appreciation.’ This discretion on the part of the state is justified on the basis that state authorities are in a better position to judge the necessity or otherwise of any interference. The Court also made clear, however, that this margin of appreciation is not unlimited in that the Court and the Commission will give the final ruling: ‘... the domestic margin of appreciation thus goes hand in hand with a European supervision.’ The doctrine reflects the principle that the primary responsibility for the protection of human rights lies with the state. The institutions in Strasbourg act only as monitors. In addition, the doctrine negates any allegation of the imposition of solutions from ‘outside’ the state concerned. The extent of the margin of appreciation will, however, vary depending on the permissible ground claimed so that a wider margin will be permitted as regards ‘public morals’ and ‘national security’ than ‘administration of justice’. The doctrine of margin of appreciation, particularly because of its narrow/wide application depending on the context, has been attacked as having the potential to undermine the Convention itself. Van Dijk and Van Hoof (*Theory and Practice of the ECHR*, 2nd edn, 1990, Kluwer) have described the doctrine as a ‘spreading disease’; since it is applicable to most of the rights and freedoms contained in the Convention and is wide in nature, it has the potential to effectively remove the rights themselves.

11.14.4 General limitations

There are also general restrictions on the rights. In particular, Article 15 permits a state to derogate from its obligations under the Convention ‘in time of war or other public emergency threatening the life of the nation ... to the extent strictly required by the exigencies of the situation’. Under para 3, derogation is not

permitted in respect of Articles 2, 3, 4, and 7. The doctrine of margin of appreciation is applicable here on the basis that the state is in the best position to determine the situation. Indeed in *Ireland v United Kingdom* (1978) the Court made it clear that the margin here is a wide one:

It falls in the first place to each contracting state with its responsibility for the 'life of [the nation], to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the member, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogation necessary to avert it. In this matter Article 15(1) leaves the authorities a wide margin of appreciation.

Again, however, this margin is not unlimited and will be subject to review at Strasbourg. Article 64 also entitles states to enter reservations to specified articles of the Convention at the time of signature or ratification.

The Convention clearly provides a means of redress for an individual who alleges violation of rights in the UK. But there are clearly problems with seeking redress at Strasbourg. The procedure is time-consuming (taking up to five years) and also expensive. This raises questions as regards the appropriateness of incorporating the Convention into national law so that it may be directly enforced before domestic courts. This argument really turns on the issue of the need for a Bill of Rights.

11.15 The future – human rights as a ground for judicial review?

The current position of the ECHR is that the courts are not prepared to give effect to it directly since it does not have the appropriate legal status. Recent cases, however, have seen the courts develop the common law in judicial review proceedings to protect individual rights without reference to the ECHR.

In *Bennett v Horseferry Road Magistrates' Court* (1993), a New Zealand citizen wanted by the English police was being held in South Africa. There was no extradition agreement between the two countries and no such proceedings were begun. Instead, the appellant was put on a plane for London where he was arrested and brought before magistrates who committed him for trial. The appellant then sought a judicial review of the magistrate's decision arguing that he had been brought within the jurisdiction by disguised extradition or kidnapping since he had believed that he was being repatriated to New Zealand. The Divisional Court held that, even if such was the case, the court had no jurisdiction to inquire into the circumstances by which he came to be within the jurisdiction and, therefore, dismissed his application. The House of Lords (Lord Oliver dissenting) held that the court did have the power to exer-

cise its supervisory jurisdiction to inquire into the circumstances by which a person came to be within the jurisdiction. The rule of law prevailed over the public interest in the prosecution and punishment of a crime so that if the court was satisfied that an individual had been brought within the jurisdiction without regard to extradition procedures, and the police or other executive authority was a knowing party, the court could stay the prosecution and order the accused's release. Lord Griffiths stated:

If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

It seems, therefore, that the courts are willing to protect 'basic human rights'.

R v Secretary of State for Transport ex parte Richmond upon Thames LBC (No 4) (1996) concerned a challenge to the Secretary of State's order imposing new night flight restrictions at Heathrow, Gatwick and Stansted airports under s 78(3) of the Civil Aviation Act 1982. The applicants argued that the Secretary of State's decision:

- infringed the legitimate expectations of local residents that the benefit of the previous policy would not be withdrawn without rational grounds being given on which they could comment;
- failed to give adequate reasons;
- was irrational.

Brookes LJ noted that English common law did not give the applicants a 'right to sleep' but that noise generated by aircraft came within Article 8 of the ECHR but that this was subject to Article 8(2) (*Powell and Rayner v United Kingdom* (1990)). He stated: 'The final effect therefore, is the same, although the route is different'. He went on to note that the UK is bound to observe the Treaty and, although it is not part of domestic law, ministers are presumed to have intended to comply with it unless there is clear intention otherwise. With regard to the applicants' argument that insufficient justification had been given of the infringement of the 'right to sleep', he referred to Bingham MR in *R v Ministry of Defence ex parte Smith* (1996), where he accepted counsel's submission that the court cannot interfere with the exercise of discretion on substantive grounds unless it is satisfied that the decision is unreasonable but 'in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable ...'. Brookes LJ

then went on to state that, within this framework, the courts are increasingly willing to recognise such rights as respect for one's home and family (within which the 'right to sleep' fell). In the event, he found that the minister did have sufficient justification for his decision. However, the case is important in that it indicates the court's increasing willingness to formulate the common law in such a way as to protect individual rights without reference to the ECHR.

R v Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants and R v Secretary of State for Social Security ex parte B (1996) concerned challenges to the Secretary of State's orders as regards the social security position of refugees who failed to declare their status immediately upon their arrival. Under the Social Security (Persons From Abroad) Regulations 1996, failure to declare a claim for asylum on arrival would exclude entitlement to income support. The applicant sought judicial review of the regulations on the grounds that the minister did not have the power to make them under the Social Security Contributions and Benefits Act 1992. The Court of Appeal (Neill J dissenting) in finding for the applicants stated: 'So basic are the human rights here at issue, that it cannot be necessary to resort to the Convention for the Protection of Human Rights and Fundamental Freedoms to take note of their violation' (Simon Brown LJ). He went on to find the regulations 'so uncompromisingly draconian in effect that they must indeed be held *ultra vires* ... Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horn of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs'. This case demonstrates the court's willingness to use infringement of human rights as a ground to hold executive action unlawful.

In *R v Lord Chancellor ex parte Witham* (1997), the applicant challenged Article 3 of the Lord Chancellor's Supreme Court Fees (Amendment) Order 1996. This purported to increase the fees for writs in certain actions. The applicant, who was on income support and who wished to bring an action for defamation, for which legal aid is not available, argued that the level of fees in effect deprived him of his constitutional right of access to the courts. Laws J found that the common law provided no lesser protection of the right of access to the courts than did the ECHR. Further, that the common law 'has clearly given special weight to the citizen's right of access to the courts ... The executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament'. This, he said, was the meaning of 'constitutional right'. The court here has shown that it will protect 'constitutional rights' to the extent that Parliament has not legislated to remove them.

Although the ECHR is to be incorporated into domestic law, all the signs are that it will be on the weaker New Zealand model. If such is the case then the steps that the courts have taken thus far in protecting rights will continue to be important.

EUROPEAN ADMINISTRATIVE LAW II – THE EUROPEAN CONVENTION ON HUMAN RIGHTS

'Rights' in English law

In the UK it is not possible to talk about fundamental human rights. In the UK we have residual freedoms in the sense that we may do anything that is not prohibited by law. This is not to say that rights are not protected at all. They are, but only by negative statements in the sense that the law will state what an individual cannot do to another.

The legal status of the ECHR

The ECHR is like any other international agreement so that for it to be enforceable domestically, national legislation is needed. To date, the UK has not incorporated the ECHR into domestic law, although the current Labour government is committed to doing so. Although the ECHR is not directly enforceable before the national courts it is of relevance. The courts presume that Parliament intends to comply with its obligations and, therefore, the Convention is available as an aid to statutory interpretation in cases of ambiguity. The Convention has also been useful in the development of the common law (*Derbyshire County Council v Times Newspapers* (1992)). Thus, although the courts will not directly enforce the Convention, they will take judicial notice of it.

A Bill of Rights for the United Kingdom?

The argument for and against a Bill of Rights for the UK is a long running one. Those who support a Bill argue for its necessity on such grounds as:

- the protection of individual rights not being as comprehensive as in other countries;
- individual rights would be better protected by concrete legal principle than by temporary party politics;
- the dominance of the executive would be removed.

For those who are against, the primary argument is that of entrenchment.

There is, however, a consensus that if the UK is to have a Bill of Rights then the most appropriate thing to do is to incorporate the ECHR. This is clearly the view of the present Labour government which is currently preparing a White Paper to incorporate the ECHR.

The operation of the ECHR

Although the ECHR is not directly enforceable by an individual in the national courts, the UK has accepted the right of individuals to institute proceedings and has agreed to be bound by decisions of the European Court of Human Rights.

Making an application

Applications may be inter-state or by an individual. With regard to state applications, the Commission may consider 'any alleged breach' of the Convention by another state. The politics of instituting proceedings against another state, however, mean that such applications are few.

With regard to individual applications, a number of requirements must be met. For example:

- the applicant must be a victim (Article 25);
- applications must not be anonymous (Article 27(1)(a));
- the application must not be 'manifestly ill-founded' (Article 27(2)).

With both state and individual applications, domestic remedies must be exhausted and there is a six-month time limit.

Friendly settlement or court?

Once an application is deemed admissible by the Commission, it will seek to reach a friendly settlement. Failing this, a report is submitted to the Committee of Ministers setting out the Commission's findings of fact and an opinion as to whether there has been a violation of the Convention. The application may then be referred to the court. If it is not, the decision is made by the Committee of Ministers.

The rights

The rights are contained in Articles 2–14.

The limitations on the rights

Not all the rights are absolute. Paragraph 2 of Articles 8–11 are subject to such limitations as are 'prescribed by law', 'in accordance with the law' and which are 'necessary in a democratic society'. These limitations are often described as 'claw back clauses' in that the right is conferred in para 1 and then 'clawed back' in para 2. These limitations are subject to a margin of appreciation, ie

states are left a certain discretion in establishing the limitations. This reflects the fact that states are initially responsible for the protection of individual rights. The limitations are, however, subject to ultimate determination by the Commission and the court. There are also general limitations; in particular, Article 15 which permits a state to derogate from its obligations in a 'time of war or other public emergency threatening the life of the nation'. The doctrine of margin of appreciation also applies here.

The future – human rights as a ground for judicial review?

Recent cases (for example *R v Lord Chancellor ex parte Witham* (1997)) have seen the courts developing the common law to protect individual rights. The forthcoming incorporation of the European Convention on Human Rights will be a major constitutional development which may see a change in the relationship between the courts and Parliament. It seems, however, that incorporation will be on the weaker New Zealand model. If this is the case, then the role played by the courts in the development of the common law will continue to be important.

LIABILITY OF PUBLIC BODIES IN PRIVATE LAW

12.1 Introduction

This chapter discusses to what extent private law can be used to control government and other bodies performing public functions. For Dicey, the fact that public bodies were liable in civil actions in the same way as any private individual was a fundamental tenet of the rule of law. One aspect of this theory is that no one is above the law; that is, that the law applies equally, regardless of whether actions are brought against the government or an individual. This may have been an appropriate path to follow at the time when Dicey was writing, given the atmosphere of free markets and the notion that government was regarded as being merely a collective of individuals acting in the capacity of government. Today, however, the state intervenes greatly in the life of the individual. On the one hand, there is a public interest in not intervening too greatly with government and this is reflected in the protection offered in the Order 53 procedure. In *O'Reilly v Mackman* (1983) Lord Diplock stated:

The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

As such, under the Order 53 procedure, applications are subject to a three month time limit and require the leave of the court to proceed. The court can also refuse relief on the ground of undue delay, regardless of the specified time limit. On the other hand, the increasing involvement of government in our everyday lives means that it wields great power and the individual is in an unequal bargaining position. As such, the public need protection.

In principle, public bodies can now be liable in civil actions just as any private citizen. Immunities have operated in the past. At one time, the Crown was immune from criminal and civil liability. As a result, governmental bodies could not be held liable in private law. The only means of seeking redress was to bring an action against individual officials. Although the government was not vicariously liable, in fact any damages awarded against an individual officer were usually paid by the government. The Crown Proceedings Act 1947 removed this immunity and, under s 2(1), made the Crown liable in torts. This chapter will consider the liability of public bodies in torts and briefly consider their position as regards liability in contract.

There is an alternative to a civil action where an individual suffers damage as a result of maladministration. This takes the form of a complaint to the Parliamentary Commissioner for Administration (the Ombudsman). This is especially useful where there are difficulties in establishing the requisite requirements of a particular civil action. For example, in the *Barlow Clowes* affair, a huge number of investors lost their savings following the collapse of a fraudulent investment company. The Ombudsman can recommend the payment of compensation and, in this case, his report resulted in the government making *ex gratia* payments to the investors.

12.2 Liability in torts

12.2.1 Introduction

The question arises as to whether a public body *should* be liable in torts in the same way as a private individual. Weir ('Governmental Liability' (1989) PL 40) expressed a hope that when Professor Wade wrote 'what might be called Administrative Torts ... are on the threshold of important developments', he was wrong. Markesinis and Deakin in *Tort Law* (3rd edn, 1994, Oxford University Press) also set out a number of persuasive arguments as to why governmental liability should be treated as a special case. The first relates to liability for omissions and economic loss. They argue that, if claims of an economic nature are made, the cost is inevitably met by the public at large, either by the diversion of resources or by an increase in taxation. However, as they note, a local authority may be better able to take precautionary measures, for example, by insuring against liability. Very often, it is not an individual who brings an action. It is often the individual's insurer who, by means of subrogation, brings the action in the name of the insured. It seems wrong in such circumstances that the insurer should have a cause of action. Insurers speculate to make profits. It seems proper they should also suffer the consequences of their gamble. Otherwise, the public in effect bail out the insurer. The second argument relates to the special treatment of governmental bodies. This Markesinis and Deakin argue, is to avoid public bodies being flooded with 'frivolous and unmeritorious claims'. They argue that this is a real possibility, given that public bodies cannot normally become insolvent or bankrupt. Often, the most obvious cause of action is not pursued and the local authority becomes the defendant. Even if the local authority is a joint tortfeasor (as in *Anns v Merton* (1978)) the difficulty of getting the other party (for example, the builder in *Anns v Merton*) to pay, will mean the local authority paying everything. Their third argument is that the court should not be resurrecting the policy-making functions of a public body and should not be interfering with decisions not susceptible to judicial review.

The pertinent question as regards liability in torts was succinctly put by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* (1995) as being whether:

... if Parliament has imposed a statutory duty on an authority to carry out a particular function, a plaintiff who has suffered damage in consequence of the authority's performance or non-performance of that function has a right of action in damages against the authority.

Lord Browne-Wilkinson notes that a 'breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action'. He classifies claims for damages into four categories and, for convenience, this section will follow his useful classification:

- actions for breach of statutory duty *simpliciter*;
- actions based on the careless performance of a statutory duty in the absence of any other common law right of action;
- actions based on a common law duty of care arising whether from the imposition of the statutory duty or from the performance of it;
- misfeasance in public office.

12.2.2 Breach of statutory duty

To have an action for breach of statutory duty, the plaintiff must establish that the defendant owed a duty, breach of that duty and damage. The action arises if the plaintiff can show that, on construction of the statute, a statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule as to when the cause of action arises. However, if no other remedy is provided by the statute for its breach and it can be established that Parliament intended to protect a limited class, then this indicates that there may be a private cause of action. Otherwise, a plaintiff has no other means of seeking redress. If the statute does provide a means of enforcing the duty, then this normally indicates that this was to be used to enforce the duty and a private cause of action was not.

What is required then, is an examination of the relevant statute to establish Parliament's intention. As Lord Simonds stated in *Cutler v Wandsworth Stadium* (1949):

The only rule which in all the circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances including the pre-existing law in which it was enacted.

In *Cutler*, the plaintiff was a bookmaker who sued the occupier of the stadium for breach of s 11(2) of the Betting and Lotteries Act 1934. This made it an offence for the occupier of a licensed dog track to exclude a bookmaker if a lawful tote was being operated at the track. In examining the statute to establish the intention of Parliament, the House of Lords held that the purpose of the statute was to protect the public and not to protect the livelihood of the book-

maker. In *Cutler*, the House of Lords also rejected the presumption of civil liability for statutory breach established by Greer LJ in *Monk v Warbey* (1935). Greer LJ had there stated the rule as being that '*prima facie*, a person who has been injured by breach of a statute has a right to recover damages from the person committing it, unless it can be established by considering the whole of the Act that no such right was intended to be given'.

The position was restated by Lord Diplock in *Lonrho v Shell Petroleum* (1981). He began with the presumption in *Doe d Bishop of Rochester v Bridges* (1831) in which Lord Tenterden CJ laid down the rule that 'where an Act creates an obligation, and enforces the performance in a specified manner ... that performance cannot be enforced in any other manner'. He went on to state:

Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or contravening the statutory prohibition which the Act creates, there are two classes of exception to this rule.

These exceptions were:

- where on the true construction of the Act, it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals;
- where the statute creates a public right (ie a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J in *Benjamin v Storr* described as 'particular, direct and substantial damage other and different from that which was common to all the rest of the public'.

The *Lonrho* case concerned the Southern Rhodesia Act 1965 and sanction orders made under it. The order prohibited the unauthorised supply or delivery of crude oil to Rhodesia on penalty of a fine or imprisonment. Lonrho claimed that Shell had supplied oil in breach of the order and that this had caused Lonrho loss of business, since the breach had kept the illegal regime in power, thereby prolonging the period during which the orders were in place. Lord Diplock found that the orders were not passed for the protection of a group of which Lonrho was a member and that the sanctions did not confer a benefit on the public generally. All they did was to prohibit activity which had previously been lawful. As such, Lonrho had no cause of action for breach of statutory duty.

Thus, to establish when an action for breach of statutory duty lies, one needs to examine the statute. If the Act provides for a penalty, then this is the only remedy. If it does not, then one needs to examine the statute to seek to establish Parliament's intention. The presumption will be the exclusion of civil liability, subject to the exceptions set out by Lord Diplock in *Lonrho* (that the statute was for the benefit of an ascertainable class of individuals or that the

statute creates a public right and an individual member of the public suffers particular damage). In *X v Bedfordshire County Council* (1995), Lord Browne-Wilkinson noted:

... it is significant that ... [in the case] ... their Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty.

He went on to indicate that the courts are unlikely to find that Parliament intended to create a cause of action where the relevant statute imposes general administrative functions involving the exercise of administrative discretions.

12.2.3 The careless performance of a statutory duty in the absence of a common law duty of care

Here, the plaintiff alleges a statutory duty and a negligent breach of that duty. Lord Browne-Wilkinson in *X v Bedfordshire County Council* (1995) stated that a careless performance of a statutory duty does not in itself give rise to a cause of action. To sustain a cause of action, there must either be a statutory right of action or a common law duty of care. He stated:

In my judgment the correct view is that in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient.

12.2.4 Actions based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it

Lord Blackburn in *Geddis v Proprietors of the Bann Reservoir* (1878) stated:

It is now thoroughly well-established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently.

For the purposes of negligence, statutory bodies are like any other. Statutory authority is a defence only if the statute specifically authorises the action causing the damage and the action is the result of the proper exercise of the statutory power or duty. For example, in *Allen v Gulf Oil Refining Ltd* (1981), the defendants had secured a private Act of Parliament to compulsorily purchase land and build an oil refinery. In an action for nuisance by members of a nearby village which followed the refinery coming into operation, the defendants

raised the defence of statutory authority. The House of Lords found that, although the statute did not specifically approve the operation of a refinery, it must have been the intention of Parliament that this be the case. Otherwise, the defendants would have been left with an inoperable refinery. Lord Diplock stated:

Parliament can hardly be supposed to have intended the refinery to be nothing more than a visual adornment to the landscape in an area of natural beauty. Clearly the intention of Parliament was that the refinery was to be operated as such.

In *X v Bedfordshire County Council* (1995), Lord Browne-Wilkinson set out what a claimant alleges in such an action:

... either that a statutory duty gives rise to a common law duty of care owed to the plaintiff by the defendant to do or refrain from doing a particular act or that in the course of carrying out a statutory duty the defendant has brought about a relationship between himself and the plaintiff as to give rise to a duty of care at common law.

Lord Browne-Wilkinson was invited in the case to lay down general principles applicable in determining the circumstances in which the law would impose a common law duty of care arising from the exercise of statutory powers or duties. Although he felt this would be desirable, he found it impossible to do so. He went on to state:

However, in my view, it is possible in considering the points raised by the particular appeal to identify *certain* points which are capable of significance.

The first point to consider is whether the duty of care arises out of the manner of the exercise of the statutory discretion or from the manner in which the statutory duty has been implemented. Lord Browne-Wilkinson gives examples of these in *X v Bedfordshire County Council* (1995). An example of the exercise of a statutory discretion in the education field would be 'a decision whether or not to exercise a statutory discretion to close a school'. An example of the manner in which a statutory duty is implemented would be 'the actual running of the school pursuant to the statutory duties'. The distinction is that, in the first, the authority must take care in the *exercise of the discretion* of whether or not to act, whereas in the second, having decided to act, the authority must take care in *the manner* in which they do it.

The issue really turns on the question of discretion. Statutes which impose a duty on an authority usually also confer a discretion as to the extent to which and the methods by which the duty is to be performed. If the decision being challenged is within the discretion conferred by the statute, then there is no action at common law. If it falls outside, then there *may* be liability at common law. *Home Office v Dorset Yacht Club* (1970) concerned borstal trainees who escaped whilst working and caused damage to property. Lord Reid stated:

... where Parliament confers a discretion the position is not the same. Then there may be, and almost certainly will be, error of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that.

The question then is how one establishes whether the decision is outside the ambit of the discretionary power. In *X v Bedfordshire County Council* (1995), Lord Browne-Wilkinson rejected Lord Diplock's view in *Home Office v Dorset Yacht Club* that a finding of *ultra vires*, in the public law sense, is a pre-condition to any common law action arising; it was Lord Browne-Wilkinson's view that a public law decision can be *ultra vires* for reasons other than narrow *Wednesbury* unreasonableness. However, although he asserted that public law has no role as such to play in a common law action, he nevertheless stated that 'the exercise of a statutory discretion cannot be impugned unless it is so unreasonable that it falls altogether outside the ambit of the statutory discretion'. This would seem to mean that only a discretion which is exercised in a *Wednesbury* unreasonable manner can give rise to a common law action. As Lord Browne-Wilkinson stated:

... to establish that a local authority is liable at common law for negligence in the exercise of a discretion conferred by statute, the first requirement is to show that the decision was outside the ambit of the discretion altogether: if it was not, a local authority cannot itself be in breach of any duty of care owed to the plaintiff.

How does the court decide this? As stated above, the exercise of the power must be entirely outside the statutory discretion in the sense that it must be *Wednesbury* unreasonable. In establishing this, the court will be required to examine the way in which the local authority reached its decision; that is, the court will have to examine the factors taken into account by the authority in exercising its discretion. Relevant factors will include such matters as 'social policy, the allocation of finite resources between different calls made upon them or the balance between pursuing desirable social aims as against the risk to the public inherent in doing so' (Lord Browne-Wilkinson). These are policy matters and, as such, are non-justiciable since the court is not in a position to make a judgment upon them. They are matters for the decision-maker alone. This does not mean that such a decision may not be subject to judicial review; only that it is not actionable in negligence. For example, in *R v Cambridge Health Authority ex parte B* (1995), the court chose not to quash the Health Authority's decision not to provide expensive medical treatment on the ground that the decision was not unlawful in the *Wednesbury* sense; the reasoning was not that

the decision was non-justiciable because it involved the allocation of limited resources.

The issue turns, therefore, on whether a decision is one of policy or whether it is operational. In *Anns v Merton London Borough Council* (1978), Lord Wilberforce attempted to set out the way of determining whether a decision was a policy one. The plaintiffs were lessees in a block of flats which had been passed under plans passed by the defendant's predecessors. The plaintiffs claimed that structural movement in the block had been caused because it had been erected on inadequate foundations which did not comply with the plans. They alleged negligence arising out of the council approving the foundations and/or failing to inspect them. In setting out principles for deciding whether a decision was one of policy, Lord Wilberforce stated:

Most, indeed probably all, statutes relating to public authorities or public bodies contain in them a large area of policy. The courts call this 'discretion', meaning that the decision is one for the authority or body to make, and not for the courts. Many statutes, also, prescribe or at least pre-suppose the practical execution of policy decisions. A convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many 'operational' powers or duties have in them some element of 'discretion'. It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose on it a common law duty of care.

In *Murphy v Brentwood District Council* (1991), the House of Lords restricted the class of persons to whom a duty of care is owed. As a consequence, the policy/operational distinction becomes relevant to a more limited extent.

Lord Wilberforce (in *Anns v Merton*) did not, however, provide any clear test as to when a matter was subject to the court's jurisdiction. In *Rowling v Takaro* (1988) a minister exercised a statutory power to prevent the issue of shares in Takaro to a foreign company. This action resulted in a rescue plan for Takaro failing. In subsequent proceedings, the minister's action was found to be *ultra vires*. A private action was then brought seeking compensation for the loss suffered. In considering when the court has jurisdiction, Lord Keith took the view that the policy/operational distinction was not a touchstone of liability but operated only to exclude cases; that is, the issue of whether a matter is one of policy only goes to the question of whether a decision is suitable for judicial resolution. However, 'a conclusion that it does not fall within the category does not, in their Lordship's opinion, mean that a duty of care will necessarily exist'.

In summary, it is for the body upon whom a discretion is conferred to exercise it and, providing it does so within the ambit of the discretion, no common law action will arise from its exercise. If, however, the body acts beyond the

ambit of its discretion, then it may be liable at common law. However, if the factors taken into account in exercising the discretion are of a policy nature, then the courts cannot intervene. Policy matters are non-justiciable. If the decision is an operational one, then the normal principles of a common law duty of care will apply; that is, to establish that a duty of care is owed, the principle in *Caparo v Dickman* (1990) must be met. Was the damage reasonably foreseeable? Was there a sufficiently proximate relationship between the plaintiff and the defendant? Is it fair, just and reasonable to impose a duty of care? This must be influenced by the statute conferring the power, ie the imposition of a common law duty of care must be consistent with the purpose of the statute. As stated by Lord Browne-Wilkinson:

... a common law duty of care cannot be imposed on a statutory duty if the observance of such a common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.

So, even if it is established that a common law cause of action may arise, the court may take the view that the imposition of a duty of care is not consistent with the statute. For example, in *Governors of Peabody Fund v Sir Lindsay Parkinson & Co Ltd* (1985), it was held that the powers of the local authority under the public health legislation to inspect buildings in the course of construction were for the protection of the health and safety of the occupants and, as such, the developer could not recover for the cost of replacing faulty drains. In *X v Bedfordshire County Council* (1995), the local authorities were sued for the way in which their Social Services Departments had handled allegations of child abuse. Lord Browne-Wilkinson, however, concluded that, in his judgment 'a common law duty of care would cut across the whole statutory system set up for the protection of the children at risk'. He was also of the view that there were other reasons for not imposing a common law duty of care. The relationship between social worker and child is a delicate one which takes place under difficult circumstances. The fear of civil litigation would put further pressure on this relationship. The absence of any other remedy for maladministration would have provided a substantial argument for imposing a duty of care. However, there was a statutory complaints procedure in the Act for the investigation of grievances. In the same case, the local authorities were also sued for inadequate provision of special needs education. Lord Browne-Wilkinson again chose not to impose a common law duty of care since it would be inconsistent with the statute. He was of the opinion that the exercise of the discretion involved the parents and that there were appeal mechanisms in the statute that the parents had availed themselves of. He concluded:

... the aim of the 1981 Act was to provide, for the benefit of society as a whole, an administrative machinery to help one disadvantaged section of society. The statute provides its own detailed machinery for securing that the statutory purpose is performed.

Even if a duty of care can be established, the plaintiff will also have to prove that the defendant public body fell below the standard of a reasonable public body. The fact that a decision must be *Wednesbury* unreasonable before it can be impugned is relevant here. The effect is that the standard of care is, in fact, *Wednesbury* unreasonableness. If the plaintiff can establish that a decision is *Wednesbury* unreasonable so that the court may intervene, then, if a duty of care is established, the authority must necessarily be deemed to have fallen below the negligence standard of not acting in the way a reasonable authority would have acted.

The common law duty of care for omissions has recently been considered in *Stovin v Wise* (1996).

12.2.5 *Stovin v Wise* (Norfolk County Council, third party) (1996)

The plaintiff was injured in an accident involving a car driven by the defendant. The accident occurred at a junction where the plaintiff's visibility of the road from which the defendant came was obscured by an earth bank which was on railway land adjacent to the road. The local highway authority was aware of the problem and had had a meeting with the railway authority as regards removing the bank at the local authority's expense. At the time of the accident, no action had been taken although there had been agreement subject to clearance from the railway authority. The railway authority had failed to contact the highway authority to give the go-ahead and the highway authority had not pursued the matter. The highway authority was under a duty under s 41 of the Highways Act (HA) 1980 to maintain the highway and had power under s 79 to serve a notice on the occupier or owner of land requiring the removal of any danger arising from the obstruction of views. The plaintiff sued the defendant who joined the highway authority, Norfolk County Council, as a third party arguing that it had breached its statutory duty under s 41 of the HA 1980 by failing to have the bank removed; that the highway authority was in breach of its common law duty of care to remove dangers which impaired visibility. At first instance, the highway authority was found not to be in breach of its statutory duty. It was, however, in breach of its common law duty of care and was consequently 30% to blame for the accident. The Court of Appeal dismissed the highway authority's appeal and the authority subsequently appealed to the House of Lords.

The majority of the House of Lords (Lords Slynn and Nicholls dissenting) allowed the appeal. The issue was really one of liability for *omissions* in that the authority had failed to exercise a power that had been conferred upon it. The House of Lords held that, in determining the liability of a public authority for a negligent omission to exercise a statutory power, it was required to consider whether, in the light of the policy of the statute, the public authority was under a public law duty to consider the exercise of the power and also whether it was

under a private law duty to act so that a failure to do so would give rise to a claim for compensation. The House set out the minimum preconditions for founding a duty of care on a statutory power:

- that there was a public law duty to act in that it would be irrational for the authority not to exercise the power in the circumstances;
- that there were exceptional grounds for holding that the policy of the statute conferred a right to compensation. The fact that payment of compensation increased the burden on public funds and that Parliament had chosen to confer a discretion rather than a duty indicated that the policy of the Act was not to create a right to compensation.

In considering the decision of the authority not to exercise the power, the court found that the highway authority had not acted irrationally since there was no duty to carry out the works but only a discretion. In any event, even if it was the case that the authority ought to have carried out the works, it could not be said that such a duty gave rise to an obligation to compensate an individual who had suffered loss as a result of the failure. It was impossible to interpret s 79 so as to impose a common law duty of care as regards the use of the power when there was no such liability for breach of the statutory duty contained in s 41.

Lord Hoffman also commented on the use of the policy/operational distinction in discovering whether or not it is appropriate to impose a duty of care. He concluded that the distinction was 'inadequate'. He gave two reasons for this:

The first is that ... the distinction is often elusive. This is particularly true of powers to provide public benefits which involve the expenditure of money. Practically every decision about the provision of such benefits, no matter how trivial it may seem, affects the budget of the public authority in either timing or amount ... another reason is that even if the distinction is clear cut, leaving no element of discretion in the sense that it would be irrational (in the public law meaning of that word) for the public authority not to exercise its power, it does not follow that the law should superimpose a common law duty of care.

(See Convery 'Public or Private? Duty of Care in a Statutory Framework: *Stovin v Wise* in the House of Lords' (1997) 60 MLR 559.)

In conclusion, it is extremely difficult to establish a cause of action at common law for breach of a duty of care. A plaintiff might be better advised to allege negligence on the part of an officer; that is, the plaintiff will have to establish that the officer(s) individually owed a professional duty of care for which the authority as employer will be vicariously liable. The allegation here is not that the authority itself is directly under a duty of care. In *X v Bedfordshire County Council* (1995), one allegation was that educational psychologists and other members of staff of the defendant authority owed a duty to use reason-

able professional skill and care in the assessment and determination of the plaintiff's educational needs. If established that this duty had been breached, the defendant authority would be vicariously liable. Lord Browne-Wilkinson found that the psychologists had held themselves out as having special skills. They were thus bound to possess them and exercise them carefully. He found no reason to exclude such a duty of care and, therefore, the local authority could be liable vicariously for the negligent advice given by its officers.

12.2.6 Mifeseance in a public office

This can be described as a public law tort since it applies only to the activities of public officials (Cane, *An Introduction to Administrative Law*, 3rd edn, 1996, Oxford University Press). The tort is committed only if the official either knew that the action was *ultra vires* or acted with improper motive. Essentially, what is required is the abuse of a public office resulting in damage to the plaintiff. Knowledge that the act complained of was taken in excess of the power conferred or with malice (the intention to injure) towards the plaintiff establishes the abuse of office.

It does not matter whether the power being exercised is one of a public or private nature. In *Jones v Swansea County Council* (1990), the plaintiff's application to amend the terms of her lease with the council was turned down. She alleged that the council had been motivated by malice on the basis that her husband had previously been a councillor for the ruling party's opposition. The council argued that the power in question was one of private law. This was rejected by the court on the ground that a power exercised by a public officer or by a statutory body collectively should only be exercised for the public good. Slade LJ stated that:

It is not the juridical nature of the relevant power but the nature of the Council's office which is the important consideration.

In *Bourgoin SA v Minister of Agriculture, Fisheries and Food* (1986), Mann J examined the relevant authority on this tort. The minister had banned the importation of French turkeys in contravention of Article 30 of the Treaty of Rome which provides for the free movement of goods. The minister's motive was said to be to protect British turkey farmers from competition. The plaintiff brought an action for damages when his business was affected by the ban. Mann J and the Court of Appeal held that an action for misfeasance in public office would lie if it could be shown that the minister had knowingly acted in excess of his powers. Mann J stated that:

There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A (and) the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injury to B.

It is in fact extremely difficult for the plaintiff to meet the burden of proof except in the most obvious cases as, for example, in *Roncarelli v Duplessis* (1959). Here the defendants (the Prime Minister and Attorney General of Quebec) refused to grant the plaintiff a liquor permit because the plaintiff had acted as surety for Jehovah's Witnesses charged with distributing literature without license. This refusal was 'a gross abuse of legal power expressly intended to punish for an act wholly irrelevant to the statute ...'.

12.2.7 Can an *ultra vires* act give rise to an action for damages in private law?

It is clear that this is not the case. As stated by Sir Nicholas Browne-Wilkinson in *Lonrho v Tebbit* (1991): 'The improper exercise of statutory powers does not, by itself, give rise to any civil liability in English law.' The relationship between *ultra vires* and actions for damages was considered in *Rowling v Takaro* (1988). In the House of Lords, Lord Keith identified the usual consequence of an *ultra vires* act as being delay pending the act in question being quashed by way of judicial review proceedings. This, he considered, was not in itself an argument against awarding damages, especially when one considers that in business even a short delay can be extremely damaging. However, he went on to say that it was only rarely that such an error could be classified negligent. A misinterpretation of power on its own was unlikely to be actionable in damages. There must be something more, such as the requirements for the tort of misfeasance in public office. The central question always seems to be whether a common law duty of care can be established. The issue of whether the action complained of is *ultra vires* is largely irrelevant.

In recent times there has been an increase in the number of actions being brought in the context of European law. Even here, the courts have been unwilling to allow an individual to recover damages where there is an *ultra vires* act taken in good faith. In *Bourgoin SA v Minister of Agriculture, Fisheries and Food* (1986), Nourse LJ stated:

... In this country the law has never allowed that a private individual should recover damages from the Crown for an injury caused him by an *ultra vires* order made in good faith ... this rule is grounded ... on the sound acknowledgment that a Minister of the Crown should be able to discharge the duties of his office expeditiously and fearlessly, a state of affairs which could hardly be achieved if acts done in good faith, but beyond his powers, were to be actionable in damages.

In contrast, Oliver LJ was of the view that there was no basis for protecting a minister's exercise of discretion on the grounds of what amounted to public policy.

The question to be addressed now is whether, given the European Court of Justice's view in cases such as *Francovich* and *Factortame* that Member States can

be liable in damages to individuals for breaches of Community law, the position adopted in *Bourgoin* can be sustained. In *Francoovich*, the ECJ made clear that it was a general principle of Community law that Member States pay compensation for harm suffered by individuals as a result of a breach of Community law for which it is responsible. However, the position adopted in *Bourgoin* that there can be no liability for a *mere* breach is probably correct in the light of *Brasserie*, which provides that liability only arises where there is a 'sufficiently serious breach' of Community law. What the courts cannot do is deny any right to damages. But in *Bourgoin* the court did make clear that there was a right to damages for misfeasance in public office. It is for national systems to lay down the remedy for a breach of Community law but it must be an effective one in that it must not make it impossible in practice to get compensation. So the real question, therefore, is whether misfeasance in public office is an effective remedy. Given the difficulties in establishing this tort, as explained above, it would seem that it may not provide an effective remedy. This is particularly so given that there is no liability for an innocent exercise of power. This neglects the fact that although an official may act in good faith he may nevertheless commit a 'manifestly grave breach' of Community law and, as the law currently stands, an individual would have no remedy.

12.2.8 Order 53 as a bar to a private law action

To what extent can a defendant public body raise Order 53 as a bar to a private law action? Where a matter is one of public law, an applicant must proceed by way of Order 53. The issue of proceedings by writ will be struck out as an abuse of the court process (*O'Reilly v Mackman*). Under Order 53, applications must be made within three months although the court does have a discretion to increase this time limit in exceptional circumstances. By contrast, the limitation period in a civil action is significantly longer. In addition, an applicant requires the leave of the court to make an application for judicial review.

In *Lonrho v Tebbit* (1991), the court again considered whether bringing the action in private law was an abuse of the court process as alleged by the defendant. Sir Nicolas Browne-Wilkinson VC felt obligated to follow the opinion of Lord Diplock in *Home Office v Dorset Yacht Club* that no claim in negligence could arise out of the *intra vires* exercise of statutory powers. In his judgment, '*O'Reilly v Mackman* did not establish that, in every action where the validity of the exercise of the statutory power is challenged, it is an abuse of the process of the court to proceed by way of judicial review'. He recalled that Lord Diplock 'expressly refers to possible exceptions in cases where the "invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law"'. The question in this case, therefore, was whether the action fell within the general principle or within the exception to the principle. Sir Nicolas Browne-Wilkinson found that it fell within the exception. He stated, 'The requirement to show that the negligent act complained of

was *ultra vires* is not purely collateral, but is only one ingredient in the cause of action'. However, this was not a case in which the validity of the order was being challenged and thus the only remaining cause of action was in damages. Sir Nicolas also noted that the constraints of the Order 53 procedure would in effect mean that, if forced to seek a remedy through Order 53, *Lonrho* would probably be 'locked out'. Thus, it seems that the courts are not willing to allow public bodies to raise Order 53 as a means of barring actions in private law.

12.3 Liability in contract

12.3.1 Introduction

The Crown may enter into contracts and, under the Crown Proceedings Act 1947, may sue and be sued in contract. All actions are brought by and against appropriate departments and, in their absence, by or against the Attorney General. Government departments enter into contracts in the name of the Crown and, as such, are subject to the Crown Proceedings Act 1947. Officials and ministers are not personally liable since they act as Crown agents and the contract is with the Crown. As Crown agents, all the normal rules of agency are applicable. The Crown will, therefore, be bound where the agent has actual authority, the principal (the Crown) has represented that the agent has authority, or if the agent has usual authority. The only exception to the usual rules is that a Crown agent cannot be sued for the breach of the implied term of warranty of authority.

Where there is a contract, then the court will not extend its supervisory jurisdiction in judicial review. Instead, it will find that the matter arises in private law (*R v Disciplinary Committee of the Jockey Club ex parte HH The Aga Khan* (1993)). As such, where a public body enters into a contract then the matter falls outside the scope of judicial review. Ordinary contract principles will apply as they do to any individual entering into a contract.

The government is free to contract for any purpose not prohibited by law. A consequence of this is that 'in the extreme case, the use of contractual rather than legislative techniques may enable the government (for a time at least) to evade the effects of the rule that parliament cannot bind its successors' (Cane, *An Introduction to Administrative Law*, 3rd edn, 1996, Oxford University Press). That the contractual powers can be used for any purpose has meant that other objectives can be pursued. This is really the result of public bodies being in a strong bargaining position and, therefore, able to use contracts to achieve other ends. For example, local planning authorities may enter into planning agreements which require as a condition of the grant of planning permission that a sports centre be built. This recently happened in *Merton BC*. Sainsbury's planning permission to build a store was granted, subject to an agreement that they built a swimming pool and leisure centre. The council subsequently allowed

the store to withdraw from this agreement and instead to build a fast food outlet. In an application for judicial review brought by a number of children, the council was found not to have acted illegally. The agreement was a legitimate use of planning agreements and, as such, not *ultra vires* the local authority's powers.

Powers to enter into contracts by public bodies other than the Crown are statutory; for example, those of a local authority. As statutory powers, they are then subject to the rules of *ultra vires* so that contracts which do not fall within the statutory power will be void and unenforceable. For example, in *Hazell v Hammersmith* (1992) the House of Lords held that the local authority had no contractual power to invest in 'interest rate swaps' to finance expenditure. The freedom to contract by local authorities has been limited by the Local Government Act 1988 which requires local authorities to submit certain services (eg street cleaning and refuse collection) to compulsory competitive tendering. However, under s 17, in so doing they may not pursue a 'non-commercial purpose'.

The freedom of governmental bodies to pursue collateral objectives (eg social policy) is limited by European law. There is secondary legislation which requires:

- the abolition of discriminatory practices which might prevent contractors from Member States participating in public contracts on equal terms (Directives 70/32 and 71/304);
- public supply and works contracts with an estimated value above a certain threshold to be subject to common advertising procedures and awards criteria (Directives 71/62 as amended and 71/305 as amended).

These directives have been given effect to by the Public Works Regulation 1991, the Public Supply Contracts Regulation 1995, the Public Service Contracts Regulation 1993 and the Utilities Supply and Works Regulation 1992. In addition, in putting contracts out for competitive tendering, any criterion must not be a breach of Article 30 which prohibits quantitative restrictions and measures having equivalent effect (*Commission v Ireland* (Dundalk Water) (1988)).

12.3.2 Breach of contract

Litigation for breach of contract in the context of government contracts is rare because the relationships are usually long term and may be adversely affected. As a result, any 'differences' will be pursued by means of informal negotiations followed by arbitration if necessary. However, the law governing breach of contract is equally applicable subject to the defence of public policy which is available only to government bodies. That is, where circumstances are such that the

public interest demands non-fulfilment of contractual obligations, then the defence of public policy may be raised in response to a claim for breach of contract. The court will then be required to decide whether the public interest pleaded outweighs the interests of the private contractor. For example, in *The Amphritite* (1921) the public policy defence based on the exigencies of war was accepted by the court on the basis that it would not review power relating to a state of war. In contrast, in *Dowty, Boulton Paul v Wolverhampton Corporation* (1971), the defendant corporation reclaimed the site of an aerodrome to use for the provision of housing. It had contracted 40 years previously to allow the plaintiff to use the site for a period of 99 years, or as long as the Corporation maintained an airport, whichever was the longer. In response to the claim for breach of contract, the Corporation argued that the initial conveyance was a fetter on its future executive discretion. The court held, however, that the power exercised in entering the contract had been validly exercised and that the Corporation could not now claim public interest in terminating the contract. The public interest pleaded did not justify the interests of the plaintiff being overridden.

Pleas of public policy are subject to the scrutiny of the courts to the extent that the courts will judge their merits. In *Commissioners of Crown Lands v Page* (1960), it was held that the requisitioning of premises was not a breach of the implied covenant of quiet enjoyment. Although Devlin LJ was not willing to review the conduct of war, he made it clear that the government could not simply raise public interest to escape from a contract. The courts would examine such a claim and weigh it against the interests of the contractor. The plea is not now usually relevant in that contracts will contain a clause allowing the government to withdraw in the interests of public policy.

12.3.3 Effect of plea of public policy

As Cane illustrates in *Introduction to Administrative Law*, the position is unclear. It depends very much on whether the matter is dealt with by analogy to accepted private law principles. If the approach is that the contract contains an implied term that the government may not perform its contractual obligation on the grounds of public policy, then the result is that the contractor will bear the losses. Cane argues that the fairer way to address the issue would be to compensate irrecoverable expenses incurred in the performance of the contract with the courts ultimately determining the amounts in the light of the circumstances of the case. However, he recognises the judiciary's reticence in getting involved and calls for the legislature to lay down general principles. He argues: 'The appropriate question is, who should bear the risk that the public interest may justify and demand non-performance? When the question is put in this way the answer, fairly obviously, is "the public".'

12.3.4 The relationship between breach of contract and *ultra vires*

A public authority cannot fetter the exercise of its discretion by entering into a contract. What is the position where a government authority enters into a contract validly exercising a power and then the subsequent exercise of another power results in a breach of contract? In such a situation, the authority would effectively be raising the defence of public policy and the principles set out above will apply.

12.3.5 Contracting out and privatisation

This has been very much a part of government policy in recent times. We have seen the privatisation of nationalised industries as well as the public sector being reorganised on a contractual basis so that some services have been contracted out to private organisations (see Lewis, 'Regulating Non-Government Bodies: Privatization, Accountability and the Public Private Divide' in Jowell & Oliver (eds), *The Changing Constitution*, 2nd edn, 1989, Oxford University Press). Where there has not been contracting out, so-called 'internal markets' have been created. For example, in local authorities the buying and selling of services takes place between departments.

In 1988, the government also launched the Next Step Agencies which have had many executive functions transferred to them (see Drewry, 'Revolution in Whitehall: The Next Step and Beyond' in Jowell and Oliver (eds), *The Changing Constitution*, 3rd edn, 1994, Oxford University Press). These are semi-independent and are headed by a Chief Executive who runs day-to-day activities. The aim is to subject the public sector to the accountability of market forces. The question which arises is whether these bodies are now accountable either:

- in the sense of being accountable to a minister who, in turn, is constitutionally responsible to Parliament; and/or
- in the sense of being public bodies responsible to the courts via judicial review.

The unclear position as regards ministerial accountability for actions of Chief Executives is illustrated by the Parkhurst Prison break-out which saw the then Home Secretary, Michael Howard, refusing to accept responsibility on the basis that the issue was an 'operational' one, for which the Prison Service's Director General was responsible. If this was in fact the case, then these bodies are effectively unaccountable to Parliament. This will leave the individual to seek redress through the courts. If the body cannot be classified as being a public one, and so subject to judicial review, the only cause of action will be in private law (see *the Mercury Communications* and *British Steel* cases).

LIABILITY OF PUBLIC BODIES IN PRIVATE LAW

This chapter sought to examine the extent to which private law can be used to control government and other bodies performing public functions. In principle, public bodies are liable in private law just as any private citizen.

Liability in torts

The categories of liability can be classified into four (*X (minors) v Bedfordshire County Council* (1995) *per* Lord Browne-Wilkinson):

- actions for breach of statutory duty *simpliciter*;
- actions based on the careless performance of a statutory duty in the absence of any other common law right of action;
- actions based on a common law duty of care arising whether from the imposition of the statutory duty or from the performance of it;
- misfeasance in public office.

Can an *ultra vires* act give rise to an action for damages in private law?

The issue of whether the action complained of is *ultra vires* is largely irrelevant. The central question is whether a common law duty of care can be established. The courts have been unwilling to allow individuals to recover where there is an *ultra vires* act taken in good faith (*Bourgoin SA v Minister of Agriculture, Fisheries and Food* (1986)). This position must now be reconsidered given the ECJ's position that member states are liable in damages (*Francovich*) to the individual for breaches of Community law and that member states are required to provide effective remedies for breaches of Community law.

Order 53 as a bar to a private law action

The courts are not willing to allow public bodies to raise Order 53 as a means of barring actions in private law.

Liability in contract

The Crown may enter into contracts and, under the Crown Proceedings Act 1947, may sue and be sued in contract. The main difference between contracts entered into by public bodies, particularly the government, and ordinary private individuals, is that the public body is in a strong bargaining position. As such, it may seek to use the contract to pursue objectives other than those relating to the contract itself. Powers to enter into contracts, other than those of the Crown, are statutory and are, therefore, subject to the rules of *ultra vires* so that contracts which do not fall within the statutory power will be void and unenforceable.

Breach of contract

Unlike ordinary contracts, government may claim public policy in defence to an action for breach of contract. The effect of the plea is unclear. The plea is also relevant as regards the relationship between breach of contract and *ultra vires*.

Contracting out and privatisation

This has been very much part of recent government policy and the central question in this context is that relating to accountability. Are these bodies subject to ministerial accountability or are they subject to the court's supervisory judicial review jurisdiction? If the position is neither, then the only cause of action will be in private law.

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