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CROWN PROCEEDINGS

THE CROWN IN LITIGATION

Legal status of the Crown

It is fundamental to the rule of law that the Crown, like other public authorities, should bear its fair share of legal liability and be answerable for wrongs done to its subjects. The immense expansion of governmental activity from the latter part of the nineteenth century onwards made it intolerable for the government, in the name of the Crown, to enjoy exemption from the ordinary law. For a long time the government contrived, in the manner dear to the official heart, to meet the demands of the time by administrative measures, while preserving the Crown's ancient legal immunity. But the law caught up with the practice when finally the Crown Proceedings Act was passed in 1947. In principle the Crown is now in the position of an ordinary employer and of an ordinary litigant. But the history and development of the law of Crown proceedings, together with some important surviving peculiarities, make it essential to explain this subject separately.[1]

'The Crown' means the sovereign acting in a public or official capacity. In law the sovereign has two personalities, one natural and the other corporate.[2] In its corporate capacity the Crown is a corporation sole,[3] though other suggestions have at times been made.[4] A corporation sole, as opposed to a corporation aggregate,

[1] Different aspects of the Crown's constitutional position, powers and functions are discussed in Sunkin and Payne (eds.), *The Nature of the Crown*. See also Sir Stephen Sedley in Forsyth and Hare (eds.), *The Golden Metwand*, 253.

[2] *Duchy of Lancaster Case* (1561) 1 Plowd. 212 at 213; *Willion* v. *Berkley* (below).

[3] *Willion* v. *Berkley* (1559) 1 Plowd. 223 at 242 and 250; *Case of Sutton's Hospital* (1612) 10 Co. Rep. 1a at 29b; Hale, *Prerogatives of the King*, Selden Soc. vol. 92, p. 84; Bl. Comm. i. 469; Hargrave's notes to Co. Litt. 15b; *A.-G.* v. *Köhler* (1861) 9 HCL 654 at 670 (Lord Cranworth); *Re Mason* [1928] Ch. 385 at 401 (Romer J); Holdsworth, *History of English Law*, iv. 203; *Town Investments Ltd.* v. *Department of the Environment* [1987] AC 359 at 384 (Lord Diplock).

[4] In the *Town Investments* case (above) at 400 Lord Simon held that the Crown was a corporation aggregate together with ministers and government departments, but for this strange proposition there is no authority. Elementary constitutional principles, explained above, p. 46, and again below, require that the Crown's personality should be separate from that of its ministers and servants. Maitland, following an argument of counsel in *Willion* v. *Berkley* (above), preferred to regard the Crown as incorporated together with all its subjects as 'the Commonwealth': Coll. pp. iii, 259. Statements in the Court of Appeal in *M.* v. *Home Office* [1992] QB 270 at 300 and 313, that the Crown has no legal personality, must be regarded as aberrations: see *M.* v. *Home Office* [1994] AC 377 at 424. In *Madras Electric Supply Cpn.* v. *Boarland* [1955] AC 667 the House of Lords held that the Crown was a 'person' for purposes of income tax legislation.

consists of a single office-holder whose corporate capacity and property passes automatically to his successors in office, as for example does that of a bishopric. Crown property thus descends directly from sovereign to sovereign.

The Crown itself is immune from legal process, save only where statute provides otherwise.[5] But this privilege causes little difficulty in the law which governs judicial control of powers, since statutory powers are in the vast majority of cases conferred upon designated ministers or public authorities rather than upon the Crown itself[6] and the same is true of duties. Ministers and public authorities acting in their own names enjoy none of the immunities of the Crown, as many examples have already illustrated. This artificial cleavage between the Crown and its agents may be criticised as an impediment to a coherent theory of the state as a legal entity.[7] But it is deeply rooted historically and of fundamental importance in the law.

Ordinary proceedings by judicial review or otherwise against ministers and other Crown servants do not here count as proceedings against the Crown,[8] nor do the exceptional cases where action under the royal prerogative has been reviewed in proceedings against a minister for a declaratory judgment.[9] Indeed, in all such cases the Crown is usually the nominal plaintiff. In the present context we must consider the Crown's position in the law of tort and contract, since Crown employees often commit torts and the Crown itself is legally the employer of the central government's officials and is legally the contracting party in many central government contracts. Consequently this chapter may be regarded as an extension of the preceding one, but dealing especially with the liability of the Crown itself, as distinct from that of its servants.[10]

Discussion of the Act of 1947 requires, as an essential prologue, some account of the traditional position of the Crown as litigant at common law.

'The king can do no wrong'

English law has always clung to the theory that the king is subject to law and, accordingly, can break the law. There is no more famous statement of this ideal than Bracton's, made more than 700 years ago: 'rex non debet esse sub homine sed

[5] 'No suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him': Bl. Comm. i. 242. The immunity is recognised in *M.* v. *Home Office* (above) in terms of 'the king can do no wrong': see at 395, 408 and 412.

[6] See above, p. 46.

[7] See *The Nature of the Crown* (as above), ch. 3 (M. Loughlin).

[8] *Minister of Foreign Affairs, Trade and Industry* v. *Vehicles and Supplies Ltd.* [1991] 1 WLR 550 (PC).

[9] Above, p. 574.

[10] See generally Glanville Williams, *Crown Proceedings*; Street, *Government Liability*; Hogg, *Liability of the Crown*, 3rd edn. (2000).

sub deo et sub lege, quia lex facit regem'.[11] But in practice rights depend upon remedies, and the theory broke down—as Bracton's words suggest that it would—because there was no human agency to enforce the law against the king. The courts were the king's courts, and like other feudal lords the king could not be sued in his own court. He could be plaintiff—and as plaintiff he had important prerogatives in the law of procedure[12]—but he could not be defendant. No form of writ or execution would issue against him, for there was no way of compelling his submission to it. Even today, when most of the obstacles to justice have been removed, it has been found necessary to make important modifications of the law of procedure and execution in the Crown's favour.

The maxim that 'the king can do no wrong' does not in fact have much to do with this procedural immunity. Its meaning is rather that the king has no legal power to do wrong. His legal position, the powers and prerogatives which distinguish him from an ordinary subject, is given to him by the law, and the law gives him no authority to transgress. This also is implicit in Bracton's statement, and it provided the justification, such as it was, for the rule that the Crown could not be sued in tort in a representative capacity, as the employer of its servants. But the king had a personal as well as a political capacity, and in his personal capacity he was just as capable of acting illegally as was anyone else—and there were special temptations in his path. But the procedural obstacles were the same in either capacity. English law never succeeded in distinguishing effectively between the king's two capacities.[13] One of the best illustrations of this is that, despite the doctrines that the Crown is a corporation sole and that 'the king never dies', the death of the king caused great trouble even in relatively modern times: Parliament was dissolved; all litigation had to be begun again; and all offices of state (even commissions in the army) had to be regranted. Until numerous Acts of Parliament had come to the rescue the powers of government appeared wholly personal, and it could truly be said that 'on a demise of the Crown we see all the wheels of the state stopping or even running backwards'.[14]

[11] 'The king must not be under man but under God and under the law, because it is the law that makes the king': Bracton, *De legibus et consuetudinibus Angliae*. fo. 5b (S. E. Thorne's edn., p. 32); cited by Coke, *Prohibitions del Roy* (1608) 12 Co. Rep. 63 at 65. For later instances of this principle see Holdsworth, *History of English Law*, ii. 435; v. 348.

[12] Thus costs could not be awarded against the king and lapse of time could not prejudice his claims.

[13] The Crown could dispose of Crown lands by grant but not by will until permitted by the Crown Private Estates Acts 1800–1961.

[14] Maitland, *Collected Papers*, iii. 253.

The petition of right

Justice had somehow to be done, despite the Crown's immunity, and out of the streams of petitions which flowed in upon medieval monarchs came the procedure known as petition of right.[15] This held the field until the new system began in 1948, and many of the vagaries of its early procedure were rationalised by the Petitions of Right Act 1860, which provided a simplified form of petition and made provision for awarding costs on either side. In essence the petition of right was a petition by a subject which the Crown referred voluntarily to the decision of a court of law. The Crown's consent was signified by the Attorney-General endorsing the petition 'Let Right be Done' (fiat justitia), so that after obtaining this fiat the plaintiff could obtain the judgment of one of the regular courts. Employed originally for the recovery of land or other property, this remedy made an important stride after the Revolution of 1688, when it was agreed by the judges that it would lie to enforce a debt. This was in the *Bankers' Case* (1690–1700),[16] in which various bankers attempted to sue the Crown for payments due on loans to Charles II on which that king had defaulted. It was, in fact, by other means that the bankers finally obtained their judgment—though not their money, for the problem of enforcement was as intractable as ever. No further case of importance arose until 1874, when an inventor of a new kind of heavy artillery sued for a reward promised to him by the War Office.[17] This case finally settled the point that judgment could be given against the Crown on a petition of right for breach of contract made by the Crown's agent. Since in any normal case the Crown would grant the fiat[18] and respect the judgment, there was now a reasonably effective remedy in contract.

A claim made by petition of right was judged in accordance with the ordinary law, under which the Crown enjoyed no special advantages. A case of 1865 was at one time thought to lay down that monetary liability of the Crown in contract was contingent upon funds being voted by Parliament.[19] But the contract in question expressly provided that payments (for the carriage of mails) were to be made out of moneys to be provided by Parliament, and no such moneys were voted. The notion of contingent liability as a general rule was rejected in a strong decision of the High Court of Australia[20] and may be regarded as exploded. If Parliament refuses to vote the money for the due performance of a Crown contract, payment cannot properly be made. But there is no reason why the other contracting party should not recover

[15] For the form of the petition of right see below, p. 828 n. 80.

[16] 14 How. St. Tr. 1.

[17] *Thomas* v. *The Queen* (1874) LR 10 QB 31.

[18] The fiat could not properly be refused where the claim was arguable: *Dyson* v. *A.-G.* [1911] 1 KB 410 at 422.

[19] *Churchward* v. *R.* (1865) LR 1 QB 173, especially at 209 (Shee J). On this question see Mitchell, *The Contracts of Public Authorities*, 68.

[20] *New South Wales* v. *Bardolph* (1934) 52 CLR 455, upholding a notable judgment of Evatt J and considering inconclusive decisions of the House of Lords and Privy Council.

damages for the breach.[21] Nor is there any sign that the Crown would wish to assert the contrary.

No liability in tort

Meanwhile the judges had set their faces against any remedy in tort. This was an unfortunate by-product of the law of master and servant as it was understood in the nineteenth century. For obvious reasons it had become necessary that employers should be liable for the torts—most commonly negligence—committed by their employees in the course of their employment. But in seeking a legal basis for this, judges at first tended to say that it depended on the implied authority given by the master to the servant, or that the fault was the master's for not choosing his servants more carefully. Neither line of thought would bring liability home to the Crown, for as we have seen the theory has always been that the Crown's powers cannot be exercised wrongly. Thus 'the king can do no wrong' meant that the Crown was not liable in tort—even though a breach of contract is just as much a 'wrong' as a tort, and even though the social necessity for a remedy against the Crown as employer was just as great as, if not greater than, the need for a remedy in contract. The first important case was an unsuccessful petition of right by Viscount Canterbury in 1842.[22] He had been Speaker of the House of Commons in 1834 when some workmen in the employ of the Crown, being told to burn the piles of old tallies from the Exchequer, succeeded in burning down both Houses of Parliament and the Speaker's house in addition. But the Speaker's claim against the Crown for the value of his household goods foundered on the objection that the negligence of the workmen could not be imputed to the Crown either directly or indirectly. Similarly, where a British naval commander, suppressing the slave trade off the coast of Africa, seized and burnt an allegedly innocent ship from Liverpool, the owner's petition of right was rejected.[23] It was later recognised that employer's liability is quite independent of fault on the part of the master, and depends rather on the fact that it is for the master's benefit that the servant acts and that the master, having put the servant in a position where he can do damage, must accept the responsibility. But it was then too late to challenge the doctrine that the Crown could have no liability in tort, which was an unshakeable dogma until Parliament abolished it in 1947. But for any claim which did not 'sound in tort'—such as for breach of contract, recovery of property, restitution or statutory compensation—a petition of right would lie.

[21] This proposition seems clearly supported by Cockburn CJ in *Churchward's* case (above) at 200 and by Lord Haldane in *A.-G.* v. *Great Southern and Eastern Rly Co. of Ireland* [1925] AC 754 at 771: see *Bardolph's* case (above) at 514 (Dixon J).

[22] *Canterbury (Viscount)* v. *A.-G.* (1842) 1 Ph. 306.

[23] *Tobin* v. *The Queen* (1864) 16 CBNS 310. Similarly *Feather* v. *The Queen* (1865) 6 B & S 257.

Personal liability of Crown servants

The Crown was always, as it still is, immune from legal process at common law. Against the king the law had no coercive power.[24] But this immunity never extended to the Crown's servants. It was, and still is, a constitutional principle of the first importance that ministers and officials of all kinds, high or low, are personally liable for any injury or wrongdoing for which they cannot produce legal authority.[25] The orders of the Crown are not legal authority unless it is one of the rare acts which the prerogative justifies, such as the detention of an enemy alien in time of war. Thus although in past times the Crown was not liable in tort, the injured party could always sue the particular Crown servant who did the deed, including any minister or superior officer who ordered him to do it or otherwise caused it directly.[26] In a famous eighteenth-century case, where damages of £4,000 were awarded to Wilkes against the Secretary of State, Lord Halifax, for trespass and false imprisonment, Wilmot CJ said: 'The law makes no difference between great and petty officers. Thank God they are all amenable to justice.'[27]

A superior officer cannot be liable merely as such, for it is not he but the Crown who is the employer;[28] but if he takes part in the wrongful act he is no less liable than any other participant. Superior orders can never be a defence, since neither the Crown nor its servants have power to authorise wrong.[29] The ordinary law of master and servant makes the master and the servant jointly and severally liable for torts committed in course of the employment. Before 1948, therefore, someone negligently injured by an army lorry could sue the driver of the lorry but not the commander-in-chief or the war minister or the Crown. Had the lorry been owned by a private employer, the action would have lain both against the driver and against the employer, although the damages could have been recovered only once.

Crown servants were equally liable to the remedy of injunction. The events which led to the settlement of a vexed question by the House of Lords, after much difference of judicial opinion and not without anomalies will be explained below.[30] The final decision is a landmark for the rule of law and sheds much light on the legal position of the Crown and its servants. Lord Templeman said that the

[24] Maitland, *Constitutional History*, 100; *M.* v. *Home Office* (below) (Lord Templeman).

[25] Statements by the House of Lords in *R.* v. *Secretary of State for Transport ex p. Factortame Ltd.* [1990] 2 AC 85 at 145 that Crown officers were immune from suit both before and after the Crown Proceedings Act 1947 were based on erroneous argument and are corrected by *M.* v. *Home Office* [1994] AC 377 at 418. For erroneous dicta in *Town Investments Ltd.* v. *Department of the Environment* [1978] AC 359, see above, p. 46.

[26] See *Raleigh* v. *Goschen* [1898] 1 Ch. 73; *Roncarelli* v. *Duplessis* (1959) 16 DLR (2d) 689 (above, p. 361).

[27] *Wilkes* v. *Wood* (1769) 19 St. Tr. 1406 at 1408.

[28] *Bainbridge* v. *Postmaster-General* [1906] 1 KB 178.

[29] The law as stated in the text is confirmed in *M.* v. *Home Office* (above) at 407–10.

[30] Below, p. 834 (*M.* v. *Home Office*).

proposition that the executive obeyed the law as a matter of grace and not of necessity 'would reverse the result of the Civil War'.

The personal liability of officials was not only one of the great bulwarks of the rule of law: it also provided a peg on which a remedial official practice was hung. The Crown did in fact assume the liability which could not lie upon it in law by regularly defending actions brought against its servants for torts committed by them in the course of their duties.[31] The legal process was issued solely against the individual servant, but his defence was in practice conducted by the Crown, and if damages were awarded they were paid out of public funds. Government departments did their best to be helpful in making this practice work smoothly, and if there was any doubt as to which servant to sue they would supply the name of a suggested defendant, known as a 'nominated defendant'.[32]

Breakdown of the fiction: The Crown Proceedings Act 1947

For many years the practice of supplying nominated defendants provided a satisfactory antidote to the shortcomings of the law. But ultimately two fatal flaws appeared. One was in a case where it was clear that some Crown servant was liable but the evidence did not show which. A representative defendant might then be nominated merely in order that the action might in substance proceed against the Crown, but this practice was condemned by the House of Lords in 1946.[33] The other difficulty was that there can be torts (such as failure to maintain a safe system of work in a factory) which render only the employer liable, so that there could be no one to nominate in, say, a government-owned factory where the occupier was in law the Crown.[34] These two cases exposed the weaknesses of the makeshift practice of suing the Crown indirectly through a nominated defendant. The favourite argument that juries would award extravagant damages against government departments had also lost its force, since juries were no longer used in most civil cases. The Minister of Transport had been made liable for his department in tort (as also in contract) since 1919.[35] The time had at last come—and was, indeed, overdue—for abolishing the general immunity in tort which had been an anomaly of the Crown's legal position for more than a hundred years. This was the genesis of the Crown Proceedings Act 1947.[36]

[31] See *M.* v. *Home Office* [1994] AC 377 at 410.

[32] This device was adopted by statute for criminal liability for traffic offences: Road Traffic Act 1972, s. 188 (8); *Barnett* v. *French* [1981] 1 WLR 848. But it was omitted from the Road Traffic Act 1988.

[33] *Adams* v. *Naylor* [1946] AC 543.

[34] *Royster* v. *Cavey* [1947] KB 204.

[35] Ministry of Transport Act 1919, s. 26.

[36] For a good account of the legislative history see [1992] *PL* 452 (J. M. Jacob). And see the valuable historical discussion in several speeches in *Matthews* v. *Ministry of Defence* [2003] UKHL 4; [2003] 2 WLR 435 (HL).

The law as it now stands under the Act may be divided under four headings: 1. Tort; 2. Contract; 3. Remedies and procedure; 4. Statutes affecting the Crown.

LIABILITY IN TORT

General rules

The Act subjects the Crown to the same general liability in tort which it would bear 'if it were a private person of full age and capacity'.[37] The general policy, therefore, is to put the Crown into the shoes of an ordinary defendant. Furthermore, the Act leaves untouched the personal liability of Crown servants, which was the mainstay of the old law, except in certain cases concerning the armed forces (and formerly the Post Office), to be mentioned presently. The principle of the new law is that where a servant of the Crown commits a tort in the course of his employment,[38] the servant and the Crown are jointly and severally liable. This corresponds to the ordinary law of master and servant.

The Act[39] specifically makes the Crown liable for:

(a) torts committed by its servants or agents;
(b) breach of duties which a person owes to his servants or agents at common law by reason of being their employer; and
(c) breach of duties attaching at common law to the ownership, occupation, possession or control of property.

Head (a) is subject to the proviso that the Crown shall not be liable unless the servant or agent would himself have been liable. This proviso gives the Crown a dispensation which a private employer does not enjoy in occasional cases where the servant has some defence but the employer is still liable as such; for the doctrine is that personal defences belonging to the servant do not extend to the employer unless he also is entitled to them personally, and they may not prevent the servant's act from being a tort even though he personally is not liable. But in other respects it seems that the three heads are comprehensive. Head (c) subjects the Crown to the normal rule of strict liability for dangerous operations (*Rylands* v. *Fletcher*), so that the position is more satisfactory than in the case of other public authorities.[40]

[37] s. 2(1). There is no liability in tort outside the Act: *Trawnik* v. *Lennox* [1985] 1 WLR 532.
[38] Misfeasance, i.e. deliberate excess of authority, by a Crown servant will normally be outside the course of his employment: *Weldon* v. *Home Office* [1992] 1 AC 58 at 164.
[39] s. 2(1).
[40] See above, p. 772. But if the same meaning as there mentioned is given to 'its own purposes', the Crown also might escape liability anomalously.

The Crown is also given the benefit of any statutory restriction on the liability of any government department or officer.[41] A number of statutes contain such limitations of liability, for example the Mental Health Act 1983 which protects those who detain mental patients under the Act unless they act in bad faith or without reasonable care,[42] and the Land Registration Act 1925, which frees officials of the Land Registry from liability for acts or omissions made in good faith in the exercise or supposed exercise of their functions under the Act.[43]

Statutory duties

Statutory duties can give rise to liability in tort, as already explained. The Act therefore subjects the Crown to the same liabilities as a private person in any case where the Crown is bound by a statutory duty which is binding also upon other persons.[44] The Act makes no change in the general rule that statutes do not bind the Crown unless an intention to do so is expressed or implied,[45] so the Crown will normally be liable only where the statute in question says so. This rule might well be the other way round, so that (so to speak) the Crown would have to contract out instead of having to contract in. But many important statutes do expressly bind the Crown, such as the Road Traffic Act 1960, the Factories Act 1961 and the Occupiers' Liability Act 1957. Under the last of these Acts, for instance, the Crown becomes liable in the same way as any other occupier of premises for not taking reasonable care for the safety of visitors invited or permitted to be there. A visitor to a government office or workshop who was injured by a negligently maintained roof or staircase would be able to sue the Crown for the tort. So far as concerns the occupation of land, the Crown shares both the common law and statutory liabilities of its subjects.

The Act does not allow the Crown to shelter behind the fact that powers may be given (either by common law or statute) to a minister or other servant of the Crown directly, and not to the Crown itself. In such cases the Crown is made liable in tort as if the minister or servant were acting on the Crown's own instructions.[46]

These primary rules for imposing liability in tort may be said, in general, to achieve their object well. The Crown occasionally claims that public policy should entitle it to exemption in respect of its governmental functions. But this claim is

[41] s. 2(4).
[42] See *R.* v. *Bracknell Justices ex p. Griffiths* [1976] AC 314.
[43] s. 131.
[44] s. 2(2). In *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 QB 233 at 268 Lord Denning MR says that the Crown is not liable for mistakes in the Land Registry by virtue of s. 23(3)(f) of the Crown Proceedings Act 1947. That provision however applies only to Part II of the Act (Jurisdiction and Procedure) and does not exclude Crown liability under s. 2(3). But Land Registry officials acting in good faith are not liable: see above.
[45] s. 40(2)(f); below, p. 836.
[46] s. 2(3).

now, as in the past, rejected by the courts. Thus where boys escaped from an 'open Borstal' and damaged a yacht, the Home Office was held to have no defence if negligent custody could be established, despite its claims to immunity on grounds of public policy.[47]

Who is a Crown servant?

In broaching the question who is a servant of the Crown, it must be remembered that the Crown is liable to the same extent as a private person for torts committed by its servants *or agents*, and that 'agent' includes an independent contractor.[48] The general principle in tort is that the employer is liable for the misdeeds of his servant or agent done in the course of the employer's business but not for the misdeeds of independent contractors, who bear their own responsibility. Where the employer can control what the employee does and how he does it, the relationship is likely to be that of master and servant, so that they are liable jointly. The same is true when an agent is employed. But an agent has to be distinguished from an independent contractor, for whose tortious acts the employer is not liable at all. For example, a person who takes his car for repair to an apparently competent garage is not liable if, because of careless work by the garage, a wheel comes off and injures someone.[49] Yet there are some special cases where there is liability even for independent contractors, for example where the work is particularly dangerous. Thus a householder had to share the liability when she called in workmen to thaw out frozen pipes and by using blowlamps they set fire both to her house and her neighbour's.[50] If this had happened on Crown land, the Crown would have been equally liable under the Act because of its general liability for the torts of its agents.

In the case of *servants* the Act sets up a special criterion based on appointment and pay. It says that the Crown shall not be liable for the torts of any officer of the Crown 'unless that officer has been directly or indirectly appointed by the Crown' and was at the material time paid wholly out of monies provided by Parliament or out of certain funds (which in case of doubt may be certified by the Treasury), or would normally be so paid.[51] The final words cover the case of voluntary office-holders, such as ministers acting without salary. But the principal importance of this provision is that it prevents the Crown becoming answerable for the police. It can be said, as explained earlier,[52] that in some of their functions at least the police act as officers of the Crown. Yet since the police, both in London and in the provinces, are partly paid out of local taxes, and in the provinces are appointed by

[47] *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] AC 1044; above, p. 761.

[48] s. 38(2).

[49] Compare *Phillips* v. *Britannia Hygienic Laundry* [1923] 2 KB 823, where the plaintiff failed to circumvent this principle by pleading breach of statutory duty.

[50] *Balfour* v. *Barty-King* [1957] 1 QB 496.

[51] s. 2(6).

[52] Above, p. 128.

local authorities, they are all excluded by the Act.[53] This left an unsatisfactory situation until the Police Act 1964 remedied it by placing representative liability on the chief constable as explained previously.[54] Under the Official Secrets Act 1989[55] a police constable is treated as a 'Crown servant', but only for the purposes of that Act.

Nor do there seem to be any other plausible complaints against the restriction. It has been suggested that it frees the Crown from responsibility for the acts of 'borrowed' servants—as where the servant of A is told to work at B's orders, so that B may be liable for his negligence—but the answer to this may be that if the Crown borrows A's servant, A's servant is not for that reason an 'officer of the Crown', so that the exclusion clause does not operate. There is also some doubt as to the Crown's liability for the servants of certain public corporations. It is clear that denationalised industries and the BBC are independent bodies and not servants or agents of the Crown. But the less industrial and more governmental corporations, such as the New Town Development Corporations and the Civil Aviation Authority, stand in much closer relationship with the Crown, and whether they and their servants can render the Crown liable must depend on careful examination of their constituent Acts as was explained earlier.[56] But this is unlikely to afford the Crown any exemption to which it would not be entitled on ordinary legal principles. What matters in practice is that there should be an employer with a deep enough purse to satisfy a judgment, and there is no doubt of the capacity of public corporations on that score.

Judicial functions

The Crown has one general immunity in tort which is a matter of constitutional propriety. The Act provides against Crown liability in tort for any person discharging judicial functions or executing judicial process.[57] This expresses the essential separation of powers between executive and judiciary. Judges and magistrates are appointed by the Crown or by ministers. They are paid (if at all) out of public funds, and so may be said to be servants of the Crown in a broad sense[58]—a sense that was brought home to them when their salaries were reduced as 'persons in His Majesty's service' under the National Economy Act 1931.[59] But the relationship between the Crown and the judges is entirely unlike the relationship of employer

[53] Above, p. 129.
[54] Above, p. 129.
[55] s. 12(1)(e).
[56] Above, p. 128.
[57] s. 2(5).
[58] See above, p. 67.
[59] See (1932) 48 *LQR* 35 (W. S. Holdsworth).

and employee on which liability in tort is based. The master can tell his servant not only what to do but how to do it. The Crown has had no such authority over the judges since the days of Coke's conflicts with James I.[60] The master can terminate his servant's employment, but the superior judges are protected by legislation, dating from 1700, against dismissal except at the instance of both Houses of Parliament.[61] Their independence is sacrosanct, and if they are independent no one else can be vicariously answerable for any wrong that they may do.

It is virtually impossible for judges of the Supreme Court to commit torts in their official capacity, since they are clothed with absolute privilege, and this privilege has now been extended to lower judges, such as magistrates.[62] But the Act comprehensively protects the Crown in the case of anyone 'discharging or purporting to discharge' judicial functions.[63] In this context the word 'judicial' ought naturally to cover members of independent statutory tribunals, e.g. rent tribunals, even when they are whole-time employees of the Crown as are some of the Special Commissioners of Income Tax.[64] A contrasting case is that of independent authorities such as social security adjudication officers, whose functions are basically administrative.[65] Nor would the functions of inspectors holding public inquiries seem to be 'judicial' in this sense, though they are so denominated for other purposes. The same question arises here as has already been discussed in the context of personal liability. If there is no personal liability, the Crown cannot be liable in the capacity of employer.[66] But the Court Service, although an executive agency, facilitates and implements the functions of the judiciary; and the acts of court officers are thus immune as being responsibilities 'in connection with the execution of judicial process'.[67]

The Post Office and armed forces

Both the Post Office and its employees were given remarkably wide dispensations

[60] *Prohibitions del Roy* (1608) 12 Co. Rep. 63.
[61] See above, p. 68.
[62] See above, p. 788.
[63] s. 2(5).
[64] See *Slaney* v. *Kean* [1970] Ch. 243. But see also above, p. 40. Note the questionable reasoning of the majority of the Judicial Committee of the Privy Council in *Ranaweera* v. *Ramachandran* [1970] AC 951, holding that for the purposes of the constitution of Ceylon members of the income tax Board of Review did not exercise judicial functions and were not servants of the Crown.
[65] *Jones* v. *Department of Employment* [1989] QB 1. Likewise administrative functions of the Crown Prosecution Service: *Welsh* v. *Chief Constable of Merseyside Police* [1993] 1 All ER 692.
[66] There would be no basis of liability at common law and in any case the proviso to s. 2(1) of the Act would exclude liability.
[67] s. 2(5). See *Quinland* v. *Governor of Swaleside Prison* [2002] EWCA Civ. 174; [2002] 3 WLR 807 (CA) (prisoner served six weeks more than proper sentence because the Registrar of Criminal Appeals failed to place a matter before the full court in due time; dicta in *Welsh*'s case (below) restricting immunity to judicial functions doubted and human rights compliance left open).

by the Act.[68] But since the Post Office is no longer a Crown service, they are discussed elsewhere.[69]

In the case of the armed forces there were provisions (now repealed) designed to prevent the taxpayer from paying twice over for accidents in the services, once by way of damages and once more by way of disability pension to the injured person or his dependants. The dispensation therefore applied only where the injury was attributable to service for pension purposes, and it could not affect the right of plaintiffs outside the armed forces. The main provision was that, provided that pensionability was certified, neither the Crown nor the tortfeasor was liable for death or personal injury caused by one member of the armed forces,[70] while on duty as such, to another member of the armed forces who was either on duty as such or was on any land, premises, ship, aircraft or vehicle for the time being used for service purposes.[71] Similarly the Crown and its servants as owners or occupiers of any such land, etc., were exempted if a certificate of pensionability was given and the injured party was a member of the forces. Ministers were empowered to give certificates to settle the question whether any person was or was not on duty, or whether any land, etc., was in use by the forces at the relevant time. This procedure has, however, been held by the House of Lords to be substantive as opposed to procedural; and thus not a breach of the claimant's right of access to a court in the determination of his civil rights and obligations under Article 6(1) of the European Convention.[72]

Although these provisions were supposed to produce equitable results, they were too restrictive and caused injustice.[73] In one case a territorial reservist was accidentally killed by the firing of a live shell, and the death was duly certified as attributable to service for pension purposes; but the award was nil, since his parents, who were his nearest surviving relatives, did not themselves qualify under the pension scheme.[74] Thus the sole result was to deprive the parents of their remedy in

[68] s. 9, replaced by Post Office Act 1969, ss. 29–30 and now governed by the Postal Services Act 2000, s. 90.

[69] Above, p. 143.

[70] In *Pearce* v. *Secretary of State for Defence* [1988] AC 755, where the plaintiff claimed to have been injured by the negligence of employees of the Atomic Energy Authority while on duty on Christmas Island in connection with tests of nuclear weapons. The transfer to the Secretary of State of the AEA's liabilities, effected by statute, did not enable the Secretary of State to claim exemption. The Court of Appeal, upholding Caulfield J, declined to apply *Town Investments Ltd.* v. *Department of the Environment* [1978] AC 359, criticised above, p. 46; the House of Lords affirmed, overruling the *Bell* case (below).

[71] s. 10. In *Bell* v. *Secretary of State for Defence* [1986] QB 322, where a fatally injured soldier in Germany was sent to a civilian hospital, the Court of Appeal were divided on the question where the alleged injury took place and the claim failed. It failed also in the similar case of *Derry* v. *Ministry of Defence* (1998) 11 Admin. LR 1.

[72] *Mathews* v. *Minister of Defence* (below). For discussion of Art. 6(1) in this context see above, p. 445.

[73] See [1985] *PL* at 287 (G. Zellick).

[74] *Adams* v. *War Office* [1955] 1 WLR 1116.

damages, as their son's personal representatives, for his death. Protest at this injustice has brought about the repeal of the whole provision for exemption in respect of the armed forces.[75] But the Secretary of State is empowered to revive it by statutory instrument in case of imminent national danger or great emergency or warlike operations outside the United Kingdom.

LIABILITY IN CONTRACT

General principles

The Crown's liability for breach of contract was, as previously explained, acknowledged in principle long before the Crown Proceedings Act 1947, but was subject to the ancient procedure of petition of right. There were also a few special cases where statute had provided other remedies. The Minister of Transport was expressly made liable in contract by the Ministry of Transport Act 1919,[76] and could be sued by ordinary procedure. Other departments were incorporated by statute (such as the former Office of Works), and it was held that this rendered them liable to be sued on their contracts as principals, notwithstanding that they were acting on behalf of the Crown.[77] Some ministers or departments were by statute made able 'to sue and be sued', which was held to render them liable in contract, though not in tort.[78]

The Crown Proceedings Act 1947 modernised and simplified the procedure, without altering the general principle of Crown liability. The petition of right was abolished, together with a number of old forms of procedure. Also abolished were the special provisions as to the Ministry of Transport and as to departments able to sue and be sued.[79] Instead, all actions against the Crown in contract are brought by suing the appropriate government department, or else the Attorney-General, under the standard procedure laid down in the Act. Proceedings both in contract and in tort are thus covered by the same set of rules, which are explained in the next section.

[75] Crown Proceedings (Armed Forces) Act 1987. But this Act is not retrospective, thus claims based on injuries incurred prior to 1987 may still be met with a s. 10 defence: *Mathews* v. *Minister of Defence* [2003] UKHL 4; [2003] 2 WLR 435 (HL) (injuries allegedly caused by exposure to asbestos during service in the Royal Navy between 1955 and 1968).

[76] Above, p. 820.

[77] *Graham* v. *Commissioners of Public Works* [1901] 2 KB 781.

[78] *Minister of Supply* v. *British Thompson-Houston Co. Ltd.* [1943] KB 478.

[79] 1st and 2nd scheds. It is possible that ministers and departments incorporated by statute may still sue and be sued as principals, as previously, but in practice the procedure of the Act of 1947 is always used.

The principal provision of the Act is that any claim against the Crown which might have been enforced, subject to the fiat, by petition of right or under any of the statutory liabilities repealed by the Act, may now be enforced as of right and without the fiat in proceedings under the Act.[80] Thus the scope of the Act depends upon the scope of the petition of right and the other old procedures, and the old law relating to them will still be of importance if the Crown ever resists a claim on the ground that it falls outside the area of Crown liability. But apart from tort and certain cases such as actions by servants of the Crown (discussed elsewhere),[81] and the special case of salvage (now covered by the Act),[82] the scope of the old actions was probably comprehensive. The petition of right, for instance, appears to have been available for recovery of money from the Crown where an ordinary subject would have been liable in restitution, a head of liability which is not truly contractual; and, as already noted, the petition of right could be used to recover money due from the Crown under statute. The substance of these remedies is thus infused into the new statutory scheme, and there are no obvious gaps.

The Act applies to proceedings by or against the Crown, however, only in respect of the United Kingdom.[83] Except where local legislation provides otherwise, therefore, claimants attempting to enforce Crown liabilities in respect of other territories must fall back on the old pre-1947 procedures. Such claimants have even been deprived of the benefits of the Petitions of Right Act 1860, since it has been held that the repeal of that Act by the Crown Proceedings Act 1947 is total.[84] This inconvenient conclusion does not seem to be necessary, since the Act of 1947 merely provides that nothing in it shall affect proceedings against the Crown in respect of non-United Kingdom claims, and this saving should qualify the repeal of the Act of 1860 as much as any other provision of the Act of 1947.

Personal liability of the sovereign

The Act of 1947 may have created a lacuna, though of more theoretical than practical importance, as regards actions against the sovereign personally. A petition of right used to lie, and the Petitions of Right Act 1860 provided for payments from the privy purse. But now the Crown Proceedings Act both abolishes the petition of

[80] s. 1.

[81] Above, p. 61.

[82] s. 8.

[83] s. 40(2)(b), (c). See *Trawnik* v. *Lennox* [1985] 1 WLR 532 (no Crown liability for nuisance created by British forces in Germany).

[84] *Franklin* v. *A.-G.* [1974] 1 QB 185 at 201, where the reasoning of Lawson J is not explained. The pre-1860 procedure was however simplified by agreement of the Crown: see at 202, where the form of petition is given. But under the pre-1860 procedure there may be difficulty as to costs: see above, p. 801. This was one of a series of claims by holders of Rhodesian stocks: see also *Franklin* v. *The Queen* (No. 2) [1974] 1 QB 205; *Barclays Bank Ltd.* v. *The Queen* [1974] 1 QB 823. In none of these cases was there any order as to costs.

right and provides that 'nothing in this Act shall apply to' proceedings by or against the sovereign in his private capacity, or authorise proceedings in tort against him.[85] Is the Crown then no longer personally liable in contract? It seems possible, following the words of the Act, that the petition of right is not abolished to that extent,[86] so that it still survives for claims against the Crown in person, which remain under the old law, with or without the benefit of the Act of 1860.[87] This result would be far from ideal, but at least it would preserve the remedy in some form.

Agents in contract

The Crown servant or agent who actually makes the contract—for example, a War Office official who orders boots for the army—is not in law a party to the contract, and is not liable on it personally. He is merely the Crown's agent, and the ordinary law is that where a contract is made through an authorised agent, the principal is liable but the agent is not. The agent is merely a mechanism for bringing about a contract between his principal and the other contracting party. Thus if the boots are ordered from a manufacturing company, the parties to the contract are the Crown and the company. If a minister in his official capacity takes a lease of land, the parties to the contract are the lessor and the Crown, and the Crown becomes the tenant.[88] The agents on either side are not personally liable on the contract. It has long been clear that Crown servants, acting in their official capacity, are as immune as any other agents: in 1786 it was decided that the Governor of Quebec could not be sued on promises made by him to pay for supplies for the army in Canada.[89] This immunity of the agent must be contrasted with the position in tort, where master and servant are both fully liable personally for torts committed by the servant in the course of his employment, and where the personal liability of Crown servants is an important safeguard—though not quite so important as it was in the era before the Crown itself became liable in tort.

Where a contract is made through an agent duly authorised,[90] the principal is

[85] s. 40(1).

[86] The petition of right is listed in the 1st schedule among 'Proceedings abolished by this Act'; but the Act itself contains no other provision for abolition: it merely substitutes the new procedure under s. 1. Where that does not apply, therefore, the petition of right may survive.

[87] See the comment on the *Franklin* case, above.

[88] *Town Investments Ltd.* v. *Department of the Environment* [1978] AC 359, where the House of Lords held that a special principle of public law equates the government, i.e. ministers and officials, with the Crown. But this rule must be confined to similar property transactions: see above, p. 46.

[89] *Macbeath* v. *Haldimand* (1786) 1 TR 172.

[90] Actual or ostensible authority is determined according to the ordinary law of agency (subject to doubts created by the *Town Investments* case): *Verrault* v. *A.-G. for Quebec* (1975) 57 DLR (3d) 403: *Meates* v. *A.-G.* [1979] 1 NZLR 415 (Prime Minister held not authorised to contract on behalf of the Crown).

liable but not the agent. Where the agent is unauthorised, the agent is liable but not the principal. This latter result is achieved by allowing the other party an action against the agent for breach of warranty of authority. This is a contractual remedy, for a contract is implied by law to the effect that the agent promises, in consideration of the party agreeing to deal with him, that he had the authority of his principal. Thus the law finds a means of making agents responsible for any loss which they may cause by exceeding their authority. But it is doubtful whether this remedy is available against agents of the Crown. The Court of Appeal has upheld a judgment to the effect that a Crown servant acting in his official capacity is, on grounds of public policy, not liable to actions for breach of warranty of authority. 'No action lies against a public servant upon any contract which he makes in that capacity, and an action will only lie on an express personal contract'.[91] There seem to be two distinct strands of argument, one that public policy requires Crown agents to be able to contract free of personal liability, and the other that in such cases the implied contract of warranty is unjustified on the facts. Public policy should weigh less heavily now that the Crown Proceedings Act has gone so far towards assimilating the Crown's prerogatives with the ordinary law of the land. The other argument is also of dubious validity. Since the case was one arising out of a contract of employment, where (as explained elsewhere)[92] the principles underlying the case-law are confused, it is sometimes regarded as a less formidable obstacle than it appears at first sight. There were also other alternative grounds for the decision in the Court of Appeal. Nevertheless, while this authority stands, Crown agents appear to have a privileged position and to enjoy an anomalous personal immunity in making contracts on behalf of the Crown. If they exceed their authority, therefore, neither the Crown nor its agent is liable, and the law fails to provide the remedy which justice demands.

Difficulty also arises over subjecting the Crown to the normal rule that the principal may be liable for an unauthorised contract made by the agent if the principal has given the agent ostensible authority, as by putting him in a position where the other contracting party might reasonably assume that the agent was duly authorised. This rule in effect rests on the principle of estoppel; and as has been explained previously there are problems in applying this principle to governmental powers exercised in the public interest, so that officers of the Crown cannot be safely assumed to have the powers which they purport to exercise.[93] Consequently the fact that a customs officer would appear to have authority to sell unclaimed goods from a customs warehouse will not give a good title to the buyer if in fact the sale was outside his statutory powers.[94] This does not mean that the Crown cannot

[91] *Dunn* v. *Macdonald* [1897] 1 QB 401, 555.
[92] Above, p. 61.
[93] Above, p. 336.
[94] *A.-G. for Ceylon* v. *A. D. Silva* [1953] AC 461, quoted above, p. 340. See [1957] *PL* at 337 (G. H. Treitel).

be made liable in contract by way of an estoppel. In one case a supplier of ships' stores made an oral contract with an Admiralty officer and next day wrote to the Admiralty confirming the agreed terms as he understood them. When the Admiralty later disputed the terms, the supplier succeeded in enforcing them because the Admiralty had not replied to his letter and had consequently induced him to believe that his version was correct, thereby estopping the Crown from maintaining otherwise.[95] This ruling, however, did not turn on any question of agency.

REMEDIES AND PROCEDURE

The statutory procedure

The Crown Proceedings Act 1947 has much to say about procedure. The general policy is that the ordinary procedure in civil actions shall apply so far as possible to actions by and against the Crown, both in the High Court and in the County Court. But inevitably there must be modifications in detail. The Crown is not nominally a party to proceedings under the Act: where the Crown is suing, the plaintiff is a government department or the Attorney-General; where the Crown is being sued, it is represented similarly.[96] The Treasury is required to issue a list of the departments which can sue and be sued under the Act, and if there is no suitable department or if there is doubt in any particular case the Attorney-General will fill the gap.[97] It is a departure from ordinary legal notions that departments which are not juristic persons (for some departments are not incorporated) should be able to be parties to actions, but all things are possible by Act of Parliament.[98]

The Act also exempts the Crown from the compulsory machinery of law enforcement. This is not in order to enable the Crown to flout the law, but because it would be unseemly if, for example, a sheriff's execution could be issued against a government department which failed to satisfy a judgment. For the purposes of the Act the Crown must be treated as an honest man, and the ordinary laws must have their teeth drawn. Therefore the Act provides that no execution or attachment or process shall issue for enforcing payment by the Crown.[99] Nor can the Crown be made the object of any injunction or order for specific performance or order for the delivery up of property. Instead of these remedies the court merely

[95] *Orient Steam Navigation Co. Ltd.* v. *The Crown* (1952) 21 Ll LR 301 (successful petition of right); see Turpin, *Government Procurement and Contracts*, 96.

[96] s. 17.

[97] s. 17.

[98] An example in common law is the case of the prerogative remedies, where the respondent is often a tribunal.

[99] s. 25(4).

makes a declaratory order so that the plaintiff's rights are recognised but not enforced.[1]

A special provision prohibits any injunction or order against an officer of the Crown where the effect would be to grant relief against the Crown which could not be obtained in proceedings against the Crown.[2] As explained below,[3] this formula was for many years misunderstood until the House of Lords made it clear that it is only where the power is conferred upon the Crown itself, as opposed to some minister or official, that the prohibition applies, thus protecting the Crown's immunity from being indirectly infringed. Ministers as such are subject to the ordinary law, and can therefore be subjected to compulsory orders such as injunctions and mandamus and they can be liable for contempt of court.[4]

The remedy most often desired is the payment of money. Here the court's order will state the amount payable, whether by way of damages, or costs, or otherwise, and the Act provides that the appropriate government department shall pay that amount to the person entitled.[5] It is also provided that payments made under the Act shall be defrayed out of moneys provided by Parliament.[6] A successful plaintiff against the Crown must thus be content with a declaration of his rights or with a mandatory order for payment. The statutory duty to pay, being cast upon the department rather than the Crown, should be enforceable, if necessary, by mandamus.[7]

The Act in no way affects the prerogative remedies, e.g. certiorari and mandamus, which are outside its definition of 'civil proceedings'[8] and which in any case do not lie against the Crown.[9]

In his or her private capacity the sovereign stands wholly outside the Act and under the older law.[10] Nor does the Act apply in respect of matters arising outside the government of the United Kingdom.[11]

The ordinary legal rules as to indemnity and contribution, and also the rules as to third party proceedings,[12] apply in Crown proceedings.[13] The rule most likely to come into play is that which allows an employer, who has to pay damages for his servant's wrongful act, to recover the amount from the servant. This illustrates the general principle that where there are joint tortfeasors—and master and servant

[1] s. 21(1). For the problem of interim injunctive orders see below, p. 833.
[2] s. 21(2).
[3] Below, p. 833.
[4] *M.* v. *Home Office* [1994] AC 377. Lord Woolf's speech contains an illuminating commentary on Crown proceedings both before and after the Act.
[5] s. 25(3).
[6] s. 37.
[7] As suggested by Lord Donaldson MR in *M.* v. *Home Office* [1992] QB 270 at 301. Section 21(2) is inapplicable owing to the definition of 'civil proceedings' (below).
[8] s. 38(2).
[9] See above, p. 615.
[10] s. 41; see above, p. 814.
[11] s. 40(2).
[12] See *St Martin's Property Investments Ltd.* v. *Philips Electronics (UK) Ltd* [1995] Ch. 73.
[13] s. 4.

are in law joint tortfeasors—the tortfeasor who is innocent may claim contribution from the tortfeasor who is to blame. Thus if a government driver knocks down and injures someone negligently, and the injured man sues the Crown and obtains damages, the Crown has a legal right as employer to make the driver indemnify it.[14]

The Act now provides one uniform procedure for all actions against the Crown, including interlocutory matters such as discovery of documents and interrogatories.[15] The Act has therefore abolished the petition of right and various other antiquated forms of procedure.[16] But, as already noticed, a petition of right may still have to be used in cases not covered by the Act, such as proceedings in respect of overseas territories.[17]

Problems of injunctive relief

The Crown itself (as opposed to its servants) is immune from legal process except as authorised by statute. The Crown Proceedings Act 1947 expressly forbids the grant of an injunction in the proceedings which it authorises but provides that in lieu of an injunction the court may make 'an order declaratory of the rights of the parties'. It has been held, however, that the Act authorises only a definitive order, corresponding to a final injunction, and not a provisional order, corresponding to an interim injunction,[18] apparently because of the reference to 'the rights of the parties', which is assumed to mean final as opposed to interim rights. There seems to be no necessity for this narrow interpretation of the Act, which is contrary to its policy of putting the Crown, so far as practicable, on the same footing as a private litigant. The Law Commission made a recommendation[19] for statutory reform of this 'triumph of logic over justice'.[20] Nevertheless a majority of the House of Lords positively approved the restriction, though Lord Diplock and a unanimous Court of Appeal deplored it.[21] It seems unlikely to survive after *M.* v. *Home Office* rejected narrow interpretations in this area.[22] Indeed, CPR 25.1(1)(b) now provides that the court may make an 'interim declaration' and may do so whether or

[14] See *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] AC 555.
[15] s. 28.
[16] s. 23 and 1st sched. For an example of a 'latin information' see *A.-G.* v. *Valle-Jones* [1935] 2 KB 209.
[17] Above, p. 827.
[18] *International General Electric Co.* v. *Customs & Excise Commissioners* [1962] Ch. 784; *Underhill* v. *Ministry of Food* [1950] 1 All ER 591.
[19] Cmnd. 6407 (1976) para. 52.
[20] Working Paper No. 40 (1971), para. 48. In fact the logic seems no better than the justice.
[21] *R.* v. *Inland Revenue Commissioners ex p. Rossminster Ltd.* [1980] AC 952. Lords Wilberforce, Dilhorne and Scarman approved. Lord Diplock considered it 'a serious procedural defect in the English system of administrative law'.
[22] See below.

not a declaration has been sought as final relief or not. Although an interim declaration in circumstances in which an injunction is not available has not yet been made, but this is the likely role of this remedy.

Servants of the Crown, as opposed to the Crown itself, ought to be liable to injunctions as much as to other legal remedies, on the principle already explained. But this question was bedevilled for many years by misunderstanding of the Act's provision that no injunction or order should issue against an officer of the Crown if the effect would be to give a remedy against the Crown which could not have been obtained in proceedings against the Crown.[23] This was held to bar any relief by injunction against ministers or other officers of the Crown. But, correctly understood, it applies only to protect the Crown's own immunity, and does not alter the personal liability of a minister or official who commits a wrong or who misuses a power conferred upon him in his own name. For example, take the provision of the European Communities Act 1972[24] that 'Her Majesty may by Order in Council, and any designated minister or department may by regulations, make provision' for implementing Community obligations, subject to the restriction (among others) that no tax may thereby be imposed. If an Order in Council attempted to impose a tax, no injunction could be granted either against the Crown or against a tax-collecting official since to restrain the latter would stultify the immunity of the former. But if a designated minister made regulations to the same effect, he or his officials could be restrained by injunction since that would not be to give relief against the Crown. This is the vital distinction, already emphasised,[25] between the Crown, which is immune, and ministers and Crown servants, who are not.

The misunderstanding derived from a case of 1955 where it was held that this provision of the Crown Proceedings Act prevented the grant of an injunction against the Minister of Agriculture, even though the minister's power was conferred upon him in his own name rather than upon the Crown.[26] That decision, though criticised,[27] was expressly approved by the House of Lords in 1989,[28] but finally disapproved in 1993.[29] The House has now made it clear that injunctions, both final and interim, have always been and are today still available against

[23] s. 21(2).

[24] s. 2(2) and sched. 2.

[25] Above, p. 819.

[26] *Merricks* v. *Heathcoat-Amory* [1955] Ch. 567 (unsuccessful application for injunction requiring minister to withdraw marketing scheme). This decision did not affect applications for prerogative remedies, which were outside the Crown Proceedings Act, and the correct remedy might have been prohibition.

[27] In the 6th edition of this book, p. 589, cited in *R.* v. *Home Secretary ex p. Harbage* [1987] QB 872.

[28] *R.* v. *Secretary of State for Transport ex p. Factortame Ltd.* [1990] 2 AC 85. The misunderstanding persists in Scotland, where *M.* v. *Home Office* is rejected with the result that the Crown Proceedings Act is held to have abolished relief by interdict which Scots law previously allowed: *McDonald* v. *Secretary of State for Scotland* 1994 SC 234.

[29] *M.* v. *Home Office* [1994] 1 AC 377.

ministers and officials of the Crown,[30] and that in judicial review proceedings the Supreme Court Act 1981 confirms this position.[31] A long period of judicial aberration is now ended, and the constitutional principle that Crown officers do not partake of the Crown's immunity is reinstated.

The decision of 1993 concerned an unsuccessful application for asylum by a citizen of Zaïre who was ordered to be deported and sought judicial review. The Home Office deported him while his case was before the High Court, contrary to the expressed wishes of the judge and to an undertaking by the Home Office which the judge thought had been given to him. When the deportee reached Zaïre there was still an opportunity to secure his return, and the judge made an order that this should be done; but the Home Secretary personally decided to take no action, being advised that the judge's order was made without jurisdiction, the law then being misunderstood as explained above. But since an order of the High Court, however wrong, cannot be without jurisdiction,[32] the Home Secretary was adjudged to be in contempt of court, though no penalty was imposed.[33] Since contempt of court is the sanction for disobedience of injunctions, the contempt jurisdiction is of great importance. But in the last analysis the House of Lords' judgment contains an inconsistency about enforcement. According to Lord Templeman, 'the courts are armed with coercive powers' against ministers and officials.[34] According to Lord Woolf, 'the Crown's relationship with the courts does not depend on coercion' and 'the object of the exercise is not so much to punish an individual as to vindicate the rule of law by a finding of contempt', leaving it to Parliament to determine the consequences.[35] Yet he recognises that 'in cases not involving a government department or a minister the ability to punish for contempt may be necessary'. As the Zaïrean case shows, ministers do not invariably respect orders of the court, and just how coercive such orders really are in various situations may be in issue on future occasions. Ultimately it is the executive power which has to enforce court orders, whose efficacy against the government thus depends upon the government's willingness to police itself.[36]

[30] As in *Rankin* v. *Huskisson* (1830) 4 Sim. 13; *Ellis* v. *Earl Grey* (1833) 6 Sim. 214 (interim injunction against the prime minister); *Tamaki* v. *Baker* [1901] AC 561; *Attorney-General of New South Wales* v. *Trethowan* [1932] AC 526; *Conseil des Ports Nationaux* v. *Langlier* [1969] SC 60 (Can.).

[31] See *M.* v. *Home Office* (above) at 420–2, rejecting the House of Lords' questionable reasons for restricting the scope of s. 31 of the Act and restoring Lord Woolf's former opinion in *R.* v. *Licensing Authority Established under Medicines Act ex p. Smith Kline French Laboratories Ltd.* (No. 2) [1990] 1 QB 574.

[32] See above, p. 306.

[33] For a case of contempt by revenue officers, purged after full apology, see *R.* v. *Inland Revenue Commissioners ex p. Kingston Smith* [1996] STC 1210.

[34] See the quotation above, p. 819. Examples concerning ministers are *Bhatnager* v. *Minister of Employment and Immigration* (1990) 71 DLR (4th) 84; *State of Victoria* v. *Australian Building Federation* (1982) 152 CLR 25.

[35] *M.* v. *Home Office* (above) at 425.

[36] As observed by Nolan LJ, [1992] QB at 314.

Other Crown privileges

The Crown has various advantages under the general law, which fall outside the scope of this book. Under the law of limitation of actions the Crown's title to land is not barred until the land has been in adverse possession for thirty years,[37] whereas the normal period in ordinary cases is twelve years. Formerly the Crown and its servants shared with other public authorities the privilege of a short limitation period for wrongful acts, until the legislation was repealed in 1954.[38]

STATUTES AFFECTING THE CROWN

Presumption against Crown liability

An Act of Parliament is presumed not to bind the Crown in the absence of express provision or necessary implication.[39] This is a long-standing rule of interpretation,[40] which has nothing to do with the royal prerogative.[41] 'The Crown' in this case includes the Crown's ministers and servants, since it is necessarily by their agency that the Crown's immunity is enjoyed. The Crown Proceedings Act 1947 expressly refrains from altering the position.[42] In this respect, contrary to its general policy, the Act does not impose on the Crown the same liability as lies upon other people.

In fact it is frequently necessary that statutes should bind the Crown, and in such cases each statute makes the necessary provision. Thus the speed limits now in force under the Road Traffic Act 1960 are expressly made applicable to the Crown by the Act itself, which makes detailed provision for these and other traffic rules to

[37] Limitation Act 1980, 1st sched., Pt. II.

[38] See above, p. 790.

[39] Examples are *Province of Bombay* v. *Municipal Corporation of Bombay* [1947] AC 58; *A.-G. for Ceylon* v. *A. D. Silva* [1953] AC 461; *Madras Electric Supply Co. Ltd.* v. *Boarland* [1955] AC 667; *China Ocean Shipping Co.* v. *South Australia* (1979) 27 ALR 1. For the rule generally see Hogg, *Liability of the Crown*, 2nd edn., 201.

[40] In earlier times the Crown was more readily held bound, it being said that it was bound by statutes passed for the public good, the relief of the poor, the advancement of learning, religion and justice, and the prevention of fraud, injury and wrong: *Willion* v. *Berkeley* (1561) 1 Plowd. 223; *Magdalen College Case* (1615) 11 Co. Rep. 66b; *R.* v. *Archbishop of Armagh* (1711) 1 Str. 516; Chitty, *Prerogatives of the Crown*, 382. But these exceptions are no longer admitted: see the *Province of Bombay* case (above).

[41] *Madras Electric Supply Corporation Ltd.* v. *Boarland* [1955] AC 667 at 684–85. But 'prerogative' is sometimes used in a loose sense (see above, p. 216) in connection with this rule: *Coomber* v. *Berkshire Justices* (1883) 9 App. Cas. 61 at 66, 71, 77; and see the *Madras* case (above) at 687.

[42] s. 40(2)(f).

apply to vehicles and persons in the public service of the Crown.[43] Sometimes the Act will provide for its partial application to the Crown: thus the Crown is bound by the Equal Pay Act 1970[44] and the Sex Discrimination Act 1975[45] in respect of the civil service but not in respect of the armed forces. Formerly the Crown was not bound by the National Health Service Act 1977 and associated legislation, but this immunity was removed in 1990.[46]

Other statutes which have been held not to bind the Crown, because of the absence of any provision, are the Town and Country Planning Act 1947 (now 1990) and the Contracts of Employment Act 1972. Accordingly the Crown does not need planning permission for developing Crown land,[47] and a Crown employee is not entitled to a written statement of the terms of his employment.[48] The House of Lords reversed a Scots decision which attempted to confine the doctrine to cases where the statute encroached upon the Crown's own rights or interests, and so held the Ministry of Defence liable under highway and planning legislation when it fenced off part of a main road in which the Crown claimed no proprietary or other right.[49] In allowing the Crown's appeal the House reinstated the established rule without qualification.[50]

Whether the Crown can commit a criminal offence under a statute made binding upon it was discussed in one case by the High Court of Australia.[51]

Crown may claim benefit of statutes

It has been maintained consistently for centuries that the Crown, although not bound by the obligations of a statute, might take the benefit of it in the same way as other persons.[52] Accordingly the Crown was able to claim the benefit of statutes of

[43] s. 250. Other examples are Social Security Act 1975, ss. 127, 128; Social Security Contributions and Benefits Act 1992, s. 115; Race Relations Act 1976, s. 75, applying the procedure of Crown Proceedings Act 1947.

[44] s. 1(8).

[45] s. 85.

[46] National Health Service and Community Care Act 1990, s. 60 (health service bodies no longer to be regarded as Crown servants).

[47] *Ministry of Agriculture* v. *Jenkins* [1963] 2 QB 317.

[48] *Wood* v. *Leeds Area Health Authority* [1974] 2 ICR 535.

[49] *Lord Advocate* v. *Strathclyde Regional Council* [1990] 2 AC 580.

[50] The High Court of Australia rejects an inflexible rule and seeks the legislative intention by the ordinary canons of interpretation: *Bropho* v. *State of Western Australia* (1990) 171 CLR 1 (Act safeguarding aboriginal heritage held to bind government departments).

[51] *Cain* v. *Doyle* (1946) 72 CLR 409. The question was raised on the prosecution of a Commonwealth munition factory manager for aiding and abetting an offence by the Crown in wrongfully dismissing an ex-serviceman. The majority opinion was that an offence could be committed, but the accused was acquitted.

[52] *Case of the King's Fine* (1605) 7 Co. Rep. 32a; *Magdalen College Case* (1615) 11 Co. Rep. 66b at 68b; *R.* v. *Cruise* (1852) 2 Ir. Ch. Rep. 65; BI. Comm. i. 262; Chitty, *Prerogatives of the Crown*, 382; Hogg, *Liability of the Crown*, 2nd edn., 215. See also *Town Investments Ltd.* v. *Department of the Environment* [1978] AC 359, criticised above, p. 46.

limitation which prevented actions being brought after a fixed time.[53] Although the historical justification for this one-sided arrangement has been treated as an open question,[54] there can be little doubt that it represents the law. There is no reason why the Crown's exemption from the burden of a statute should prevent its taking the benefit, since the exemption was originally a limited rule for the protection of the Crown's executive powers and prerogatives rather than a rule that statutes did not concern the Crown. On the other hand, the Crown cannot pick out the parts of a statute which benefit it without taking account of qualifications: if it claims some statutory right, it must take that right subject to its own statutory limitations, whether imposed by the original Act or otherwise.[55]

The Crown's common law rights are confirmed by the Crown Proceedings Act 1947, which provides that the Act shall not prejudice 'the right of the Crown to take advantage of the provisions of an Act of Parliament although not named therein', and that in any civil proceedings against the Crown the Crown may rely upon any defence which would be available if the proceedings were between subjects.[56] The Crown is thus amply entitled to claim statutory rights and defences.

LIMITATIONS OF STATE LIABILITY

Political action: tort

A line has to be drawn between governmental acts which can give rise to legal liability because they are analogous to the acts of ordinary persons, and acts which give rise to no such liability because the analogy breaks down. There is a certain sphere of activity where the state is outside the law, and where actions against the Crown and its servants will not lie. The rule of law demands that this sphere should be as narrow as possible. In English law the only available examples relate in one way or another to foreign affairs.

In tort the Crown and its servants can sometimes plead the defence of act of state. But this plea is only available for acts performed abroad. It would subvert the rights of the citizen entirely if it would justify acts done within the jurisdiction, for

[53] *A.-G. v. Tomline* (1880) 15 Ch D 150; *Cayzer Irvine & Co. Ltd.* v. *Board of Trade* [1927] 1 KB 269 at 274 (Rowlatt J).

[54] By Scrutton LJ in the *Cayzer Irvine* case (above) at 294.

[55] *R. and Buckberd's Case* (1594) 1 Leon 149; *Crooke's Case* (1691) 1 Show KB 208; *Nisbet Shipping Co.* v. *The Queen* [1955] 1 WLR 1031; *Housing Commission of New South Wales* v. *Panayides* (1963) 63 SR (NSW) 1; Hogg (as above), 216.

[56] s. 31(1). It may be that 'therein' refers to 'provisions' rather than to 'Act', so that mention of the Crown elsewhere in the Act is immaterial.

it would be the same as the defence of state necessity, which has always been rejected. But acts of force committed by the Crown in foreign countries are no concern of the English courts. In the time of the naval campaign against the slave trade, for example, a Spanish slave trader failed in an action for damages against a British naval commander who destroyed one of his establishments in West Africa.[57] It is by this fundamental rule that acts of violence in foreign affairs, including acts of war, if committed abroad, cannot be questioned in English courts. It also casts a complete immunity over all acts of the Crown done in the course of annexing or administering foreign territory.

A British protectorate was in principle considered to be a foreign territory, so that a person arrested by the government's orders had no remedy.[58] But where, as used to happen in practice, a protectorate was in fact completely 'under the subjection of the Crown' and was ruled as if it were a colony, the courts asserted their jurisdiction and the Crown was required to act according to law.[59] The boundaries of the area within which the rule of law is upheld may thus sometimes be difficult to draw. But it is clear that within that area the Crown cannot extend its limited legal power by plea of act of state. In another naval case, where the British and French governments had made an arrangement by which no new lobster factory was to be established in Newfoundland without joint consent, a factory was in fact established by the plaintiff, contrary to the terms of the inter-governmental agreement, and the defendant, a naval captain acting under Admiralty orders, seized it. The plaintiff was a British subject and his factory was within British territory. The Crown's attempt to justify the seizure as an act of state therefore failed, and the plaintiff was awarded damages against the responsible Crown officer.[60] Today, under the Crown Proceedings Act, the Crown would also be liable directly. The enforcement of treaties, so far as it affects the rights of persons within the jurisdiction, must be authorised by Act of Parliament. The Crown has no paramount powers.

It is often said that act of state cannot be pleaded against a British subject. No such rule was laid down in the lobster-fishing case; but the case was treated as an illustration of some such rule in a number of *obiter dicta* in a later case in the House of Lords.[61] This is weighty authority, but even so there are grounds for thinking that the proposition may be too wide. All the cases in question were cases where the acts took place within the jurisdiction—and within the jurisdiction the rights of an alien (not being an enemy alien) are similar to those of a subject. If in British territory an alien has his property taken, or is detained, in any way not

[57] *Buron* v. *Denman* (1848) 2 Ex. 167.

[58] *R.* v. *Crewe (Earl) ex p. Sekgome* [1910] 2 KB 576.

[59] *Ex p. Mwenya* [1960] 1 QB 241 (Northern Rhodesia, now Zambia).

[60] *Walker* v. *Baird* [1892] AC 491.

[61] *Johnstone* v. *Pedlar* [1921] 2 AC 262 (successful action by American citizen resident in Ireland for recovery of money taken from him by the police: plea of act of state rejected by the House of Lords).

justified by law, he has full legal protection[62]—not because of his nationality, but because he is within the area where the government must show legal warrant for its acts. Conversely, if a British subject chooses to live outside the jurisdiction, it is hard to believe that he can thereby fetter the Crown's freedom of action in foreign affairs. If the house of a British subject living in Egypt had been damaged by British bombs in the operations against the Suez Canal in 1956, would its owner really have been able to recover damages in an English court?

An affirmative answer indeed appears to be given by Lord Reid in a later case where a British subject claimed compensation from the Crown for injury done to his hotel in Cyprus (a foreign country) when it was in the occupation of a 'truce force' of British troops.[63] But the other Lords of Appeal left this question open, holding that there was in fact no act of state. In any case, the gist of the action allowed was for use and occupation of the land and for breach of contract, and act of state is no defence to contractual or quasi-contractual claims as opposed to claims in tort. A different answer is suggested by another case in which British subjects lost valuable concessions granted by the paramount chief of Pondoland when that territory was annexed by the Crown. The Crown refused to recognise the concessions and pleaded act of state successfully.[64]

The latter case perhaps gives the right lead. Generalities about the immunity of British subjects ought probably to be confined to (a) acts done within the realm, and (b) acts against British subjects abroad which are not in themselves acts of international policy, such as the above-mentioned injury to the hotel in Cyprus. A logical basis for 'act of state' then emerges. It is not so much a matter of nationality as of geography—that is to say, the Crown enjoys no dispensation for acts done within the jurisdiction, whether the plaintiff be British or foreign; but foreign parts are beyond the pale (in Kipling's words, 'without the law'), and there the Crown has a free hand, whether the plaintiff be foreign or British.

Political action: contract

In contract there are also cases where ordinary business must be distinguished from political acts. It has been laid down that 'it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises'.[65] But this was an isolated

[62] *Johnstone* v. *Pedlar* (above); *Kuchenmeister* v. *Home Office* [1958] 1 QB 496; *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74 at 111.

[63] *Nissan* v. *A.-G.* [1970] AC 179. The fact that the 'truce force' was for some time part of a United Nations peace-keeping force was held to make no difference to the Crown's responsibility. On the questions raised by this case see [1968] *CLJ* 102 (J. C. Collier).

[64] *Cook* v. *Sprigg* [1899] QC 572; and see *Winfat Enterprise (HK) Co. Ltd.* v. *Attorney-General of Hong Kong* [1985] AC 733.

[65] *Rederiaktiebolaget 'Amphitrite'* v. *The King* [1921] 3 KB 500. See Mitchell, *The Contracts of Public Authorities*, 27; Turpin, *Government Procurement and Contracts*, 86.

decision, and its scope is by no means clear. It concerned a Swedish ship which was detained in England in 1918 after its owners had been given an assurance through the British Legation in Stockholm, on behalf of the British government, that the ship would be given clearance if she brought (as she did) an approved cargo. The owners sued the Crown by petition of right for damages for breach of contract. The court held that this was not a contract at all—so far from being a commercial transaction, it was merely a statement by the government that it intended to act in a particular way in a certain event. Up to this point there is no difficulty, for plainly a boundary must be drawn between legal contracts and mere administrative assurances which may or may not create rights.[66] But the judge went on to say that the Crown not merely *had* not made such a contract but *could* not make such a contract, because it could not hamper its freedom of action in matters which concerned the welfare of the state; and he argued *a fortiori* from the doctrine that Crown servants are always dismissible at will, which is discussed elsewhere.[67]

The rule thus laid down is very dubious; it rests on no authority, and it has been criticised judicially.[68] Very many contracts made by the Crown must fetter its future executive action to some extent. If the Admiralty makes a contract for the sale of a surplus warship, that fetters the Crown's future executive action in that the ship will have to be surrendered or damages will have to be paid. Yet there ought to be a remedy against the Crown for breach of contract in that case as much as in any other.[69] The only concession that need be made to public policy is that the remedy should be in damages rather than by way of specific performance or injunction. But that is achieved by the Crown Proceedings Act 1947, and in any case the court would use its discretion.

Another case which falls outside the ordinary law of contract is that of treaties. No English court will enforce a treaty, that is to say an agreement made between states rather than between individuals. 'The transactions of independent states between each other are governed by other laws than those which municipal courts administer'.[70] In the days when much of India was governed by the East India Company this principle was often invoked by English courts in order to disclaim jurisdiction over transactions between the Company, acting in effect as a sovereign power, and the native rulers of India. For the same reason the Company was given the benefit of the doctrine of act of state, so that it could commit acts of force with no legal responsibility.[71] Its commercial and its governmental activities had to be separated, so that while liable for the one it was not liable for the other. Similarly,

[66] See above, p. 372.
[67] Above, p. 62.
[68] In *Robertson* v. *Minister of Pensions* [1949] 1 KB 227 and *Howell* v. *Falmouth Boat Co.* [1951] AC 837, for which see above, p. 337.
[69] Compare the problems of contracts which fetter statutory powers: above, p. 330.
[70] *Secretary of State for India* v. *Kamachee Boye Sahaba* (1859) 13 Moo PC 22.
[71] *Salaman* v. *Secretary of State for India* [1906] 1 KB 613.

where money is paid to the Crown under a treaty as compensation for injury inflicted on British subjects, those subjects cannot sue the Crown to recover the money, for the transaction is on the plane of international affairs out of which no justiciable rights arise.[72] The ordinary principles of trust or agency are no more suitable to the case than the law of contract is suitable for the enforcement of treaties.

SUPPRESSION OF EVIDENCE IN THE PUBLIC INTEREST

'Crown privilege'

A dilemma arises in cases where it would be injurious to the public interest to disclose evidence which a litigant wishes to use. The public interest requires that justice should be done, but it may also require that the necessary evidence should be suppressed. In many cases the Crown has successfully intervened to prevent evidence being revealed, both in cases where it was a party and in cases where it was not. To hear the evidence in camera is no solution, since to reveal it to the parties and their advisers may be as dangerous as to reveal it to the public generally. The Crown's object must therefore be to suppress it altogether, even at the cost of depriving the litigant of his rights.

It was for long supposed that only the Crown could make application to the court for this purpose, and its right to do so was known as 'Crown privilege'.[73] But in 1972 the House of Lords disapproved this expression, and held that anyone may make such an application. The turning-point in the history of the subject had come in 1968, when in *Conway* v. *Rimmer*[74] the House held that the court should investigate the Crown's claims and disallow them if on balance the need for secrecy was less than the need to do justice to the litigant. This was the culmination of a classic story of undue indulgence by the courts to executive discretion, followed by executive abuse, leading ultimately to a radical reform achieved by the courts and, later, by government concessions. Since the struggle was one between the Crown and litigants, it belongs properly to this chapter, even though the House of Lords has now thrown open the door to all comers.

The Crown's claims had caused so much discontent that important administrative

[72] *Rustomjee* v. *The Queen* (1876) 2 QBD 69; *Civilian War Claimants Association* v. *The King* [1932] AC 14. The principle is not changed by the Foreign Compensation Acts 1950–69.

[73] For the history of Crown privilege and of its conversion into public interest immunity see [1993] *PL* 121 (J. M. Jacob). For historical synopsis and a critical account of the law as it stood in 1994 see [1994] *PL* 579 (Simon Brown LJ). See also Sunkin and Payne (eds.), *The Nature of the Crown*, 191 (A. Tomkins).

[74] [1968] AC.910; below, p. 845.

concessions were made in 1956 and again in 1996. Judicial rebellion began in the Court of Appeal in 1964. The initial wrong turning had been made in 1942, when the House of Lords, departing from the current of earlier authority, declared in wide terms that a ministerial claim of privilege must be accepted without question by the court. This meant that the court was obliged to refuse to receive any evidence if a minister swore an affidavit stating that he objected to the production of the evidence since in his opinion its disclosure would be contrary to the public interest. The power thus given to the Crown was dangerous since, unlike other governmental powers, it was exempt from judicial control. The law must of course protect genuine secrets of state. But 'Crown privilege' was also used for suppressing whole classes of relatively innocuous documents, thereby sometimes depriving litigants of the ability to enforce their legal rights. This was, in effect, expropriation without compensation. It revealed the truth of the United States Supreme Court's statement in the same context, that 'a complete abandonment of judicial control would lead to intolerable abuses'.[75]

The Crown Proceedings Act 1947 made no attempt to resolve the difficulty. It applied to Crown proceedings the ordinary procedure for obtaining discovery of documents and answers to interrogatories.[76] The Crown may therefore be required to authorise the disclosure of official information, which would otherwise be an offence under the Official Secrets Act 1911. But the Crown Proceedings Act also provides that this shall not prejudice any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that disclosure would be injurious to the public interest.[77]

The misguided 'Thetis' doctrine

The case of 1942[78] was for long a source of trouble because the House of Lords laid down the law in terms far wider than were required by the question before them. In 1939 the submarine *Thetis* sank during her trials with the loss of ninety-nine men. Many of their dependants brought actions for negligence against the contractors who had built the submarine, and this was a test case. The plaintiffs called on the contractors to produce certain important papers, including the contract with the Admiralty for the hull and machinery and salvage reports made after the accident. But the First Lord of the Admiralty swore an affidavit that disclosure would be against the public interest. The House of Lords held that this affidavit could not be questioned, so that the plaintiffs inevitably lost their case. After the war it was divulged that the *Thetis* class of submarines had a new type of torpedo tube which

[75] *US* v. *Reynolds* 345 US 1 (1953).
[76] s. 28.
[77] s. 28.
[78] *Duncan* v. *Cammell, Laird & Co. Ltd.* [1942] AC 624.

in 1942 was still secret. The case is a good example of the most genuine type, where it seems plain that the interests of litigants must be sacrificed in order to preserve secrets of state. Diplomatic secrets and methods for the detection of crime might demand similar protection.

But the House of Lords unanimously laid down a sweeping rule that the court could not question a claim of Crown privilege made in proper form, regardless of the nature of the document. Thus the Crown was given legal power to override the rights of litigants not only in cases of genuine necessity but in any cases where a government department thought fit. This had not been the law previously. In several English cases judges had called for and inspected documents for which privilege was claimed in order to satisfy themselves that the claim was justified. In 1931 the Privy Council held that the court could examine such a claim, and remitted a case to Australia with directions to examine the documents and strong hints that the claim of privilege should be disallowed.[79] An English court had actually disallowed a claim of privilege in one case, and the document (quite innocuous) may be seen in the report.[80]

The principal danger of the *Thetis* doctrine was that it enabled privilege to be claimed merely on the ground that documents belonged to a class which the public interest required to be withheld from production, i.e. not because the particular documents were themselves secret but merely because it was thought that all documents of that kind should be confidential. A favourite argument—and one to which courts of law have given approval[81]—was that official reports of many kinds would not be made fearlessly and candidly if there was any possibility that they might later be made public. Once this unsound argument gained currency, free rein was given to the tendency to secrecy which is inherent in the public service. It is not surprising that the Crown, having been given a blank cheque, yielded to the temptation to overdraw.

Official concessions

In 1956 the government made important concessions administratively. The Lord Chancellor announced that privilege would no longer be claimed for reports of witnesses of accidents on the road, or on government premises, or involving government employees; for ordinary medical reports on the health of civilian employees; for medical reports (including those of prison doctors) where the Crown or the doctor was sued for negligence; for papers needed for defence against a criminal charge; for witnesses' ordinary statements to the police; and for reports on matters of fact (as distinct from comment or advice) relating to liability in

[79] *Robinson* v. *South Australia* (No. 2) [1931] AC 704.
[80] *Spiegelman* v. *Hocker* (1933) 50 TLR 87 (statement to police after accident).
[81] *Smith* v. *East India Co.* (1841) 1 Ph 50; *Hennessy* v. *Wright* (1888) 21 QBD 509.

contract.[82] These heads, which were defined in more detail in the statement, were said to comprise the majority of cases which came before the courts. Privilege would still be claimed in cases of inspectors' reports into accidents not involving the Crown (such as factory inspectors' reports), though the inspector would not be prevented from giving evidence; for medical reports and records in the fighting services and in prisons in cases not involving negligence; and for departmental minutes and memoranda. These were said to be the cases where freedom and candour of communication with and within the public service would be imperilled if there were to be the slightest risk of disclosure at a later date. Supplementary announcements were made in 1962 and 1964.[83] The concessions of 1996 are noted later.

After these concessions it became all the harder to accept the argument about 'freedom and candour of communication with and within the public service'. Lord Radcliffe said in the House of Lords: 'I should myself have supposed Crown servants to be made of sterner stuff', and he criticised the insidious tendency to suppress 'everything however commonplace that has passed between one civil servant and another behind the departmental screen'.[84] Lord Keith likewise said scornfully:[85]

> 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 . . . the candour argument is an utterly insubstantial ground for denying [the citizen] access to relevant documents.

When this favourite argument was later deployed by the Home Office to justify withholding top-level departmental documents about prison policy McNeill J rejected it out of hand.[86]

The judicial rebellion

The government's concessions helped legal opinion to mobilise for the overthrow of the extreme doctrine of the *Thetis* case and the unrestricted use of 'class' privilege. In 1956 the House of Lords held that in Scotland the court had power to disallow a claim by the Crown, and that in the *Thetis* case the House had failed

[82] 197 HL Deb. col. 741 (6 June 1956).

[83] 237 HL Deb. 1191 (8 March 1962), referring to this book (proceedings against police and statements made to police); 261 HL Deb. 423 (12 November 1964) (claims based on national security).

[84] *Glasgow Cpn.* v. *Central Land Board* 1956 SC 1 at 20, 19.

[85] *Burmah Oil Co. Ltd.* v. *Bank of England* [1980] AC 1090.

[86] *Williams* v. *Home Office* [1981] 1 All ER 1151.

to consider a long line of authority.[87] In 1964 the Court of Appeal, noting the superior law of Scotland, Canada, Australia, New Zealand and the United States,[88] held that the same was true of England and asserted (though without exercising) its own power to inspect the documents in a 'class' case and order their production.[89] But the Court of Appeal changed its mind in 1967 and relapsed into the unqualified *Thetis* doctrine.[90]

Finally in 1968 the House of Lords was given the opportunity to lay down more acceptable law. In *Conway* v. *Rimmer*[91] the House unanimously reversed what it unanimously stated in 1942, it shattered the basis of the unrestricted 'class' privilege, and it successfully ordered the production of documents against the objections of the Crown. These documents were reports by his superiors on a probationer police constable who was prosecuted by the police for theft of an electric torch and decisively acquitted. He sued the prosecutor for damages for malicious prosecution, and applied for discovery of five reports about himself which were in the police records and which were important as evidence on the question of malice. Both parties wished this evidence to be produced, but the Home Secretary interposed with a wide claim of 'class' privilege, asserting that confidential reports on the conduct of police officers were a class of documents the production of which would be injurious to the public interest.

The House of Lords heaped withering criticism on the overworked argument that whole classes of official documents should be withheld, at whatever cost to the interests of litigants, for the sake of 'freedom and candour of communications with and within the public service'. On the other hand they made it clear that the court would seldom dispute a claim based upon the specific contents of a document concerning, for example, decisions of the cabinet,[92] criminal investigations, national defence or foreign affairs. But in every case the court had the power and the duty to weigh the public interest of justice to litigants against the public interest asserted by the government. In many cases this could be done only by inspecting the documents, which could properly be shown to the court, but not to the parties, before the court decided whether to order production.

[87] *Glasgow Cpn.* case (above). For a case of a claim disallowed see *Whitehall* v. *Whitehall* 1957 SC 30.

[88] As in *R.* v. *Snider* (1953) 2 DLR (2d) 9; *Corbett* v. *Social Security Commission* [1962] NZLR 878; *Bruce* v. *Waldron* [1963] VR 3. Later cases rejecting claims of privilege are *US* v. *Nixon* (1974) 418 US 683; *Konia* v. *Morley* (1976) 1 NZLR 455; *Sankey* v. *Whitlam* (1978) 21 ALR 505.

[89] *Re Grosvenor Hotel* (No. 2) [1965] Ch. 1210.

[90] *Conway* v. *Rimmer* [1967] 1 WLR 1031, Lord Denning MR strongly dissenting.

[91] [1968] AC 910. Little mention was made of the precedents in the Court of Appeal and in other countries of the Commonwealth which prepared the way for this reform. Lord Denning MR in *Air Canada* v. *Secretary of State for Trade* [1983] 2 AC 394 at 408 gave a spirited and dramatised account of the deeds of the 'Three Musketeers' who shot down earlier claims, of how he was 'taken prisoner' by a different Court of Appeal, and how 'from over the hill there came, most unexpectedly, a relief force. It was the House of Lords themselves.'

[92] As to cabinet decisions and papers see below, p. 849.

At a later date the House itself inspected the five documents in question, held that their disclosure would not prejudice the public interest, and ordered them to be produced to the plaintiff.[93]

Thus did the House of Lords bring back a dangerous executive power into legal custody. Some of the earlier decisions, and the official concessions in administrative practice, may remain of importance. The legal foundation of excessive 'class' claims had been destroyed, but it was to take nearly thirty years for that abuse to be given decent burial.

'Crown privilege' replaced by 'public interest immunity'

The House of Lords once again put the law onto a fresh basis in a case where a would-be gaming club proprietor took proceedings for criminal libel against a police officer who had supplied the Gaming Board with unfavourable information about him.[94] The Home Secretary asked the court to quash orders requiring the police and the board to produce the correspondence, and the board itself applied similarly. Lord Reid said:[95]

> The ground put forward has been said to be Crown privilege. I think that that expression is wrong and may be misleading. There is no question of any privilege in any ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as to override the ordinary right and interest of a litigant that he shall be able to lay before a court of justice all relevant evidence. 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, in my view, it must always be open to any person interested to raise the question and there may be cases where the trial judge should himself raise the question if no-one else has done so.

The House of Lords then allowed not only the Home Secretary's claim but also the claim made independently by the board. It was held that the board would be seriously hampered in its statutory duty of making stringent inquiries into the character of applicants if information obtained from the police or from sources 'of

[93] See [1968] AC 996.

[94] *R.* v. *Lewes Justices ex p. Home Secretary* [1973] AC 388.

[95] At 400. Lords Pearson, Simon and Salmon also criticised the expression 'Crown privilege'. Lord Salmon said (at 412) that in such cases as cabinet minutes, dealings between heads of government departments, despatches from ambassadors and police sources of information the law had long recognised their immunity from disclosure and that 'the affidavit or certificate of a Minister is hardly necessary'. In *Buttes Gas & Oil Co.* v. *Hammer* (No. 3) [1981] QB 223 the Court of Appeal recognised a public interest in non-disclosure of certain kinds of information relating to foreign states, but the interest is that of this country, not that of foreign states.

dubious character' was liable to be disclosed; and that in weighing the opposing claims in the balance the risk of a gaming club getting into the wrong hands should outweigh the risk of a licence being denied to a respectable applicant.[96] The social evils which had attended gaming clubs before the Gaming Act 1968, and the obvious necessity for the board to be able to make confidential inquiries in order to fulfil its duties, tilted the balance against disclosure.

Public interest immunity may now be claimed by any party or witness in any proceedings[97] without using ministerial certificates, affidavits or special formalities. As with the old 'Crown privilege' there could be 'class' cases in which whole classes of documents were to be protected in the public interest, but the 'class' examples which follow are now out of date, as explained below. The doctrine extends beyond the sphere of central government and, indeed, beyond the sphere of government altogether.

Where, after immunity has been successfully claimed, later events make the documents of crucial importance in a criminal case, they may be disclosed without leave of the court, provided that the implications for the public interest are properly considered, with more weight being given to the interests of the defence than to those of the prosecution.[98] The special problems of criminal cases are discussed at the end of this chapter.

Weighing the public interest

The operation of balancing the public interest against the interests of a litigant may or may not require the inspection of the documents. There will be no need for inspection where the preponderance is clear one way or the other. In a case where a company sued the Bank of England for the recovery of a large holding of securities, and the Attorney-General intervened to resist disclosure of papers about government policy and confidential matters, a majority of the House of Lords decided that inspection was necessary. But, having inspected, the House upheld the claim of immunity, largely on the ground that the evidential value of the papers was insufficient to outweigh the objections to disclosure.[99] The relevance and cogency of the evidence may thus be weighed in the balance along with other matters.

In confirming this last proposition the House has since held that the court should not inspect documents unless satisfied that they are likely to give substantial support to the applicant's case, and that he is not merely undertaking a 'fishing

[96] See at 412 (Lord Salmon).

[97] Including habeas corpus and criminal proceedings: *R.* v. *Brixton Prison Governor ex p. Osman* [1991] 1 WLR 281.

[98] *R.* v. *Horseferry Road Magistrates Court ex p. Bennett* (No. 2) [1994] 1 All ER 289. The later event was the decision of the House of Lords in *ex p. Bennett* (No. 1) [1994] 1 AC 42.

[99] *Burmah Oil Co. Ltd.* v. *Bank of England* [1980] AC 1090.

expedition'.[1] The House for this reason declined to authorise inspection of ministerial papers about decisions of policy, and also correspondence between senior civil servants, of which a group of airlines sought disclosure in attempting to show that the government had unlawfully compelled the British Airports Authority to make a large increase in their charges. Since it was not contended that the government had other motives than those published in their White Paper, there was nothing to outweigh the consideration that, as the law then stood, high-level documents about policy should not normally be disclosed.

As regards cabinet documents Lord Fraser said:

> 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.

He cited such cases in Australia[2] and the United States[3] where claims of immunity had been disallowed. But he made it clear that cabinet documents were entitled to 'a high degree of protection against disclosure'. In previous cases dicta in the House of Lords have been conflicting, some favouring absolute immunity and others not.[4]

The weight to be given to the private rights of citizens is shown by a decision that the customs and excise authorities may not, in the absence of a strong public interest, withhold information which is vital to the enforcement of a person's rights.[5] The owners of a patent for a chemical compound found that it was being infringed by unknown importers and they applied for orders to make the customs authorities disclose the importers' names, in accordance with the duty of persons possessing information about legal wrongs to make it available to the party wronged. This duty was held by the House of Lords to prevail over the Crown's objection that disclosure of the information might cause importers to use false names and so hamper the customs administration; and the 'candour' argument

[1] *Air Canada* v. *Secretary of State for Trade* [1983] 2 AC 394. Contrast *Fowler & Roderique Ltd.* v. *Attorney-General* [1981] 2 NZLR 728 (correspondence between minister and official advisers about grant of licences inspected and ordered to be disclosed). Disclosure was also ordered in *Brightwell* v. *Accident Compensation Commission* [1985] 1 NZLR 132. See (1985) 101 *LQR* 200 (T. R. S. Allan).

[2] *Sankey* v. *Whitlam* (1978) 21 ALR 505.

[3] *United States* v. *Nixon* 418 US 683 (1974).

[4] See the *Lewes Justices* and *Burmah Oil* cases (above). See also *A.-G.* v. *Jonathan Cape Ltd.* [1976] QB 752 (Attorney-General's application for injunction against publication of the Crossman Diaries refused since the cabinet materials contained in them were about 10 years old and no longer required protection in the public interest); *Lanyon Pty Ltd.* v. *Commonwealth of Australia* (1974) 3 ALR 58 (discovery of cabinet and cabinet committee papers refused); *Environment Defence Society Inc.* v. *South Pacific Aluminium Ltd.* (No. 3) [1981] 1 NZLR 153 (cabinet papers inspected but production not ordered); [1980] *PL* 263 (I. G. Eagles).

[5] *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners* [1974] AC 133. The same principle was applied in *British Steel Cpn.* v. *Granada Television Ltd.* [1981] AC 1096.

was once again rejected.[6] There was in fact no head of public policy to set against the rights of the owners of the patent.

Confidential information

Information is not protected from disclosure merely because it has been supplied in confidence. The House of Lords made this clear in another case in which they accepted a Crown claim to withhold documents on the ground that disclosure would be harmful to the efficient working of an Act of Parliament.[7] The customs and excise authorities objected to disclosing details which they had obtained in confidence from traders about dealings in amusement machines supplied by a manufacturer whose liability to purchase tax was in dispute. It was held that, much as traders might resent disclosure of such details, 'confidentiality' was not a separate head of immunity, though it might be very material in the balancing of the public interest against the interest of justice to the litigant.[8] Lord Cross also said:[9]

> In a case where the considerations for and against disclosure appear to be fairly evenly balanced the courts should I think uphold a claim to privilege on the grounds of public interest and trust to the head of the department concerned to do whatever he can to mitigate the effects of non-disclosure.

Although the case against disclosure was apparently not very strong, and although some of the documents were of a routine character, the House of Lords decided on this basis that the confidential character of these particular inquiries should be protected. But since the taxpayers' liability was to be decided by arbitration, and the documents withheld would not be available for use by either side, the case for disclosure was also not strong. By contrast, a plea by the Home Office to protect top-level departmental documents about prison policy did not avail when a prisoner brought an action against them, and after inspection several were ordered to be disclosed.[10] Where a local authority pleaded confidentiality in resisting a claim for preliminary discovery of their records about a violent schoolboy who had severely injured a teacher, the Court of Appeal ordered discovery after inspecting

[6] See at 190 (Lord Dilhorne). It was rejected also in *Barrett* v. *Ministry of Defence*, The Times, 24 January 1990 (evidence at naval board of inquiry).

[7] *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners* (No. 2) [1974] AC 405. The Court of Appeal had inspected the documents (see at 426). See also *Science Research Council* v. *Nassé* [1980] AC 1028, *British Steel Corp.* v. *Granada Television Ltd.* [1981] AC 1096.

[8] Or, where there is no public interest, in deciding whether discovery is really necessary for disposing fairly of the proceedings: *Science Research Council* v. *Nassé* (above).

[9] At 434.

[10] *Williams* v. *Home Office* [1981] 1 All ER 1151, taking into account that documents so disclosed may not be used for other purposes.

the documents.[11] But records of child care investigations may in a suitable case be protected.[12]

The House of Lords have also held that the anonymity of informers should be protected where the public interest so demands.[13] This applies both to police informers[14] and also to those who report maltreatment of children to a local authority or protection society. The Court of Appeal has refused to order production of a local authority's records of children in their care, holding that confidentiality was essential for the proper functioning of the child care service and this public interest outweighed that of facilitating an action for negligence by a former child in care.[15] Where, on the other hand, a police investigation concerned a violent death, and a possible charge of serious crime, the public interest in clearing up the matter outweighed the claim to secrecy.[16]

Amid a welter of conflicting authorities the House of Lords refused to give class immunity to documents generated by complaints against the police under the statutory complaints procedure, although 'contents' claims might be allowable on their merits.[17] In overruling four earlier decisions the House rejected a proposition which had been taken (probably wrongly) to lay down that a litigant holding documents prima facie entitled to 'class' immunity should refuse to disclose them as a matter of duty since the ultimate judge of where the balance of public interest lay was not him but the court.[18] That would have led to what Lord Templeman called 'a rubber stamp approach to public interest immunity' which could not be acceptable. No minister ought to claim immunity unless he is himself convinced that the public interest demands it specifically.

The strong criticisms made in the Scott Report (see below) of ministerial claims to immunity and of class claims in general led the government to announce in 1996 the abandonment of class claims altogether.[19] Future claims would be made

[11] *Campbell* v. *Tameside MBC* [1982] QB 1065 (the teacher was the prospective plaintiff, applying under Administration of Justice Act 1970, s. 31).

[12] *Re M.* (1989) 88 LGR 841.

[13] *D.* v. *National Society for the Prevention of Cruelty to Children* [1978] AC 171. And see *R.* v. *Cheltenham Justices ex p. Secretary of State for Trade* [1977] 1 WLR 95; *Buckley* v. *The Law Society* (No. 2) [1984] 1 WLR 1101.

[14] As in *Friel, Petitioner* 1981 SLT 113. See also *R.* v. *Rankine* [1986] QB 861 (police not required to disclose location of observation post).

[15] *Gaskin* v. *Liverpool CC* [1980] 1 WLR 1549.

[16] *Peach* v. *Commissioner of Metropolitan Police* [1986] QB 1064 (action for damages by mother and administratrix of man killed during disturbance: discovery ordered); and see *Ex p. Coventry Evening Newspapers Ltd.* [1993] QB 278 (Police Complaints Authority documents allowed to be disclosed to defendants in libel actions).

[17] *R.* v. *Chief Constable of West Midlands Police ex p. Wiley* [1995] 1 AC 274.

[18] Propounded in *Makanjuola* v. *Commissioner of Metropolitan Police* [1992] 3 All ER 617 at 623 (Bingham LJ) and criticised in [1997] *CLJ* 51 (Forsyth). The practice of submitting all such documents to the scrutiny of the judge in criminal cases may have caused misunderstanding.

[19] See 287 HC Deb. 949–58, 576 HL Deb. 1507–17 (18 December 1996); The Times, 19 December 1996.

only on a 'contents' basis and only where ministers believed that disclosure would cause real harm to the public interest. The certificate would explain the nature of the harm and how disclosure could cause it, unless this would itself cause the harm in question.[20] These concessions give a well-deserved quietus to class claims, for example for internal policy advice and matters of national security. The duty of explanation should help to meet the criticisms of the European Court of Human Rights, which has held that claims of immunity in matters of national security ought not to be accepted without positive judicial investigation, perhaps with a hearing in camera.[21] The Human Rights Act 1998 now gives domestic legal force to this ruling.

The concessions apply only to the central government, but their lead will doubtless be followed generally. Yet another chapter of this tangled story should now have been closed.

Criminal prosecutions

Before the House of Lords' last mentioned decision the supposed proposition which they rejected had played a highly unsuitable part in criminal prosecutions in the *Matrix Churchill* case, which led to no reported judgment but to the massive report by Sir Richard Scott V-C.[22] Arms manufacturers were prosecuted for illegally exporting military equipment to Iraq, and for their defence they sought the disclosure of official documents from several government departments. Ministers claimed public interest immunity for many documents in order to protect intelligence operations and sources in Iraq. A number of these claims were rejected by the trial judge, who ordered disclosure to the defence. That disclosure led to revelations that the equipment had been exported with ministerial encouragement, whereupon the trial collapsed and Sir Richard Scott's inquiry was commissioned. He was concerned particularly with suspicions that ministers had tried to use public interest immunity to cover up a change of policy which had not been made public, even at the risk of the conviction of innocent defendants.

The ministers who made the claims to public interest immunity, with marked reluctance in one case, were persuaded to do so by the Attorney-General, who advised that this was their legal duty, and that the question whether the claims should be allowed should be left to the trial judge.[23] The Attorney-General's

[20] As was done in *Balfour* v. *Foreign and Commonwealth Office* [1994] 1 WLR 681 and in the *Chahal* case, below.

[21] *Chahal* v. *United Kingdom* (1997) 23 EHRA 413; *Rowe and Davis* v. *UK*, The Times, 1 March 2000. Compare the similar attitude to conclusive evidence certificates, above, p. 725.

[22] *Report of the Inquiry into the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecutions*, 1995–96, HC 115 (February, 1996). The events took place in 1992. For discussion see [1996] *PL* 357–527 (various authors).

[23] Scott Report, G13.100 (Attorney-General's advice), G13.103 (Mr Heseltine's doubts).

failure to disclose the ministerial reluctance to the trial court was criticised in the Scott report, where it was also argued that criminal prosecutions were entirely different from the civil cases in which public interest immunity had mostly been claimed.[24] In a prosecution the accused is in danger of fine or imprisonment, and no public interest, however genuine, can justify the withholding of documents which he may need to prove his innocence. 'Even the name of an informer may be revealed if it is necessary to establish a prisoner's innocence'.[25] Therefore the choice before the authorities is simple: either disclose the documents or drop the prosecution.[26] This may, however, be too stark a dilemma in some cases, for example where sensitive documents will plainly be of no help to the defence so that a weighing exercise is legitimate.[27] Otherwise an undeserving defendant could abuse the rules for the purpose of aborting the prosecution. As long ago as 1956, long before the battle against Crown privilege was won, the government conceded that privilege would not be claimed for documents needed for defence against a criminal charge.[28] Citing long-standing legal authority, Sir Richard Scott cogently confirmed his conclusions in a published lecture.[29] Although they are not yet affirmed by judgment or statute, they are bound to carry great authority.

The European Court of Human Rights has recognised in the context of a criminal trial that the accused's right to disclosure of evidence is not absolute.[30] But only such limitations on full disclosure as are strictly necessary are permitted and these must be counterbalanced by procedures adopted by the judge to secure fairness to the accused.[31] Thus in exceptional circumstances a public interest immunity application might be made ex parte (without notice to the defence). And where no other course would secure fairness to the accused special counsel might be appointed to ensure that the case for the accused was properly heard in deciding

[24] Ibid., G13.125 and K6.

[25] *Makanjuola* v. *Commissioner of Metropolitan Police* [1992] 3 All ER 617 at 623 (Bingham LJ), citing *Marks* v. *Beyfus* (1890) 25 QBD at 498, where Lord Esher MR explains the rule. Despite the demise of *Makanjuola* Bingham LJ's statement should still be authoritative. A police informer may reveal his own identity if that will not prejudice police operations: *Savage* v. *Chief Constable of Hampshire* [1997] 1 WLR 1061.

[26] As recommended by Sir Richard Scott, [1996] *PL* 427 at 435. It may be that there should be some safeguard against the Crown Prosecution Service, when put to this dilemma, disclosing sensitive documents too readily. See *R.* v. *Horseferry Road Magistrates ex p. Bennett* (No. 2) [1994] 1 All ER 289 at 297 and [1997] *CLJ* 51 at 56 (Forsyth).

[27] As in *R.* v. *Keane* [1994] 1 WLR 746, where the correct course is explained by Lord Taylor CJ. See also *R.* v. *Governor of Brixton Prison ex p. Osman* [1991] 1 WLR 281 (government claims to immunity allowed on grounds of irrelevance in habeas corpus proceedings of a criminal nature). The dilemma in habeas corpus cases is similar to that in criminal prosecutions.

[28] See above, p. 844.

[29] See [1996] *PL* 427.

[30] *Rowe* v. *UK* (2000) 30 EHRR 1, para. 61, national security, the protection of witnesses and police methods being the recognised competing interests.

[31] Ibid. and *R.* v. *Botmeh* [2002] 1 WLR 531 (CA).

whether to restrict disclosure.[32] However, procedural fairness in deciding whether to suppress evidence cannot resolve the central dilemma: if the jury might properly conclude that the disputed evidence raised a doubt as to the guilt of the accused, the evidence cannot be suppressed without tainting the fairness of the trial.

[32] *R.* v. *H and others* [2004] UKHL 3; [2004] 2 WLR 335 (HL) (adoption of such procedures held premature in the particular circumstances).

PART VIII
ADMINISTRATIVE LEGISLATION AND ADJUDICATION

22

DELEGATED LEGISLATION

NECESSITY OF DELEGATED LEGISLATION

Administrative legislation

There is no more characteristic administrative activity than legislation.[1] Measured merely by volume, more legislation is produced by the executive government than by the legislature. All the orders, rules and regulations made by ministers, departments and other bodies owe their legal force to Acts of Parliament, except in the few cases where the Crown retains original prerogative power.[2] Parliament is obliged to delegate very extensive law-making power over matters of detail and to content itself with providing a framework of more or less permanent statutes. Law-making power is also vested in local authorities,[3] utility regulators and like bodies,[4] which have power to make byelaws. Outside the sphere of government it is also conferred upon professional bodies such as the Law Society, and various other bodies authorised by Parliament to make statutes or regulations for their own government.[5]

Administrative legislation is traditionally looked upon as a necessary evil, an unfortunate but inevitable infringement of the separation of powers. But in reality it is no more difficult to justify it in theory than it is possible to do without it in practice. There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading. There are some obvious general differences. But the idea that a clean division can be made (as it can be more readily in the case of the judicial power) is a legacy from an older era of political theory. It is easy to see that legislative power is the power to lay down the law for people in general, whereas administrative

[1] Classic works on this subject are Allen, *Law and Orders*, 3rd edn.; Carr, *Delegated Legislation* and *Concerning English Administrative Law*, ch. 2; *Report of the Committee on Ministers' Powers*, Cmd. 4060 (1932). See also Pearce, *Delegated Legislation in Australia and New Zealand* and Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (Oxford, 2001).

[2] Above, p. 215.

[3] Local Government Act 1972, s. 235; above, p. 123.

[4] See above, pp. 156 and 157.

[5] e.g. Oxford and Cambridge Universities under Universities of Oxford and Cambridge Act 1923, s. 7, subject to approval by the Privy Council.

power is the power to lay down the law for them, or apply the law to them, in some particular situation. In the case of the scheme for centralising the electricity supply undertakings in London, which has been instanced already as a matter of administrative power,[6] it might be said that the power was just as much legislative. The same might be said of ministerial orders establishing new towns or airports[7] or approving county councils' structure plans, which are specific in character but lay down the law for large numbers of people. Are these various orders legislative or administrative? Probably the only correct answer is that they are both, and that there is an infinite series of gradations, with a large area of overlap, between what is plainly legislation and what is plainly administration. Nevertheless a distinction must be maintained to some extent. For one thing, it is a general principle that legislative acts should be public; for another, the distinction may sometimes affect legal rights.[8]

For the most part, however, administrative legislation is governed by the same legal principles that govern administrative action generally. For the purposes of judicial review, statutory interpretation and the doctrine of ultra vires there is common ground throughout both subjects. Both involve the grant of wide discretionary powers to the government. Much that has already been said about the legal control of powers can be taken for granted in this chapter, which is concerned primarily with the special features of the administrative power to legislate.

A new dimension has been added to the subject by European Community law, which prevails over delegated legislation of all kinds just as it does over Acts of Parliament. Illustrations of its overriding effect will be found below; and note must be taken of the arrangements for Parliamentary scrutiny of Community legislation.

With the advent of devolution a new class of delegated legislation has been created—Acts of the Scottish Parliament. As explained elsewhere[9] the Scotland Act 1998 sets limits to the competence of the Scottish Parliament and sets up a special procedure for testing whether a particular Act falls within its competence.[10]

[6] Above, p. 607.

[7] The development order for Stansted Airport was judicially described as 'purely administrative or legislative': see above, p. 552.

[8] E.g. the right to a fair hearing (above, p. 552). For discussion of the distinction see *Yates (Arthur) & Co. Pty Ltd.* v. *Vegetable Seeds Committee* (1945) 72 CLR 37; *Attorney-General of Canada* v. *Inuit Tapirisat of Canada* (1980) 115 DLR (3d) 1 at 19; *Treasure Life Assurance Ltd.* v. *Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 where the Constitutional Court of South Africa held that the levying of rates by a local authority, since it was legislative action, was outside the constitutional right to 'procedurally fair administrative action'.

[9] Above, pp. 131 and 133.

[10] Act of 1998, s. 33. Above, p. 136.

The growth of a problem

Uneasiness at the extent of delegated legislation began to be evident towards the end of the nineteenth century. It was not a new device, but the scale on which it began to be used in what Dicey called 'The Period of Collectivism'[11] was a symptom of a new era. One of the most striking pieces of delegation ever effected by Parliament was the Statute of Proclamations 1539 (repealed in 1547), by which Henry VIII was given wide power to legislate by proclamation. In 1531 the Statute of Sewers delegated legislative powers to the Commissioners of Sewers, who were empowered to make drainage schemes and levy rates on landowners. These were early examples of a technique which Parliament has always felt able to use. But the flow of these powers was no more than a trickle until the age of reform arrived in the nineteenth century. Then very sweeping powers began to be conferred. The Poor Law Act 1834 gave to the Poor Law Commissioners, who had no responsibility to Parliament, power to make rules and orders for 'the management of the poor'. This power, which lasted for over a century (though responsibility to Parliament was established in 1847), remained a leading example of delegation which put not merely the detailed execution but also the formulation of policy into executive hands.[12]

But this was part of a particular experiment in bureaucratic government. As a thing in itself, delegated legislation did not begin to provoke criticism until later in the century. The publication of all delegated legislation in a uniform series under the title of Statutory Rules and Orders (since 1947, Statutory Instruments) began in 1890, and in 1893 the Rules Publication Act made provision (as will be explained) for systematic printing, publication and numbering, and for advance publicity. These measures brought the proportions of the problem to public notice. In 1891, for instance, the Statutory Rules and Orders were more than twice as extensive as the statutes enacted by Parliament. Notwithstanding regularly expressed concern, the growth of delegated legislation, fuelled by two World Wars and the welfare state, has continued unabated. In 2001 the published Statutory Instruments were over six times as extensive as the Acts of Parliament. A reform that promises much is the establishment of the Delegated Powers and Regulatory Reform Committee in the House of Lords with the task of reporting 'whether the provisions of any Bill inappropriately delegate legislative power . . .'.[13] In future the government will provide a memorandum explaining and justifying the degree of delegation in a Bill.[14]

[11] *Law and Opinion in England*, 64.

[12] See Report of the Committee on Ministers' Powers (1932) Cmd. 4060, p. 31. For the development of delegated legislation see the Report, p. 21; Holdsworth, *History of English Law*, xiv. 100.

[13] Set up following the 4th Report from the Committee on the Procedure of the House, HL Paper 92 (1992–94) (predecessor committee). See [1995] *PL* 34–36 (C. M. G. Himsworth).

[14] Himsworth (as above), 35.

The government has established an independent body, the Better Regulation Task Force, with membership largely drawn from business, to advise it on improving the effectiveness and credibility of regulation.[15] The BRTF's remit is wider than simply the reform of delegated legislation but this is where its focus lies. It scrutinises proposals for new regulations, reviews the way regulatory regimes work in practice and presses for the repeal of redundant regulations. The BRTF has published its principles of good regulation, viz., transparency, proportionality, targeting, consistency and accountability, and seeks to see that they are followed. It has no statutory powers and is purely advisory; but it is assisted by the Regulatory Impact Unit in the Cabinet Office and may change the functioning and form of delegated legislation.

SCOPE OF ADMINISTRATIVE LEGISLATION

Wide general powers

A standard argument for delegated legislation is that it is necessary for cases where Parliament cannot attend to small matters of detail. But, quite apart from emergency powers (considered below), Parliament sometimes delegates law-making power that is quite general. For instance, under the Supplies and Services (Extended Purposes) Act 1947 controls authorised by many regulations already in force were extended for the following additional purposes:

(a) for promoting the productivity of industry, commerce, and agriculture;
(b) for fostering and directing exports and reducing imports, or imports of any classes, from all or any countries and for redressing the balance of trade; and
(c) generally for ensuring that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community.

This was much more than 'emergency' legislation, in any fair sense of that overworked word. Subject to one single reservation for the sake of freedom of the press, the whole economic life of the community was subjected to executive power. These sweeping economic controls were for the most part removed, but statutory social services have inevitably extended the permanent field of delegated legislation. Some of the regulatory powers are very wide, for instance the power in the National Health Service Act 1977 (replacing the National Health Service Act 1946) for the Secretary of State to control the medical services to be provided, to secure that adequate personal care and attendance is given, and so on.

Some of the most indefinite powers ever conferred are those of the European Communities Act 1972, under which Orders in Council and departmental regula-

[15] See *Better Regulation Task Force Annual Reports.*

tions can alter the law in any way that may be needed for the purpose of implementing Community obligations or giving effect to Community rights, or matters related thereto, subject only to the exceptions mentioned below.[16]

Taxation

Even the tender subject of taxation, so jealously guarded by the House of Commons, has been invaded to a considerable extent. Under the Import Duties Act 1958 the Treasury was authorised to specify the classes of goods chargeable and the rates of duty, subject to affirmative approval by the House of Commons where duty was imposed or increased; and under the European Communities Act 1972[17] the Treasury was given similar powers, subject to Community obligations. The rate of value added tax is variable within limits by Treasury order under the Finance Act 1972, but again subject to an affirmative vote of the House of Commons if the tax is increased. Many Acts give power to prescribe charges for services rendered—which are not, of course, taxes—for example by the Post Office or under the National Health Service.[18]

Power to vary Acts of Parliament

It is quite possible for Parliament to delegate a power to amend its own Acts. This used to be regarded as incongruous, and the clause by which it was done was nicknamed 'the Henry VIII clause'—because, said the Committee of 1932, 'that King is regarded popularly as the impersonation of executive autocracy'. The usual object was to assist in bringing a new Act into effect, particularly where previous legislation had been complicated, or where there might be local Acts of Parliament which some centralised scheme had to be made to fit. Such clauses were not uncommon, and sometimes they gave power to amend other Acts as well; but the Committee of 1932 criticised them as constituting a temptation to slipshod work in the preparation of Bills.[19]

In reality, as the intricacy of legislation grows steadily more formidable, some power to adjust or reconcile statutory provisions has to be tolerated. If there is to be delegated legislation at all, it is inevitable that it should affect statute law as well as common law. Although such clauses may no longer be cast in such striking terms, substantially similar devices have been even more in vogue since the Report than before it. One need look no further than the Statutory Instruments Act 1946

[16] Below, p. 862.
[17] s. 5.
[18] Widely phrased charging powers will be narrowly construed so as not to amount to a taxing power: *Daymond* v. *Plymouth City Council* [1976] AC 609 (power to impose sewerage charges 'as thought fit' did not extend to charges upon properties not served by sewers).
[19] Cmd. 4060 (1932), 61.

itself to find an example: the King in Council may direct that certain provisions about laying statutory instruments before Parliament shall not apply to instruments made under pre-existing Acts if those provisions are deemed inexpedient. However, most Henry VIII clauses, today and in the past, are of limited scope granting power only to amend particular earlier Acts and for a limited period of time. The power is granted in order to enable the making of changes incidental or consequential upon the original enactment.[20]

Several modern clauses empowering the amendment or alteration of primary legislation by subordinate legislation are, however, of very much wider scope. They empower the amendment of any Act, sometimes for an ill-defined purpose. And, in particular, they empower ministers to amend Acts of Parliament enacted after the enactment containing the Henry VIII clause.[21] These prospective clauses have often been criticised, yet, as will be seen, mechanisms of this type are implied by the UK's constitutional arrangements with the EU and, ironically, by the method chosen to protect fundamental rights in the Human Rights Act 1998. Abuse of these powers must be prevented by proper judicial control and how this is being achieved is discussed below.[22] Three remarkable prospective Henry VIII clauses may be noted.

First, the provision of the European Communities Act 1972, which gives power to make Orders in Council and regulations for giving effect to Community law which are to prevail over all Acts of Parliament, whether past or future, subject only to safeguards against increased taxation, retrospective operation, delegated legislation and excessive penalties.[23] Wide though these powers are, the duty of the UK to give effect in domestic law to EU directives, requires some mechanism of this kind.[24] The leading case on the prospective operation of these powers is discussed below.[25]

Secondly, section 1 of the Regulatory Reform Act 2001[26] empowers a minister to reform by order legislation 'which has the effect of imposing burdens affecting persons in carrying on any activity'.[27] The legislation liable to reform includes Acts made after 2001 provided two years have elapsed since they were passed.[28] The minister must be satisfied that the removal or reduction of that burden would not remove 'any necessary protection'.[29] The minister must also not by order prevent

[20] For many examples and general discussion of 'incidental and consequential' clauses see the Third Report of the House of Lords Delegated Powers and Regulatory Reform Committee (HL 21 (2002–03)).

[21] For discussion see [2003] PL 112 (Barber and Young); [2004] *JR* 17 (Forsyth and Kong).

[22] Below, p. 864.

[23] s. 2(2), (4), and 2nd sched. See above, p. 194.

[24] Above, p. 194.

[25] Below, p. 863.

[26] Replacing the Deregulation and Contracting Out Act 1994.

[27] s. 1(1) and s. 2 for definition of 'burden'

[28] s. 1(2)(a); see too s. 1(4).

[29] s. 3(1)(a). The phrase was left 'deliberately undefined' in the 1994 Act in order that this safeguard was 'both rigorous and comprehensive' (Hansard, HL, Vol. 556, col. 481, 15 and 17

the exercise of the rights or freedoms of any person who 'reasonably expect[s]' to continue their exercise.[30] Burdens which may be imposed must, in the ministers view, strike a 'fair balance' between private and public interests.[31] This far-reaching power is hedged with restrictions and safeguards. Draft orders must be laid and approved by both Houses of Parliament.[32] New criminal offences cannot impose penalties in excess of two years' imprisonment (on indictment) or six months or a fine at level 5 (summary conviction) unless the offence being replaced imposed a more severe penalty.[33] There can be no forcible entry, search or seizure authorised or compulsory giving of evidence required by an order under this section unless such provision already exists in the provision abolished by the order.[34] The minister is required to consult with representatives of organisations whose interests are substantially affected by his proposals.[35]

Thirdly, where 'a declaration of incompatibility' has been made under section 4 of the Human Rights Act 1998[36] declaring a statutory provision ('primary legislation') to be incompatible with a Convention right, a minister may by order ('remedial order') make the necessary amendments to primary legislation—including legislation that has not been declared incompatible.[37] Such orders may be retrospective.[38] Remedial orders may not be made unless draft orders have been approved by both Houses of Parliament.[39] It may be noted that remedial orders are made by executive authorities whereas the protection of Convention rights might be considered a judicial task. Moreover, this mechanism itself may breach Convention rights, for instance, in the case where the Crown has an interest in the litigation that led to the declaration. The minister's decision whether to make a remedial order (and whether to make it retrospective) determines the 'rights and obligations' of the parties. Since the minister cannot be considered impartial is this not contrary to Article 6(1)?[40] Alternatively, the minister may decide not to make an order thus leaving the victim of the breach without an effective remedy contrary to Article 13.[41] Some such mechanism was necessary to reconcile Parliamentary

February 1994; Vol. 557, col. 874–78). It does include protection of flora, fauna and the national heritage as well as tenants from eviction (ibid.).

[30] s. 3(1)(b).

[31] s. 3(2)(a).

[32] s. 4(2). Cf. s. 4(7) and s. 6(8). The Delegated Powers and Regulatory Reform Committee considers the draft orders in detail.

[33] s. 3(3).

[34] s. 3(5)(b).

[35] s. 5.

[36] Described above, p. 166.

[37] 2nd sched., para. 1(2).

[38] 2nd sched., para. 1(1)(b).

[39] 2nd sched., para. 2(a). Urgent orders may be made immediately (para. 2(b)) but cease to have effect after 120 days unless approved by Parliament.

[40] See above, p. 171, for this and other problems.

[41] Art. 13 is not given effect by the Act of 1998 (see 1st sched.) but a victim may still petition the Strasbourg court.

supremacy with the protection of Convention rights; and was implied by the scheme of the Act of 1998.[42]

Judicial Review of the Power to vary Acts of Parliament

Powers to vary Acts of Parliament, particularly those that go beyond incidental and consequential changes, place exceptional power in the hands of ministers and also raise constitutional issues over the supremacy of Parliament.[43] The courts in reviewing the exercise of these powers have naturally responded to this context. They insist upon 'a narrow and strict construction and any doubts [about the clause's] scope [are] resolved by a restrictive approach'.[44] They also require that any modification of an Act must be expressly stated in the statutory instrument and not merely inferred from its content.[45] And the power to modify an Act cannot overcome express terms restricting modification.[46]

The implications of prospective Henry VIII clauses were explored for the first time in the 'Metric Martyrs' case.[47] The defendants were convicted of selling loose goods from bulk using only imperial measurements of weight, contrary to the Weights and Measures Act 1985 as amended in 1994 under powers conferred by s. 2(2) & (4) of the European Communities Act 1972. As enacted, the 1985 Act allowed the use of imperial measures but after the 1994 amendment it did not. The appellants contented that the Henry VIII power in the 1972 Act had been impliedly repealed by the 1985 Act. Thus the 1994 amendments were beyond the minister's powers under the 1972 Act. Laws LJ, however, reasoned that the doctrine of implied repeal, under which the later statute always prevails over the earlier, was

[42] For criticism see *Constitutional Reform in the UK: Practice and Principles* (1998, Centre for Public Law), 66–7, [1998] *EHRLR* 520 (Wade).

[43] Discussed above, p. 29.

[44] *R.* v. *Secretary of State for the Environment ex p. Spath Holme Ltd* [2001] 2 AC 349 (para. 35). Thus clauses that authorise the varying of 'any enactment' are not prospective and will only apply to past Acts: Barber and Young, below, at 119.

[45] *McKiernon* v. *Secretary of State for Social Security* (1990) Admin. LR 133 at 137 (approved in *R.* v. *Secretary of State for Social Security ex p. Britnell* [1991] 1 WLR 198 (HL)); *Bairstow* v. *Queens Moat Houses plc* [1998] 1 All ER 343 at 352–3. And see *R. (Orange Personal Communications Ltd)* v. *Secretary of State for Trade and Industry* [2001] 3 CMLR 781 (existing statutory provisions to modify (as required by EU directive) telecommunication licences should be utilised rather than making an order under s. 2(2) of the European Communities Act 1972; s 2(2) could not be considered as impliedly repealing the statutory provisions).

[46] *Bairstow* v. *Queens Moat Houses plc* (above) (power to amend 'any statutory provision relating to practice and procedure of the Supreme Court' (Supreme Court Act 1981, s 87(3)) did not extend to rendering provisions of the Civil Evidence Act 1995 retrospective when that Act itself provided against such retrospective operation).

[47] *Thoburn* v. *Sunderland City Council* [2002] EWHC 195 (Admin.); [2003] QB 151. For commentary see (2003) 54 NILQ 25 (Elliott); [2003] PL 112 (Barber and Young).

not engaged unless there was conflict of subject matter between the statutes.[48] Thus a general earlier statute would always prevail over a specific later one. Thus the judge concluded: 'Generally, there is no inconsistency between a provision conferring a Henry VIII power to amend future legislation and the terms of any such future legislation.'[49]

The alternative ground for Laws LJ's dismissal of the appeals was his development of the common law concept of a 'constitutional statute'. These either condition the legal relationship between citizen and state or touch fundamental rights.[50] A constitutional statute, the judge held, such as the European Communities Act 1972, could only be repealed expressly. Since the 1985 Act did not expressly repeal in any way the 1972 Act, the section 2(2) & (4) powers were unlimited and provided the vires for the 1994 amendments.

While this latter ground is not without difficulty,[51] it allows a distinction to be drawn between prospective Henry VIII clauses which are necessary or implied by our constitutional arrangements and those that are not. Section 10 of the Human Rights Act 1998 and section 2(2) & (4) of the European Communities Act 1972 may thus only be able to be expressly repealed. But section 1 of the Regulatory Reform Act 2001 may yet be open to implied repeal by later statutes.

Administrative repeal

It is common for statutes to come into operation on a date to be fixed by ministerial order. Cases have occurred where the commencement order deliberately omitted some provision of the Act, thereby in effect repealing it administratively.[52]

Emergency powers

The common law contains a doctrine of last resort under which, if war or insurrection should prevent the ordinary courts from operating, the actions of the military authority in restoring order are legally unchallengeable. When the courts are thus reduced to silence, martial law (truly said to be 'no law at all') prevails. This principle has had to be called into play in Ireland as late as 1921, but it lies outside

[48] Adopting the language of Barber and Young at 115.

[49] At [50]. See (2002) 118 *LQR* (Marshall) setting out how the general assumption had been that Henry VIII clause, did not operate prospectively.

[50] At [62].

[51] Necessary implication may suffice to displace a constitutional right: *R* v. *Secretary of State for the Home Department Ex p. Pierson* [1998] AC 539 at 575. And see Marshall, above, at 496 pointing to the absence of any Parliamentary warrant for the distinction between 'first and second class statutes'.

[52] See *R.* v. *Home Secretary ex p. Anosike* [1971] 1 WLR 1136 (right of appeal under Immigration Appeals Act 1969 not brought into force).

our subject.[53] All other emergency legislative powers derive from Parliament by delegation.[54]

The standing provision for dealing with emergencies is now Part 11 of the Civil Contingencies Act 2004, if enacted as proposed. The 2004 Act is of much wider scope than the Emergency Powers Act 1920, which it replaces. The 1920 Act was to protect the public from the effects of serious strikes but the definition of an emergency in the 2004 Act is very wide. It comprises 'serious threats' to the welfare of any part of the population, the environment, the political, administrative or economic stability or, the security of the United Kingdom.[55] The Act provides that Her Majesty 'may by proclamation declare herself satisfied that an emergency has occurred, is occurring or is about to occur and it is necessary to make [emergency] regulations for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency'.[56] Thereupon emergency regulations may be made by Order in Council.[57] Practically anything may be required to be done, or prohibited, by the regulations; and it may be made a criminal offence to breach the regulations or to fail to comply with a direction given under the regulations or obstruct someone performing a function under the regulations.[58] Where the Secretary of State considers that there would be 'serious delay' in involving Her Majesty either in declaring the emergency or making the regulations, he may act in her stead.[59] The full plenary powers of Parliament have been given to the maker of the regulations for they 'may make provision of any kind that could be made by Act of Parliament' including disapplying or modifying an Act.[60]

However, the maker of the regulations must consider them 'necessary' to deal with the emergency.[61] They may not require military or industrial service, prohibit a strike, create offences punishable by more than three months in prison or a fine in excess of level 5 on the standard scale.[62] The proclamation of the emergency (and the regulations) lapses after thirty days although fresh proclamations and regulations may be made.[63] The regulations must 'as soon as reasonably practical'

[53] See Bradley and Ewing, *Constitutional and Administrative Law*, 12th edn., 673–77.

[54] Executive action may be taken by the government under the royal prerogative in order to keep the peace or to deal with emergency: *R.* v. *Home Secretary ex p. Northumbria Police Authority* [1989] QB 26 (maintenance by Home Secretary of a stock of baton rounds and CS gas for supply to the police in times of emergency held authorised both by statute and by prerogative).

[55] See the extensive definition in s. 17.

[56] s. 18.

[57] s. 21.

[58] See ss. 21(2) & (3). Regulations may reorganise the administrative machine, set up special tribunals for trials, confiscate or destroy property etc.

[59] s. 19.

[60] s. 21(3)(j). The regulations will also override the Human Rights Act 1998 (s. 25).

[61] s. 21(1).

[62] s. 21(4).

[63] s. 23.

be laid before Parliament (which shall be recalled if necessary). If not approved by both Houses within seven days after being laid, the regulations lapse.[64]

LEGAL FORMS AND CHARACTERISTICS

Regulations, rules, orders etc.

Parliament follows no particular policy in choosing the forms of delegated legislation, and there is a wide range of varieties and nomenclature. An Act may empower an authority to make regulations, rules or byelaws, to make orders, or to give directions. Acts often empower the Crown to make Orders in Council, and particularly where the subject-matter falls within the province of no designated minister.[65] Such orders must be distinguished from Orders in Council made in the exercise of the royal prerogative:[66] the former are valid only in so far as they conform to the power conferred by Parliament; the latter are valid only in so far as they fall within the Crown's remaining prerogative powers at common law.

The Committee on Ministers' Powers recommended that the expressions 'regulation', 'rule' and 'order' should not be used indiscriminately, but that 'rule' should be confined to provisions about procedure and that 'order' should be used only for executive acts and legal decisions.[67] But the nomenclature in practice honours these distinctions nearly as much in the breach as in the observance. Thus under the Fishing Vessels (Safety Provisions) Act 1970 the detailed precautions are prescribed by 'rules'.[68] Import duties, contrariwise, though their character is purely that of general legislation, are prescribed by 'orders'.[69] Untidy though the language is, it makes no legal difference. 'Byelaws', for example, are subject to no special rules merely because they are given this title.

'Directions' are also used for general legislation. They may be given for example under the Town and Country Planning Act 1990, the National Health Service Act 1977, the Social Security Contributions and Benefits Act 1992 and under Acts providing for ministerial powers over denationalised industries.[70] Other Acts empower a minister to give 'guidance', the observance of which may or may not be

[64] s. 24.
[65] Above, p. 51.
[66] Above, p. 215.
[67] Cmd. 4060 (1932), 64.
[68] Fishing Vessels (Safety Provisions) Rules 1975 (SI 1975 No. 330).
[69] For instance, Import Duties (General) (No. 5) Order 1975 (SI 1975 No. 1744). 'Order' is a word of wide meaning: *R. v. Clarke* [1969] 2 QB 91; *R. v. Oxford Recorder ex p. Brasenose College* [1970] 1 QB 109.
[70] See, e.g., Railways Act 1993, ss. 84, 95, 98 and 106.

mandatory, according as the Act intends.[71] The use of directions and guidance is now a common technique of government. They allow ministers to change the rules rapidly to suit changing circumstances. On the other hand, directions and guidance are seldom required to be laid before Parliament and the benefits of such scrutiny are lost.[72]

There is scarcely a limit to the varieties of legislative provisions which may exist under different names. The statutory 'code of practice' is now in constant use, and since this has, or may have, legal effects in certain circumstances it ranks as legislation of a kind.[73] Under the Employment Protection Act 1975 the Advisory Conciliation and Arbitration Service issues a code of practice, giving guidance for the purpose of promoting good industrial relations.[74] Its legal effect is that it is admissible in evidence before the employment tribunals which adjudicate employment cases, and is to be taken into account on any question to which the tribunal thinks it relevant.[75] The ministerial code of guidance to which local authorities must 'have regard' in administering the Housing Act 1985 is statutory but not absolutely binding since 'have regard' does not mean 'comply'.[76] By contrast, the code of practice which the Secretary of State has published explaining the arrangements for the 'examination in public' of structure plans is not statutory in any way: it is merely a statement of administrative policy.[77] In fact the Town and Country Planning Act 1990 empowers the Secretary of State to make regulations for the procedure at these examinations,[78] but instead of doing so he has published the code of practice, with the object of promoting informality and flexibility.

Codes of practice, guidance and so forth have proliferated into a jungle of quasi-legislation of this kind, some codes having legal effect and others not and some, though only a minority, being subject to parliamentary approval.[79] In a debate upon them[80] the House of Lords deplored the general confusion, the lack of

[71] See *R.* v. *Islington LBC ex p. Rixon* [1997] ELR 66, holding that 'guidance' giving effect to statutory policy was mandatory in the case of educational facilities for the disabled.

[72] Directions and guidance will, of course, be struck down if ultra vires: *Laker Airways Ltd.* v. *Department of Trade* [1977] QB 643 (guidance ultra vires); *R.* v. *Secretary of State for Social Services ex p. Stitt*, The Times, 5 July 1990 (directions upheld but recognised that they could be ultra vires).

[73] See Ganz, *Quasi-legislation*, discussing many examples from the Highway Code of 1930 onwards. The great majority of these codes are recent. See also [1986] *PL* 239 (R. Baldwin and J. Houghton) for a detailed survey and comment.

[74] The Secretary of State may do the same (with overriding effect) under Employment Act 1980, s. 3.

[75] s. 6, replacing Trade Union and Labour Relations Act 1974, 1st sched.

[76] *De Falco* v. *Crawley BC* [1980] 460. See similarly *R.* v. *Police Complaints Board ex p. Madden* [1983] 1 WLR 447.

[77] Department of Environment booklet: *Structure Plans—The Examination in Public*. So likewise was the 'memorandum of guidance' issued to health authorities and yet judicially reviewed in *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

[78] s. 35B(6).

[79] Some require affirmative resolution, e.g. under Employment Protection Act 1975, s. 6(5).

[80] 469 HL Deb 1075 (15 January 1986).

parliamentary control, the lack of rules for publication and numbering and other deficiencies; and a code of practice on codes of practice was suggested.[81] Informal codes offer a way of escape from the rules governing statutory instruments and this is being freely exploited.

Administrative rules

Mere administrative rules, for example as to the allocation of business within the civil service, or for extra-statutory concessions to taxpayers,[82] are not legislation of any kind. The same applies to statements of policy and of practice and to many other pronouncements of government departments, whether published or otherwise. But the clear line which ought to divide legislative from administrative rules is blurred by ambiguous categories. Statutory rules which are undoubtedly legislation may be held to be merely regulatory and not legally enforceable. This is the case with the prison rules, made under the Prison Act 1952, which have sometimes been held to be regulatory directions only and not enforceable at the suit of prisoners, but at other times are held to be mandatory in law and fully enforceable.[83] On the other hand non-statutory rules may be treated as if they were statutory. As explained elsewhere, the High Court assumed jurisdiction to quash decisions of the (former) Criminal Injuries Compensation Board, the Civil Service Appeal Board and the Panel on Take-overs and Mergers[84] if they do not accord with their published rules, even though the rules rest upon no statutory authority. The last of these cases is especially striking, since the rules of the Panel are not made by a minister or other agency of government, and thus have no constitutional or democratic basis. Yet rules which the court will enforce must be admitted to be genuine legislation, anomalous though this is in the absence of any statutory warrant.

Another dubious case is that of the immigration rules, which are made by the Home Secretary under the Immigration Act 1971, subject to Parliamentary disapproval, and which explain how his wide discretionary powers over visitors from overseas and immigrants are to be exercised.[85] These rules have repeatedly been held to be rules of administrative practice merely, not rules of law and not delegated legislation,[86] and the House of Lords has held that they have 'no statutory force'.[87] Breach of them by an immigrant does not therefore make him an illegal

[81] Col. 1086 (Lord Renton).
[82] For these see above, p. 410.
[83] See above, p. 73.
[84] For these cases see above, pp. 640 and 641.
[85] See above, p. 77. The rules are published as House of Commons papers, not as statutory instruments. The current rules are HC 395 (1994) as amended from time to time. For the up to date version see <www.ind.homeoffice.gov.uk/default.asp?PageId=3912>.
[86] *R.* v. *Home Secretary ex p. Hosenball* [1977] 1 WLR 766 and cases cited below.
[87] *R.* v. *Home Secretary ex p. Zamir* [1980] AC 930; *R.* v. *Entry Clearance Officer, Bombay ex p. Amin* [1983] 2 AC 818.

immigrant under the Act,[88] though breach of them by an immigration officer may show that he had no authority to grant admission, thus making the immigrant illegal.[89] The rules undoubtedly have statutory force to some extent, in that an immigrant's appeal must be allowed if the adjudicator considers that the immigration officer's decision was not in accordance with them.[90] Furthermore, the courts have several times quashed immigration decisions for misconstruction or misapplication of the rules, for example where admission was wrongly refused to a boy coming to this country for education,[91] or where a rule was invalid for unreasonableness.[92] The courts did not explain whether they were treating the rules as having statutory force, or whether they were enforcing non-statutory rules as in the case of the Criminal Injuries Compensation Board. It is not surprising that the rules have been called 'very difficult to categorise or classify', being 'a curious amalgam of information and description of executive procedures'.[93] Lord Bridge has said that they are 'quite unlike ordinary delegated legislation', that they 'do not purport to enact a precise code having statutory force', and that they are 'discursive in style and, on their face, frequently offer no more than broad guidance as to how discretion is to be exercised'.[94] Roskill LJ, on the other hand, has said that they are 'just as much a part of the law of England as the Act itself'.[95]

In the United States the assimilation of different categories has been carried further,[96] and the courts have enforced administrative rules and practices merely because they have been followed in fact rather than because they have statutory backing.[97] 'He that takes the procedural sword shall perish with that sword', said Mr Justice Frankfurter.[98] English judges have confined themselves to cases where formal rules have been promulgated, as in the case of the Criminal Injuries Compensation Board and other cases mentioned earlier,[99] and to cases where an established practice creates a legitimate expectation of a fair hearing.[1] So they also have made a breach in the legal barrier, and this may be exploited further.

[88] *R.* v. *Home Secretary ex p. Mangoo Khan* [1980] 1 WLR 569.
[89] *R.* v. *Home Secretary ex p. Choudhary* [1978] 1 WLR 1177.
[90] Immigration Act 1971, s. 19.
[91] *R.* v. *Gatwick Airport Immigration Officer ex p. Kharrazi* [1980] 1 WLR 1396, holding that the immigration officer had erred in 'law' and so acted ultra vires under the doctrine of the *Racal* case (above, p. 264). See similarly *R.* v. *Immigration Appeal Tribunal ex p. Shaikh* [1981] 1 WLR 1107, quashing the tribunal's decision for misapplication of the rules; *R.* v. *Immigration Appeal Tribunal ex p. Swaran Singh* [1987] 1 WLR 1394 (similar).
[92] *R.* v. *Immigration Appeal Tribunal ex p. Begum Manshoora* [1986] Imm. AR 385.
[93] Lane and Cumming-Bruce LJJ respectively in the *Hosenball* case, above.
[94] *R.* v. *Immigration Appeal Tribunal ex p. Bakhtaur Singh* [1986] 1 WLR 910.
[95] *R.* v. *Chief Immigration Officer, Heathrow Airport ex p. Bibi* [1976] 1 WLR 979.
[96] The definition of 'rule' in the Federal Administrative Procedure Act of 1946 includes statements of policy, organisation, procedure or practice made by government agencies.
[97] Schwartz and Wade, *Legal Control of Government*, 92. But this practice may discourage public authorities from publicising their procedures.
[98] In *Vitarelli* v. *Seaton* 359 US 535 (1959) at 547.
[99] Above, p. 640.
[1] Above, p. 500.

Circulars

Departmental circulars are a common form of administrative document by which instructions are disseminated, e.g. from a department in Whitehall to its local offices or to local authorities over which it exercises control. Many such circulars are identified by serial numbers and published, and many of them contain general statements of policy, for instance as to the Secretary of State's practices in dealing with planning appeals. They are therefore of great importance to the public, giving much guidance about governmental organisation and the exercise of discretionary powers. In themselves they have no legal effect whatever, having no statutory authority.[2] But they may be used as a vehicle for conveying instructions to which some statute gives legal force, such as directions to local planning authorities under the Town and Country Planning Act 1990.[3] They may also contain legal advice of which the courts will take notice.[4]

Much confusion has been caused by the failure to distinguish between the legal and the non-legal elements in circulars. A leading example is *Blackpool Corporation* v. *Locker*.[5] Under wartime regulations, continued in force, the Minister of Health was empowered to take possession of land for any purpose and to delegate that power, subject to such restrictions as he thought proper. He delegated the power to local authorities by a series of circulars sent out from his department, which contained numerous instructions. Two of these instructions were that there should be no requisitioning of furniture, or of any house which the owner himself wished to occupy. Both these were disregarded in an attempted requisition of the plaintiff's house. The question then was, were the instructions in the circulars legal conditions restricting the delegated power, or were they merely administrative directions as to how that power, delegated in all its plenitude, should in practice be exercised? On this vital point the circulars were entirely ambiguous. The Court of Appeal held that the instructions were legal restrictions limiting the delegated power and that the requisition was therefore invalid. But the local authority and the ministry had acted on the opposite view: they had refused to disclose the terms of the circulars, and had even at first resisted disclosing them to the court on grounds of privilege.[6] Thus they had 'radically misunderstood their own legal rights and duties', and had refused to let the plaintiff see the very legislation by which his rights were determined. A judgment notable for its forceful language, as well as for its awareness of the wide constitutional implications, was delivered by

[2] See e.g. *Colman (JJ) Ltd.* v. *Commissioners of Customs and Excise* [1968] 1 WLR 1286 at 1291 (Commissioners' 'notices' cannot alter law).

[3] Above, p. 71.

[4] As in the *Gillick* case, below.

[5] [1948] 1 KB 349. See similarly *Patchett* v. *Leathem* (1949) 65 TLR 69; *Acton Borough Council* v. *Morris* [1953] 1 WLR 1228. Scott LJ's legal analysis was criticised in *Lewisham BC* v. *Roberts* [1949] 2 KB 608.

[6] For privilege see above, p. 842.

Scott LJ who had formerly been chairman of the Committee on Ministers' Powers and was inclined to deplore the failure to implement its report. He described some of the events as 'an example of the very worst kind of bureaucracy'. But the root of the trouble may well have been the difficulty of telling where legislation began and ended.

In a case of the same kind, where the requisition was held invalid for non-observance of the condition in the circular requiring notice to be given to the owner, Streatfield J said:[7]

> Whereas ordinary legislation, by passing through both Houses of Parliament or, at least, lying on the table of both Houses, is thus twice blessed, this type of so-called legislation is at least four times cursed. First, it has seen neither House of Parliament; secondly, it is unpublished and is inaccessible even to those whose valuable rights of property may be affected; thirdly, it is a jumble of provisions, legislative, administrative, or directive in character, and sometimes difficult to disentangle one from the other; and, fourthly, it is expressed not in the precise language of an Act of Parliament or an Order in Council but in the more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction.

Contradictory opinions as to the legal status of a circular were expressed in the House of Lords in a case where a departmental 'memorandum of guidance', issued to local health authorities, was alleged to contain erroneous legal advice as to the counselling of young girls about contraception.[8] Lords Fraser and Scarman held that the error would be ultra vires, thus treating the circular as having legal effect. Lords Bridge and Templeman held that it could have no legal effect but was subject to judicial review. Lord Brandon expressed no opinion. The source of this confusion was the National Health Service Act 1977, which gave the Secretary of State a duty 'to meet all reasonable requirements' for providing contraceptive advice, so that the question whether the circular was issued under specific statutory authority was arguable either way. In another case the court reviewed a government circular about taxation without considering whether it could have legal force.[9] The curiosity of these decisions was noted in the context of remedies.[10] It has been accepted in Scotland that a circular delegating a function from a chief constable to an

[7] *Patchett* v. *Leathem* (above) at 70.

[8] *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112. For comment see (1986) 102 *LQR* 173 (Wade).

[9] *R.* v. *Secretary of State for the Environment ex p. Greenwich LBC* [1989] COD 530. Similarly declarations were made by the Court of Appeal in *R.* v. *Deputy Governor of Parkhurst Prison ex p. Hague* [1992] 1 AC 58, holding that a Prisons Department circular was contrary to the Prison Rules 1964. And see *R.* v. *Secretary of State ex p. Pfizer Ltd.* [1999] 3 CMLR 875. where a Department of Health circular advised doctors not to prescribe the drug Viagra save in exceptional circumstances. It was said to be 'for guidance only' but prevented GPs from fulfilling their statutory duty to exercise their clinical judgment in each case. It was held to be unlawful, as well as contrary to the EU law forbidding quantitative restrictions on imports.

[10] Above, p. 571.

assistant chief constable could have legal effect, against the terms of the relevant regulation.[11]

It is now the practice to publish circulars which are of any importance to the public and for a long time there has been no judicial criticism of the use made of them.

Amendment, revocation, dispensation

In addition to providing that statutory powers and duties may be exercised and performed from time to time as occasion requires,[12] the Interpretation Act 1978 also lays down that a statutory power to make 'rules, regulations or byelaws' or statutory instruments shall be construed as including a power to revoke, amend or re-enact them, subject to the same conditions as applied to the making of them.[13] This is to be done, of course, only in so far as no contrary intention appears in the empowering Act.

When an Act is repealed, any rules or regulations made under it cease to have effect,[14] despite the statutory saving clause for things done while the Act was in force.[15] But where an Act is repealed and replaced, with or without modification, rules, etc. made under it are treated as if made under the new Act in so far as that Act gives power to make them.[16] Rules also continue in force notwithstanding any change in the person or body constituting the rule-making authority.[17]

So long as its rules stand, a public authority has no power to grant dispensation from them, either generally or in particular cases.[18] Whether there may be an exception to this rule in the case of formal or procedural irregularities is controversial. This has already been discussed in the context of waiver.[19]

[11] *Rooney* v. *Chief Constable, Strathclyde Police* 1997 SLT 1261 (assistant chief constable's acceptance of constable's resignation upheld although jurisdiction under statutory regulations to accept resignation vesting in chief constable).

[12] s. 12; above, p. 229.

[13] s. 14. But note the need for consistency: above, p. 372.

[14] *Watson* v. *Winch* [1916] 1 KB 688.

[15] Interpretation Act 1978, s. 16.

[16] s. 17. Even where s. 17 is not applicable, the byelaws made under a repealed Act may be saved: *DPP* v. *Jackson* (1990) 88 LGR 876 (strained interpretation, 'not . . . intended by draftsman', of s. 272 of the Local Government Act 1972 adopted to preserve byelaws made under the repealed Local Government Act 1933); and see *Aitken* v. *South Hams DC* [1995] 1 AC 262; *B* v. *B* [1995] 1 WLR 440.

[17] *Wiseman* v. *Canterbury Bye-Products Co. Ltd.* [1983] 2 AC 685.

[18] *Yabbicom* v. *King* [1899] 1 QB 444; *Bean (William) & Sons* v. *Flaxton Rural District Council* [1929] 1 KB 450; above, p. 248.

[19] Above, pp. 239–41.

JUDICIAL REVIEW

Control by the courts

In Britain the executive has no inherent legislative power.[20] It cannot, as can the French government, resort to a constitutional *pouvoir réglementaire* when it is necessary to make regulations for purposes of public order or in emergencies. Statutory authority is indispensable, and it follows that rules and regulations not duly made under Act of Parliament are legally ineffective. Exceptions have been made, it is true, in the case of a number of non-statutory bodies.[21] But they do not alter the fact that the courts must determine the validity of delegated legislation by applying the test of ultra vires, just as they do in other contexts. It is axiomatic that delegated legislation no way partakes of the immunity which Acts of Parliament enjoy from challenge in the courts, for there is a fundamental difference between a sovereign and a subordinate law-making power. Even where, as is often the case, a regulation is required to be approved by resolutions of both Houses of Parliament, it still falls on the 'subordinate' side of the line, so that the court may determine its validity.[22] Only an Act of Queen, Lords and Commons is immune from judicial review.

The court has to look for the true intent of the empowering Act in the usual way. A local authority's power to make byelaws, for example, will not extend to allow it to modify Acts of Parliament. A county council's byelaw was accordingly void when it forbade betting in public places altogether whereas the applicable Act of Parliament allowed it under certain conditions.[23] A straightforward example of the ultra vires principle was where the House of Lords invalidated an order of the Minister of Labour which would have imposed industrial training levy on clubs which were not within the Industrial Training Act 1964.[24] Another was where the Inland Revenue made regulations taxing dividends and interest paid by building societies on which tax had already been paid.[25] Where the statute permitted the Secretary of State to make regulations to distribute air traffic between airports he could not make regulations that prohibited the traffic altogether.[26] And where

[20] Except where the law breaks down and martial law is in force (above, p. 865). The Crown's prerogative power to legislate for colonies acquired by cession or conquest is also an exception, but it has been superseded by the British Settlement Acts 1887–1945 and the Foreign Jurisdiction Acts 1890–1913.

[21] For the judicial enforcement of the rules of such bodies see above, p. 631.

[22] See above, pp. 26, 379; below, p. 883.

[23] *Powell* v. *May* [1946] 1 KB 330.

[24] *Hotel & Catering Industry Training Board* v. *Automobile Pty Ltd.* [1969] 1 WLR 697.

[25] *R.* v. *Inland Revenue Commissioners ex p. Woolwich Equitable Building Society* [1990] 1 WLR 1400 (the society recovered £57 m.).

[26] *Air 2000 Ltd.* v. *Secretary of State for Transport* 1989 SLT 698; *Air 2000 Ltd.* v. *Secretary of State for Transport* 1990 SLT 335 (regulations compelling flights to land at Prestwick invalid).

the statute permitted the minister to limit the number of aircraft landing at an aerodrome in order to mitigate noise, he could not make a scheme that limited the amount of noise rather than the number of aircraft.[27] A provision of the Prison Rules was ultra vires because it authorised excessive interference with prisoners' correspondence.[28] In holding a social security regulation to be ultra vires Laws J said:

> I do not consider there to be much room for purposive constructions of subordinate legislation; where the executive has been allowed by the legislative to make law, it must abide strictly by the terms of its delegated authority.[29]

Despite their strict standards, the courts will lean in favour of upholding a regulation which forms part of a statutory scheme and which has long been relied upon in property transactions.[30] It is probably not necessary to the validity of an order or regulation that it should specify the source of the power exercised.[31]

Constitutional principles

It is axiomatic that primary constitutional statutes such as the Bill of Rights 1688, Act of Settlement 1700 and, now, the Human Rights Act 1998 are just as subject to repeal or amendment as any others, since constitutional guarantees are inconsistent with the unlimited sovereignty of Parliament. Safeguards like those provided in the constitution of the United States, or in 'entrenched provisions' in some Commonwealth countries, are unknown in this country. Faced with an Act of Parliament, the court can do no more than make certain presumptions, for example that property will not be taken without compensation.[32] There is also a common law presumption that any ambiguity in a statute should be resolved in favour of the interpretation that was consistent with the European Convention on Human Rights.[33] The Human Rights Act 1998 has now greatly strengthened this protection. Henceforth delegated legislation must be read and given effect, so far as possible, in a way which is compatible with the Convention rights.[34]

[27] *R.* v. *Secretary of State for Transport ex p. Richmond LBC* [1994] 1 WLR 74 (scheme allowing operators to fix the number of landings within specified noise quota invalid).

[28] *R.* v. *Home Secretary ex p. Leech* [1994] QB 198.

[29] *R.* v. *Secretary of State for Social Security ex p. Sutherland* [1997] COD 222.

[30] As in *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 QB 223.

[31] See *Milk Board* v. *Grisnich* (1995) 126 DLR (4th) 191 (Supreme Court of Canada); *Harris* v. *Great Barrier Reef Marine Park Authority* (1999) 162 ALR 651 (Federal Court of Australia).

[32] Above, p. 166.

[33] *R.* v. *Miah* [1974] 1 WLR 683 at 694 (Lord Reid).

[34] Act of 1998, s. 3(1). See above, p. 171, for the provisions about interpretation and incompatibility. Since it is 'unlawful' for public authorities to act incompatibly with Convention rights (s. 6(1)), subordinate legislation that breaches the Convention is itself unlawful to that extent. For the technical difficulties in challenging subordinate legislation made before the 1998 Act came into force see [2000] *European Human Rights Law Review* 116 (D. Squires).

But even before the 1998 Act the judges often treated fundamental rights as exempt from infringement unless Parliament expressed itself with unmistakable clarity. An example occurred in 1921 under the Defence of the Realm Regulations, which gave the Food Controller power to make regulations for controlling the sale, purchase, consumption, transport etc., of food, and to control prices. The Controller gave a dairy company a licence to deal in milk, but on condition that they paid a charge of two pence per gallon, as part of a scheme for regulating prices and controlling distribution. The company expressly agreed to accept this condition, but later refused to pay the charge. It was held by the House of Lords that the condition infringed the famous provision of the Bill of Rights 1689, that no money may be levied to the use of the Crown without consent of Parliament; and that even the company's own written consent could not legalise what the statute made illegal.[35] The argument that the general power to impose controls impliedly included the power to tax was rejected. Atkin LJ said:

> The circumstances would be remarkable indeed which would induce the courts to believe that the Legislature had sacrificed all the well-known checks and precautions, and, not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department.

In the Second World War the statute itself silenced all such arguments by supplementing its general provision with a battery of specific powers.[36] But in a case from the earlier war a regulation was held invalid because it purported to authorise requisitioning of property without fair compensation at market value, and without any right to dispute the value in a court of law.[37]

In the absence of clear Parliamentary sanction delegated legislation will not be able to have retrospective operation—at any rate where a criminal penalty is imposed. In the past there was scant authority for this. But now the European Convention on Human Rights has been incorporated into domestic law.[38] The Convention outlaws retrospective criminal offences (including the imposition of a heavier penalty than that which existed at the time of the offence).[39] And the Human Rights Act 1998 requires that, if possible, subordinate legislation be read and given effect in a way that is compatible with the Convention.[40] Where the legislation does not create an offence retrospective delegated legislation may be valid even if there are no words expressly sanctioning it. However, since Parliament

[35] *A.-G.* v. *Wilts. United Dairies Ltd.* (1921) 37 TLR 781, (1922) 127 LT 822. But contrast *Institute of Patent Agents* v. *Lockwood* [1894] AC 347.

[36] Above, p. 419.

[37] *Newcastle Breweries* v. *The King* [1920] 1 KB 854.

[38] By the Human Rights Act 1998. See above, p. 166.

[39] Article 7. See *R.* v. *Oliver* [1944] KB 68 for an example of the imposition of a heavier penalty.

[40] Act of 1998, s. 3(1).

uses its power to legislate retrospectively only sparingly, it seems unlikely to confer such a power impliedly.[41]

The right of access to the courts is a matter that the courts themselves guard strictly,[42] and has led to the overthrow of both wartime and peacetime regulations. In 1920 a Defence of the Realm Regulation was held ultra vires because, in order to prevent disturbance of munition workers, it provided that no one might sue for possession of a munition worker's house without the permission of the Minister.[43] So extreme a disability, it was held, could only be imposed by express enactment; and it could not really be said to be relevant to the public safety or the defence of the realm. In 1937 a byelaw made by the Wheat Commission, which had power to make byelaws for the settlement by arbitration of disputes under the Wheat Act 1932, was invalidated in the House of Lords because it purported to exclude the Arbitration Act 1889 from applying to any such arbitration, and thus it purported to exclude the right to carry a point of law to the High Court.[44] In 1997 the Lord Chancellor, who had statutory power to fix court fees, purported to repeal the regulation that exempted persons in receipt of income support from the payment of fees and in other cases allowed the Lord Chancellor to waive the fees. It was held that the right of access to the courts was a common law constitutional right which could only be abrogated by express statutory authority. The Lord Chancellor's repealing order was declared unlawful.[45] There are many similar examples.[46]

A particularly robust judicial defence of fundamental rights purportedly removed by delegated legislation is found in a decision on the regulations which excluded asylum seekers (who did not claim asylum on arrival in the UK) from any social security benefit payments.[47] The regulations deprived asylum seekers of basic subsistence while their claims to asylum were determined. This constituted a 'serious impediment' to their exercise of their rights under the Asylum

[41] Cf. *Blyth* v. *Blyth* [1966] AC 643, 666 (presumption against retrospectivity has no effect in procedural and evidential matters).

[42] As by resisting attempts to oust their jurisdiction: above, p. 717.

[43] *Chester* v. *Bateson* [1920] 1 KB 829; and see *Raymond* v. *Honey* [1983] 1 AC 1.

[44] *R. & W. Paul Ltd.* v. *The Wheat Commission* [1937] AC 139; and see *Commissioners of Customs and Excise* v. *Cure and Deeley Ltd.* [1962] 1 QB 340 (below, p. 882).

[45] *R.* v. *Lord Chancellor ex p. Witham* [1998] QB 575 (Laws J). For comment see (1997) *CLJ* 474 (Elliott). But access to the statutory bankruptcy scheme was not so protected; this was a 'benign administrative system' to deal with a debtor who could not pay his debts not a matter of constitutional right: *R.* v. *Lord Chancellor ex p. Lightfoot* [1999] 2 WLR 1126 (Laws J) [2000] 2 WLR 318 (CA). For comment see (1998) *Judicial Review* 217 (Elliott). In *R.* v. *Home Secretary ex p. Pierson* [1998] AC 539 at 575 it was doubted (Lord Browne-Wilkinson) whether *ex p. Witham* was correct in requiring express words—necessary implication would suffice.

[46] For instance, *R.* v. *Home Secretary ex p. Leech* [1994] QB 198 (interference with prisoner's correspondence with solicitor infringed right of access to courts).

[47] *R.* v. *Secretary of State for Social Security ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (CA).

and Immigration Appeals Act 1993. Simon Brown LJ said that the regulations were:[48]

> 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 horns of so intolerable a dilemma: the need either to abandon their claim to refugee status or alternatively to maintain them . . . in a state of utter destitution. Primary legislation alone could achieve that sorry state of affairs.

And he quoted from a judgment of Lord Ellenborough CJ holding that 'the law of humanity, which is anterior to all positive laws, obliges us to afford them ['poor foreigners'] relief, to save them from starving'.[49]

Judicial intervention in all these cases has been justified in terms of classic constitutional principle: Parliament could never have intended to authorise such infractions of fundamental rights and principles. Thus the offending regulation was ultra vires and void. Parliament has now, by the enactment of the Human Rights Act 1998, strengthened the judicial role in ensuring that delegated legislation does not intrude upon Convention rights. But once more this is in accord with constitutional principle: subject to the paramountcy of European Community law, Parliament remains supreme. And the judges, however bold and creative, must operate within that framework.

Conflict with European Union law

The paramountcy of European Union law requires that delegated legislation, along with domestic law generally, should give way to EU law which is 'directly applicable', i.e. which takes effect without the aid of domestic legislation; and that domestic courts should give effect to this principle. An example was where a Northern Ireland sex discrimination order made a certificate of the Secretary of State conclusive evidence of the ground of dismissal of a woman police officer, thus violating an EC Council directive requiring an effective judicial remedy in such matters; since the directive was directly applicable, the dismissed officer could enforce it in a domestic court.[50] Other examples of regulations and orders held void for similar reasons are to be found in cases already discussed.[51]

[48] At 293. But Parliament in fact enacted the substance of the impugned regulations in primary legislation with retrospective effect shortly thereafter (Asylum and Immigration Act 1996, s. 11). Asylum seekers are now entitled to special benefits largely given in kind. See above, p. 80.

[49] *R. v. Inhabitants of Eastbourne* (1803) 4 East 103 at 107.

[50] *Johnston* v. *Chief Constable of the Royal Irish Constabulary* [1987] QB 129 (ECJ). For a comparable case under the Human Rights Convention see *Tinnelly & Sons Ltd.* v. *UK* (1999) 27 EHRR 249 (above, p. 725).

[51] In *R.* v. *Secretary of State for Transport ex p. Factortame Ltd.* (No. 2) [1990] 1 AC 603 (above, pp. 28, 198) regulations as well as an Act were required to be disapplied. In *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] QB 716 (above, p. 786) a ministerial order was unlawful on account of conflict with the EC Treaty.

Uncertainty

A regulation or byelaw whose meaning cannot be ascertained with reasonable certainty is ultra vires and void.[52] Thus a local authority byelaw which ordained that 'no person shall wilfully annoy passengers in the streets' was struck down.[53] And a byelaw forbidding the flying of hang-gliders over a pleasure ground without specifying the height below which the offence was committed was also invalid.[54]

The decided cases reveal two approaches to determining whether a byelaw is sufficiently uncertain to render it invalid. Is it necessary that the byelaw must contain 'adequate information as to the duties of those who are to obey'[55] or is a byelaw invalid only if 'it can be given no meaning or no sensible or ascertainable meaning'?[56] The Court of Appeal prefers the latter approach; and has upheld byelaws notwithstanding that the plan outlining the lands by way of a thickly drawn line to which they applied 'could have been better and clearer'. This was because 'however narrow and precise the line on a map, there will always be . . . a borderline of uncertainty'.[57] The Court of Appeal cited a speech of Lord Denning in the House of Lords, where he said:[58]

> But if the uncertainty stems only from the fact that the words of the byelaw are ambiguous, it is well settled that it must, if possible, be given such a meaning as to make it reasonable and valid, rather than unreasonable and invalid . . . It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them.

Adequate guidance to those who must obey the byelaws is important.[59] But absolute certainty may be impossible to achieve and the existence of some ambiguity is often inevitable. Where the byelaw creates an offence ambiguous words will be construed so as to avoid a penalty: 'A man is not to be put in peril upon an ambiguity'.[60]

[52] *McEldowney* v. *Forde* [1971] AC 632 at 665 (Lord Diplock).

[53] *Nash* v. *Findlay* (1901) 85 LT 682.

[54] *Staden* v. *Tarjanyi* (1980) 78 LGR 614. It had already been held that it was permissible to fly at a height at which no one could be inconvenienced: *Lord Bernstein of Leigh* v. *Skyviews and General Ltd.* [1978] QB 479.

[55] *Kruse* v. *Johnson* [1898] 2 QB 91 at 108 (Mathew J).

[56] *Fawcett Properties Ltd.* v. *Buckingham CC* [1961] AC 636 at 677–78 (Lord Denning).

[57] *Percy* v. *Hall* [1996] 4 All ER 522 at 532 (Simon Brown LJ) upholding the byelaws, the Forest Moor and Menwith Hill Station Byelaws 1996, previously held uncertain in *Bugg* v. *DPP* [1993] QB 473. The plaintiffs had entered the Menwith Hill Station on many occasions (in breach of the byelaws) and had been arrested and removed.

[58] Ibid.

[59] But what does 'adequate' mean in this context? See *Percy* v. *Hall* at 534.

[60] *London and North Eastern Rly Co.* v. *Berriman* [1946] AC 278 at 313–14 (Viscount Simonds). See to like effect *Fawcett Properties* at 662 (Lord Cohen) and *Percy* v. *Hall* at 534.

Correction of Obvious Drafting Errors

Where 'Homer, in the person of the draftsman [of an Act of Parliament], nodded' and omitted words from a statute necessary to secure its purpose, those words may, in appropriate circumstances, be read into the statute.[61] The rule is the same for delegated legislation.[62] Before exercising this power the intended purpose of the legislation in question must be clear, but through the inadvertence of the draftsman effect has not been given to that purpose. In addition the substance of what the legislator would have done, if aware of the error, must be obvious.[63] In assessing these matters the court may have regard to extraneous materials such as explanatory notes and decision letters.[64] Thus an Order made by the Secretary of State authorising the levying of tolls on traffic crossing the Humber Bridge, which inadvertently omitted to levy a toll on large buses, was construed, after reference to extraneous materials, as containing that provision.[65]

Unreasonableness

Just as with other kinds of administrative action, the courts must sometimes condemn rules or regulations for unreasonableness.[66] In interpreting statutes it is natural to make the assumption that Parliament could not have intended powers of delegated legislation to be exercised unreasonably, so that the legality of the regulations becomes dependent upon their content. Only an indistinct line, however, can be drawn between the examples which follow and the examples of constitutional limits already given.

This assumption has often been called into play in the case of local authorities' byelaws, which they are empowered to make for the good rule and government of their area and for the suppression of nuisances.[67] In the leading case, where in fact the court upheld a byelaw against singing within fifty yards of a dwelling-house, it was said:[68]

If, for instance [byelaws] were found to be partial and unequal in their operation as between

[61] *Inco Europe Ltd* v. *First Choice Distribution* [2000] 1 WLR 586 (HL) at 589 (Lord Nicholls). The principle is not limited to the insertion of necessary words. Words may be substituted or omitted as required (at 592).

[62] *R. (Confederation of Passenger Transport UK)* v. *Humber Bridge Board* [2003] EWCA 842; [2004] 2 WLR 98 (CA), paras. 34–38 adopting the *Inco Europe* approach.

[63] *Confederation of Passenger Transport UK*, *ibid.*

[64] *Confederation of Passenger Transport UK*, paras. 48–52.

[65] *Confederation of Passenger Transport UK.*

[66] Above, p. 532. See (1973) 36 *MLR* 611 (A. Wharam).

[67] Local Government Act 1972, s. 235. The doctrine was developed originally for the byelaws or regulations made by chartered corporations and other institutions under common law powers: *Slattery* v. *Naylor* (1888) 13 App. Cas. 446 at 452.

[68] *Kruse* v. *Johnson* [1898] 2 QB 91 (Lord Russell CJ).

different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But . . . a byelaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient . . .

But a byelaw which forbade playing music, singing or preaching in any street, except under express licence from the mayor, was held void as being plainly arbitrary and unreasonable.[69] The same fate befell a byelaw which prohibited selling cockles on the beach at Bournemouth without the agreement of the Corporation[70] and a byelaw which restricted sales by auction in a public market.[71] The Supreme Court of Canada upholds 'the rule of administrative law that the power to make byelaws does not include a power to enact discriminatory provisions'.[72] This is 'a principle of fundamental freedom'.

Byelaws have often failed to pass the test of reasonableness, which in some respects is strict in relation to the wide words of the statutory power. Clear examples of unreasonable byelaws were where landlords of lodging-houses were required to clean them annually under penalty, yet would in many cases have no right of access against their lodgers;[73] and where a building byelaw required an open space to be left at the rear of every new building, so that in many cases it became impossible to build new extensions to existing buildings.[74] But the court normally construes byelaws benevolently and upholds them if possible, as already explained.[75]

The same doctrine applies to rules and regulations as well as to byelaws. It is true that where the power is granted to a minister responsible to Parliament, the court is less willing to suppose that Parliament intended his discretion to be limited; and this attitude is further reinforced if the regulations themselves must be laid before Parliament. On these grounds the Ministry of Transport's regulations for pedestrian crossings were upheld in 1943, despite the argument that to give the right of

[69] *Munro* v. *Watson* (1887) 57 LT 366.

[70] *Parker* v. *Bournemouth Cpn.* (1902) 66 JP 440; and see *Moorman* v. *Tordoff* (1908) 98 LT 416.

[71] *Nicholls* v. *Tavistock UDC* [1923] 2 Ch. 18.

[72] *Re City of Montreal and Arcade Amusements Inc.* (1985) 18 DLR (4th) 161, holding invalid a byelaw prohibiting minors from entering amusement halls or using amusement machines. Challenge to the validity of byelaws is particularly common in Canada.

[73] *Arlidge* v. *Mayor etc. of Islington* [1909] 2 KB 127.

[74] *Repton School Governors* v. *Repton RDC* [1918] 2 KB 133. See also *A.-G.* v. *Denby* [1925] 1 Ch. 596 (building byelaw uncertain and unreasonable); *London Passenger Transport Board* v. *Sumner* (1935) 154 LT 108 (byelaw penalising non-payment of fare unreasonable); *Cassidy* v. *Minister for Industry and Commerce* [1978] IR 297 (unreasonable price control order).

[75] Above, p. 879; *Kruse* v. *Johnson* (above); *Townsend (Builders) Ltd.* v. *Cinema News and Property Management Ltd.* [1959] 1 WLR 119; *Cinnamond* v. *British Airports Authority* [1980] 1 WLR 582.

way to pedestrians was unreasonable during the nightly wartime blackout.[76] But in a later case a purchase tax regulation made by the Commissioners of Customs and Excise, and duly laid before Parliament, was held invalid.[77] The Commissioners had power to make regulations 'for any matter for which provision appears to them to be necessary' for the purpose of collecting purchase tax. Their regulation provided that where a proper return was not made they might themselves determine the tax due and that the amount so determined should be deemed to be the proper tax payable. This was held ultra vires as an attempt to take arbitrary power to determine a tax liability which was properly to be determined according to the Act with a right of appeal to the court, and as an attempt to oust the court's jurisdiction. The court regarded the regulation as an arbitrary and unreasonable exercise of the power conferred. This case well shows how even the widest power will admit judicial review. So does another case from the same department where a Customs and Excise regulation was held to be ultra vires because it purported to empower the authorities to inspect all the records of a business, instead of being limited to records of dutiable goods.[78]

One of the Home Secretary's immigration rules, which restricted the admission of dependent relatives to those 'having a standard of living substantially below that of their own country', was 'manifestly unjust and unreasonable' and also 'partial and unequal in its operation as between different classes', and therefore invalid.[79] The rules had been laid before Parliament. So too, an asylum appeal procedure rule that 'deemed [a notice of a right of appeal to the Immigration Appeal Tribunal] to have been received . . . on the second day after which it was sent regardless of when or whether it was received . . .' was held unreasonable and of no effect. The rule was 'not necessary to achieve the timely and effective disposal of appeals and may deny an asylum seeker just disposal of her appeal'.[80] In one exceptional case, also, regulations were quashed for unfair procedure in the consultation of one business specially affected.[81]

As these cases show, judicial review is not normally inhibited by the fact that rules or regulations have been laid before Parliament and approved, though account must be taken of the House of Lords' decisions which raise the threshold of unreasonableness in cases dominated by questions of political judgment.[82] The Court of Appeal has emphasised that in the case of subordinate legislation such as

[76] *Sparks* v. *Edward Ash Ltd.* [1943] KB 223.

[77] *Commissioners of Customs and Excise* v. *Cure and Deeley Ltd.* [1962] 1 QB 340 (Sachs J); above, p. 423. The Crown did not appeal.

[78] *R.* v. *Customs and Excise Commissioners ex p. Hedges and Butler Ltd.* [1986] 2 All ER 164, holding that the power to provide for 'incidental or supplementary' matters did not assist.

[79] *R.* v. *Immigration Appeal Tribunal ex p. Begum Manshoora* [1986] Imm. AR 385 (tribunal's decision quashed). The phrases quoted are from *Kruse* v. *Johnson*, above.

[80] *R.* v. *Home Secretary ex p. Saleem* [2001] 1 WLR 443 (CA) (notice sent to old address). The rules were also discriminatory: notice to the appellate authority deemed received when 'in fact received'.

[81] This was the *United States Tobacco* case, below, p. 898.

[82] See above, p. 379.

an Order in Council approved in draft by both Houses, 'the courts would without doubt be competent to consider whether or not the Order was properly made in the sense of being intra vires'.[83]

Subjective language

The purchase tax case also illustrates the court's refusal to be disarmed by language which appears to make the legislating authority the sole judge of the extent of its power or of the purposes for which it may be used. Even where the Act says that the minister may make regulations 'if he is satisfied' that they are required, the court can enquire whether he could reasonably have been satisfied in the circumstances. A number of instances of the application of this principle to subordinate legislation have been given in an earlier chapter[84] and need not be repeated here.

Wrong purposes and bad faith

An Act of Parliament is immune from challenge on the ground of improper motives or bad faith, even in the case of a private Act allegedly obtained by fraud.[85] But subordinate legislation is necessarily subject to the principle of ultra vires. Since delegated powers of legislation are nearly always given for specific purposes, their use for other purposes will be unlawful.[86] Here again we can refer back to an earlier chapter for illustrations. One clear case of legislation being condemned for improper purposes was the Western Australian decision that regulations prescribing bus routes were invalid since their object was to protect the state-owned trains from competition.[87] In Canada municipal byelaws have been set aside where they were made with the object of restricting or penalising some individual owner of property rather than for the general benefit.[88] The Privy Council has clearly

[83] *R.* v. *HM Treasury ex p. Smedley* [1985] QB 657 (unsuccessful challenge to proposal to pay British contribution to the European Communities without specific statutory authority). See also *R.* v. *Secretary of State for the Environment ex p. Greater London Council* (unrep., 3 April 1985) discussed in 1985 SLT at 373 (C. M. G. Himsworth). Confirmed in *R. (Javed)* v. *Home Secretary* [2001] EWCA Civ. 789; [2002] QB 129 at 147.

[84] Above, pp. 423 and 427.

[85] *Pickin* v. *British Railways Board* [1974] AC 765.

[86] *Yates (Arthur) & Co. Pty Ltd.* v. *Vegetable Seeds Committee* (1945) 72 CLR 37 contains a valuable discussion by Dixon J of the law applicable to legislative and administrative acts, holding that regulations restricting dealings in seeds would be invalid if intended to promote the Committee's own trade rather than to ensure the supply of seeds in the market.

[87] *Bailey* v. *Conole* (1931) 34 WALR 18, above, p. 396.

[88] *Boyd Builders Ltd.* v. *City of Ottawa* (1964) 45 DLR (2d) 211; *Re Burns and Township of Haldimand* (1965) 52 DLR (2d) 101.

approved the same principle,[89] and hints to the same effect have been dropped in the House of Lords.[90] Many Colonial and Commonwealth legislatures have power 'to make laws for the peace, order and good government of the relevant territory'. When the legislative authority of the British Indian Ocean Territory (a Commissioner appointed by the Crown) made—for reasons of military security—an ordinance for the compulsory removal of the entire population of the BIOT, the Divisional Court condemned this as 'an abject legal failure'. The legislation could not be said 'reasonably ... to touch the peace, order and good government of BIOT'.[91] The words, 'peace, order and good government' had previously been held to 'connote ... the widest law-making powers appropriate to a sovereign',[92] so this decision is ground breaking. Especially where fundamental rights are engaged, it promises significant judicial scrutiny of the exercise of such legislative powers.

Natural justice

One context in which legislative and administrative functions must be distinguished is that of natural justice.[93] This was made clear in a case arising out of the abolition of the scale fees formerly charged by solicitors in conveyancing business. Under the Solicitors Act 1957[94] solicitors' charges were regulated by a statutory committee, which had to submit its orders in draft to the Law Society and allow them a month for comment. This procedure was followed in the case of the draft order of 1972 abolishing scale fees. But a member of another association of solicitors, which was not consulted, sought a declaration and injunction in order to postpone the making of the order and to allow wider consultation. Refusing these remedies Megarry J said:[95]

> Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. ... I do not know of any implied right to be consulted or make

[89] *A.-G. for Canada* v. *Hallett & Carey Ltd.* [1952] AC 427 at 444; above, p. 428.

[90] *Scott* v. *Glasgow Cpn.* [1899] AC 470 at 492; and see *Baird (Robert) Ltd.* v. *Glasgow Cpn.* [1936] AC 32 at 42.

[91] *R. (Bancoult)* v. *Secretary of State for the Foreign and Commonwealth Office* [2001] QB 1067 (Laws LJ) (decision also based on *Wednesbury* alone and intrusion upon fundamental rights without specific provision). Discussed in detail [2001] *PL* 571 (A. Tomkins).

[92] *Ibrahebbe* v. *The Queen* [1964] AC 900, 923.

[93] Above, p. 552, citing additional cases.

[94] Since replaced by the Solicitors Act 1974.

[95] *Bates* v. *Lord Hailsham* [1972] 1 WLR 1373 at 1378. For comment on the first sentence see above, p. 493. See also *Fedsure Life Assurance Ltd.* v. *Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (South African Constitutional Court).

objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

Since it was plain that the proposed order was legislative rather than executive, there was no room for the principle that persons affected must be given a fair hearing.

Difficult problems may therefore lie ahead in the wide area in which legislative and administrative functions overlap. But although the law gives no general right to be consulted, a duty of consultation is widely acknowledged in practice and sometimes also by statute, as was the duty to consult the Law Society in the above case. And special circumstances may give rise to exceptions, as mentioned below.[96]

With reference to the other principle of natural justice, that no man may be judge in his own cause, it has been held that a regulation empowering an insurance commission to decide claims against its own insurance fund is not for this reason invalid, at any rate where the power delegated is wide.[97]

The right to reasoned decisions under the Tribunals and Inquiries Act 1992 is expressly excluded in the case of rules, orders or schemes 'of a legislative and not an executive character'.[98]

Procedural errors

Innumerable statutes empower delegated legislation by various procedures, some requiring the laying of drafts before Parliament or the laying of orders before Parliament when made, others prescribing consultation with advisory bodies or with persons affected. There is thus ample scope for false steps in procedure. Errors of this kind will invalidate the legislation if the statutory procedure is mandatory, but not if it is merely directory. Once again, the principle is the same as in the case of other administrative action.[99]

A statutory duty to consult is a matter of importance and so normally mandatory. In one case a minister was required, before making an industrial training order, to consult associations appearing to him to be representative of those concerned. He invited numerous organisations to consult with him about an order for the agricultural industries, but in one case the letter miscarried so that the mushroom growers' association was not consulted. Members of the association, it was held, were not bound by the order, since a mandatory requirement had not been observed.[1] And in another case the legislation provided that draft regulations were to be referred to an advisory committee unless the committee agreed otherwise.

[96] Below, p. 898 (the *United States Tobacco* case).
[97] *Low* v. *Earthquake and War Damage Commission* [1959] NZLR 1198.
[98] s. 10(5)(b).
[99] Above, p. 221.
[1] *Agricultural etc. Training Board* v. *Aylesbury Mushrooms Ltd.* [1972] 1 WLR 190.

Where the committee was misled into agreeing, the subsequent regulations were invalid.[2]

From time to time there are serious oversights in procedure which demand legislation to put matters right. In 1954 the government were obliged to concede, in an unreported case, that the Post Office had for many years collected charges for wireless transmitting and receiving licences without legal authority, and therefore presumably contrary to the Bill of Rights. The Wireless Telegraphy Act 1904 empowered the Postmaster-General to make regulations for collecting the fees, but no regulations had ever been made. Retrospective legislation was at once enacted by Parliament to cure the default.[3] In 1972 it was necessary to validate national insurance regulations which had not been made by the correct authority.[4]

How far the validity of regulations may be affected by failure to follow the prescribed procedure for publishing them is separately dealt with below.[5]

Sub-delegation

The general rule against sub-delegation of statutory powers, encountered once already, turns upon statutory construction.[6] If Parliament confers power upon A, the evident intention is that it shall be exercised by A and not by B. But where power is conferred upon a minister, it is (as we have seen)[7] taken for granted that his officials may exercise it in his name, since that is the normal way in which government business is done. This is as true of legislative as of administrative powers.[8] Many ministerial regulations, though made in the minister's name, are validly signed by officials, with or without the minister's official seal.[9]

Delegation to some different authority is another matter. In accordance with general principle, and with the few available authorities,[10] it seems safe to presume that unless Parliament expresses or implies a dispensation, legislative power must be exercised by those to whom it is given, and not by further delegates. But this presumption is subject to circumstances, and may be greatly weakened in time of emergency. Power to make regulations was freely delegated in the First World War, although the Defence of the Realm Act did not authorise it expressly. No case came before the courts to show whether delegation was lawful. But in the Second World

[2] *Howker* v. *Secretary of State for Work and Pensions* [2002] EWCA Civ. 1623; [2003] ICR 405. The committee was misled by the Secretary of State's officials.
[3] Wireless Telegraphy (Validation of Charges) Act 1954.
[4] National Insurance Regulations (Validation) Act 1972.
[5] Below, p. 893.
[6] Above, p. 311.
[7] Above, p. 320.
[8] See *Lewisham BC* v. *Roberts* (above, p. 320).
[9] *R.* v. *Skinner* [1968] 2 QB 700.
[10] There is a clear line of New Zealand authorities from *Geraghty* v. *Porter* [1917] NZLR 554 to *Hawke's Bay Raw Milk Products Co-operative Ltd.* v. *New Zealand Milk Board* [1961] NZLR 218; and see *King-Emperor* v. *Benoari Lal Sarma* [1945] AC 14 at 24.

War the Supreme Court of Canada held that the Governor-General's emergency powers entitled him without express authorisation to delegate the power to make regulations.[11] In Britain the Emergency Powers (Defence) Act 1939 itself gave express powers to delegate, so that an elaborate pyramid of regulations was constructed, delegated, sub-delegated, sub-sub-delegated and so on.

Partial invalidity

As several cases already cited illustrate, it is possible for delegated legislation to be partially good and partially bad.[12] In the mushroom growers' case, where the minister was required to consult certain representative associations, it was held that the industrial training order was valid as regards the organisations consulted and invalid as to those not consulted.[13] In the case of water authorities' sewerage charges the House of Lords held that the statutory instrument fixing the charges for services was valid as regards properties served by a public sewer and invalid as to others.[14] Since legislation by definition consists of general rules affecting large numbers of people, it is easy for such situations to arise, and there is no necessary reason for condemning what is good along with what is bad. On this principle an order prohibiting herring fishery, which purported to extend slightly beyond the waters covered by the Act, was held ultra vires as to the excess only, and enforceable in respect of the remainder.[15] In contrast, the House of Lords totally invalidated a byelaw which prohibited unauthorised access to Greenham Common air force base. The empowering Act provided that no such byelaw should affect the rights of commoners and there were sixty-two registered commoners with rights thus protected.[16] The striking result of this case was that anti-nuclear protesters, who were not commoners, escaped conviction for trespassing by pleading the invalidity of the byelaw. The House of Lords held that a byelaw drawn so as to permit access by commoners and their animals would be totally different in character and quite incapable of serving the purposes of security at the air base. No solution by severance was therefore feasible. The House did not accept the possibility, suggested by

[11] *Re Chemicals Regulations* [1943] SCR 1; above, p. 319.

[12] See above, p. 288, which should be read together with this section.

[13] *Agricultural Horticultural and Forestry Industrial Training Board* v. *Aylesbury Mushrooms Ltd.* [1972] 1 WLR 190.

[14] *Daymond* v. *Plymouth City Council* [1976] AC 609; above, p. 861, n. 19. See also *Malloch* v. *Aberdeen Cpn.* (No. 2) 1974 SLT 5 (regulations requiring registration of teachers void as regards teachers already employed); *Cassidy* v. *Minister for Industry and Commerce* [1978] IR 297 (order unreasonable for some purposes, but not others); *Burke* v. *Minister for Labour* [1979] IR 354 (similar); *Transport Ministry* v. *Alexander* [1978] 1 NZLR 306 (regulation partially invalid for uncertainty).

[15] *Dunkley* v. *Evans* [1981] 1 WLR 1522, rejecting the so-called 'blue pencil' test under which amendment may be made only by textual deletion.

[16] *Director of Public Prosecutions* v. *Hutchinson* [1990] 2 AC 783.

previous decisions, that the byelaw was valid against all except the commoners, who were not in fact asserting their rights.[17]

Where, as in the above cases, the valid and invalid elements are inseparably contained in the same words, there can be no possibility of effecting textual severance by merely striking out the offending words (the so-called 'blue pencil test') as is sometimes allowed where they stand apart.[18] According to the Greenham Common decision, where the words are inseparable the court 'must modify the text in order to achieve severance' and will do so only where this 'substantial severance' will effect no change in the substantial purpose and effect of the impugned provisions. Lord Bridge, with the agreement of the majority of the House, held that rigid insistence on textual severability might operate unreasonably by defeating subordinate legislation which was substantially intra vires. Lord Lowry held that it was only where the regulation first cleared the hurdle of textual severability that it could face the further hurdle of substantial severability: a more liberal doctrine would 'encourage the law-maker to enact what he pleases' and would be 'anarchic, not progressive'. Thus the House of Lords turned against the concept of relative invalidity which seemed to be emerging in the previous decisions and which, depending upon a different principle, requires no severance and no textual modification of the partially invalid law.[19]

Remedies

The commonest method of resisting an invalid regulation or byelaw is to plead its invalidity in defence to a prosecution or enforcement proceedings.[20] Parliament may, of course, restrict such defensive, or collateral, challenges and require the validity of byelaws to be tested by way of applications for judicial review.[21] But

[17] For a decision similar in principle see *Owners of SS Kalibia* v. *Wilson* (1910) 11 CLR 689, discussed by Lord Bridge [1990] 2 AC at 807. The dissenting opinion of Higgins J well expresses the relative invalidity doctrine. See also the analogous cases discussed above, p. 887.

[18] As in *R.* v. *Immigration Appeal Tribunal ex p. Begum Manshoora* [1986] Imm. AR 385 (provision of immigration rules, void for unreasonableness, severed from the rest without affecting their validity). Contrast *R.* v. *Inland Revenue Commissioners ex p. Woolwich Equitable Building Society* [1990] 1 WLR 1400 (textual severance possible but alteration of substance too great).

[19] This explains why the issue of severance was not raised in the *Daymond* and *Aylesbury Mushrooms* cases (above). Lord Bridge (at 810) suggests a doubt on the latter case and (ibid.) remarks that in the former the possibility of severance was taken for granted; and see likewise Lord Lowry (at 819). It appears that the *Daymond* and *Hutchinson* decisions are in principle in conflict.

[20] See *Boddington* v. *British Transport Police* [1998] AC, discussed above, p. 283; and see [1998] *PL* 364 (Forsyth) [1998] Judical Review 144 (Elliott); (1998) 114 *LQR* 535 (Craig). The holding in *Bugg* v. *DPP* [1993] QB 473 that only substantive invalidity could be raised as a defence was rightly rejected.

[21] Or other procedure (such as a statutory appeal) as may be available. See *R.* v. *Wicks* [1997] 2 WLR 576.

judicial review, being discretionary, is no substitute for the right to raise the invalidity of a byelaw as a defence.[22] Such restriction is only to be implied where the challenge precluded was to an administrative act—such as an enforcement notice—specifically directed at those challenging it and where there was an adequate alternative avenue for challenge.[23]

The court in suitable circumstances may also grant an injunction, for example where a local authority is threatening demolition of a building;[24] and if unjustified demolition were carried out, an action for damages would lie. Any proceedings against a central government department are subject to the Crown Proceedings Act 1947, as explained in an earlier chapter.

In several cases also the courts have granted declarations to the effect that some general order or byelaw was invalid.[25] Nor has there been any indication that this remedy will be refused on account of any lack of locus standi on the plaintiff's part.[26] The rule that the declaration is a discretionary remedy is a sufficient protection against plaintiffs who are not genuinely concerned.

Certiorari and prohibition apply to 'judicial' rather than legislative action, but the dividing line is far from distinct.[27] Mandamus, which has no such limitations, has been used to compel the making of a byelaw.[28]

Statutory restriction of judicial review

Just as with administrative powers,[29] Parliament may make delegated legislation virtually judge-proof. Normally this is done by granting very wide powers rather than by clauses restricting the jurisdiction of the courts. 'Modern drafting technique is to use words which do not exclude jurisdiction in terms but positively repose arbitrary power in a named authority'.[30] But, as already emphasised, it is almost impossible to find language wide enough to exclude judicial control entirely, when the courts are determined to preserve it.[31] All subordinate power must have legal limits somewhere.

In the past Parliament has experimented with protective clauses of varying degrees of severity. It has, for instance, been enacted that regulations purporting to

[22] See Lord Steyn in *Boddington* (above) at 663–4.
[23] See Lord Irvine in *Boddington* at 652.
[24] As in the *Repton* case, above, p. 881.
[25] This was done in both the cases of partial invalidity mentioned above; and see above, p. 683.
[26] Woolf and Zamir, *The Declaratory Judgment*, 188.
[27] See above, p. 577.
[28] See the *Manchester* case, above, p. 688.
[29] Above, p. 712.
[30] *Customs and Excise Commissioners* v. *Cure & Deeley Ltd.* [1962] 1 QB 340 at 364 (Sachs J).
[31] Above, p. 720.

be made under the Act shall be deemed to be within the powers of the Act, and shall have effect as if enacted by the Act.[32] In 1894 a majority of the House of Lords, preferring literal verbal construction to legal principle, declared that 'as if enacted in this Act' clauses made the regulations as unquestionable by a court of law as if they were actually incorporated in the Act.[33] But in 1931 the House found a more reasonable solution in a case under the Housing Act 1925, where the Minister of Health had power to confirm a housing scheme and the Act said that his order when made 'shall have effect as if enacted in this Act'. The minister, it was held, was empowered to confirm only schemes which conformed to the Act; if the scheme itself conflicted with the Act, the order was not an order within the meaning of the Act, and was not saved by the clause.[34] Lord Dunedin said:[35]

> It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether . . . it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect, it could not be touched.

Although in fact the House upheld the order on its merits, they drew the teeth of the 'as if enacted' clause—which, as the Ministers' Powers Committee recommended,[36] has now fallen into disuse.

These decisions exhibit the same dilemma that has already been pointed out in relation to statutes which take away judicial remedies. Such provisions must either be held to make lawful action which ought to be unlawful, or else they must be virtually meaningless. The long-established policy of the courts is to resist all attempts to confer unlimited executive power, and to uphold the ultra vires principle at all costs. This has been amply illustrated elsewhere.

The Ministers' Powers Committee recognised the same principle in a general recommendation about delegated legislation:[37]

> The use of clauses designed to exclude the jurisdiction of the courts to enquire into the legality of a regulation or order should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the ministerial memorandum attached to the Bill.

What has since happened in practice is that government draftsmen have preferred

[32] e.g. Foreign Marriage Act 1892, s. 21(2).

[33] *Institute of Patent Agents* v. *Lockwood* [1894] AC 347, followed in *Insurance Committee for Glasgow* v. *Scottish Insurance Commissioners* 1915 SC 504.

[34] *Minister of Health* v. *R. ex p. Yaffe* [1931] AC 494. The minister modified the scheme so as to make it conform to the Act. See likewise *McEwen's Trustees* v. *Church of Scotland General Trustees* 1940 SLT 357. Other cases involving clauses of this kind are *R.* v. *Electricity Commissioners ex p. London Electricity Joint Committee Co.* [1924] 1 KB 171; *R.* v. *Minister of Health ex p. Davis* [1929] 1 KB 619; *London Parochial Charities Trustees* v. *A.-G.* [1955] 1 WLR 42; *Foster* v. *Aloni* [1951] VLR 481.

[35] At 501.

[36] Above, p. 716.

[37] Cmd. 4040 (1932), 65.

to put their faith in clauses which confer the widest possible discretionary power rather than in clauses which attempt to exclude the jurisdiction of the court—as was observed in the opening paragraph of this section. But generally speaking the Committee's recommendation has been observed. In one case Parliament conscientiously provided that national insurance regulations which were incorporated in a subsequent Act should remain open to challenge in the same way as if they were still merely regulations.[38]

Finally it must be added that all restrictions on the reviewing powers of the courts are now likely to be challengeable as infringements of the right to a judicial determination under the Human Rights Act 1998[39] and sometimes also under European Union law.[40]

PUBLICATION

Arrangements for publication

> The maxim that ignorance of the law does not excuse any subject represents the working hypothesis on which the rule of law rests in British democracy. . . . But the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public—in the sense, of course, that, at any rate, its legal advisers have access to it, at any moment, as of right.

The theory so stated in *Blackpool Corporation* v. *Locker*[41] is of the greatest importance, but as that case itself showed, it may break down occasionally. It was long ago realised that the first remedial measure demanded by the growing stream of delegated legislation was a systematic scheme for publication and reference. The first statute was the Rules Publication Act 1893, which regulated the publication of *Statutory Rules and Orders*, begun in 1890. The statute now in force is the Statutory Instruments Act 1946, under which the title of the series has been changed to Statutory Instruments.

The Act of 1893 had two different objects. The first was, in the case of rules which had to be laid before Parliament, to give them (with some exceptions) *antecedent* publicity by requiring notice of them to be published and copies to be provided on demand. Any representations made in writing by 'a public body' had then to be considered before the rules were finally made and laid before Parliament. But these safeguards could be evaded on plea of urgency or special

[38] National Insurance Act 1965, s. 116(2).
[39] See above, p. 170.
[40] See above, p. 724.
[41] Above, p. 871.

reasons, and provisional orders could (and sometimes did) remain in force indefinitely.

The second object was to secure publication of all statutory rules (whether or not to be laid before Parliament) *after* they were made, by requiring them to be sent to the Queen's printer to be numbered, printed and sold. Statutory rules were comprehensively defined as including rules made under any Act of Parliament, by Order in Council, or by any minister or government department. The Treasury were given power to alter the effect of the definition by regulations, and a number of exceptions were so made for special cases, and the definition was confined to cases 'of a legislative and not an executive character'.[42] The great bulk of delegated legislation became subject to an orderly system of publication, and this was a great gain. Eventually a new Act was needed, and this appeared in 1946, in time to deal with the flood tide of rules and regulations which arrived with the welfare state.

The Act of 1946

The Statutory Instruments Act of 1946 came into force in 1948, repealing and replacing the Act of 1893. Its definition of 'statutory instrument' covers three categories of 'subordinate legislation' made (or confirmed or approved) under the authority of some statute:[43]

(i) Orders in Council;
(ii) Ministerial powers stated in the statute to be exercisable by statutory instrument; and
(iii) future rules made under past statutes to which the Act of 1893 applied.

As regards (iii), regulations under the Act continue the requirement that such rules shall be 'of a legislative and not an executive character'.[44] But as regards (ii), though it applies only to 'legislation', the real test is that it will only apply where Parliament provides, as it now normally does in each statute, that 'regulations made under this Act shall be made by statutory instrument'. Parliament has abandoned the attempt to define subordinate legislation by its substance, since this could never achieve precision. It now relies on itself to prescribe on each occasion that the provisions for publication etc., shall apply. For statutes made after 1947, therefore, there is a clear-cut but mechanical definition. For statutes made before 1948, the older, vaguer, but more ambitious definition continues. The Act again gives power to control the scope of the old definition by Treasury regulations.[45] And Treasury regulations may exempt any classes of statutory instruments from the requirements of being printed and sold. Exemption has been given to local

[42] SR & O 1894 No. 734 (Treasury Regulations).
[43] s. 1.
[44] SI 1947 No. 1.
[45] s. 8.

instruments,[46] and also to instruments regularly printed in some other series. Subject to this, all statutory instruments must be sent to the Queen's printer as soon as made, and must be numbered, printed and sold.[47] A Reference Committee is empowered to deal with points of difficulty as to numbering, printing, classification and so on.[48]

Reference to statutory instruments and other delegated legislation on any subject is facilitated by an official index, the Index to Government Orders in Force, published biennially. Most statutory instruments made since 1987 are available on the internet.[49]

Sub-delegated legislation

The Acts of 1893 and 1946 have been accused of a serious shortcoming, namely, that they do not extend to sub-delegated legislation. A positive opinion was expressed by Scott LJ in *Blackpool Corporation* v. *Locker*:[50]

> They are both expressly limited to such delegated legislation as is made under powers conferred by Act of Parliament, whether on HM in Council or on a minister of the Crown. Such primary delegated legislation has now (and had under the Act of 1893) to be printed forthwith by the King's Printer and published as a statutory rule or order, etc.: but for delegated legislation made under powers conferred by a regulation or other legislative instrument not being itself an Act of Parliament, there is no general statutory requirement of publicity in force today. ... The modern extent of sub-delegated legislation is almost boundless: and it seems to me vital to the whole English theory of the liberty of the subject, that the affected person should be able at any time to ascertain what legislation affecting his rights has been passed under sub-delegated powers.

In another case Scott LJ spoke feelingly of the unfairness to the public when 'administration is mixed up with sub-delegated legislation and none of the mixture is made public'.[51] But, as to the extent of the statutory definitions, it is not clear that either Act is deficient in the manner supposed.

Effect of non-publication on validity

Another question is whether the validity of rules and regulations is affected by failure to obey the statutory requirements for publication. It may be that these

[46] This exemption renders inaccessible many orders, for example those made in the Clay Cross case, mentioned in *Asher* v. *Secretary of State for the Environment* [1974] Ch. 208.

[47] s. 2.

[48] By regulations under s. 8(1)(e).

[49] See www.hmso.gov.uk/legislation

[50] [1948] 1 KB 349 at 369; above, p. 871. See likewise *Patchett* v. *Leathem* (1949) 65 TLR 69, quoted above, p. 872.

[51] *Jackson Stansfield & Sons Ltd.* v. *Butterworth* [1948] 2 All ER 558.

requirements are merely directory—that is to say, that they embody Parliament's directions, but without imposing any penalty for disobedience.[52] In one case a minister was empowered by statute to control the use of explosives in mines by order, 'of which notice shall be given in such manner as he may direct', and though he failed to give any notice, his order was upheld on the ground that the condition was directory only.[53] It would seem *a fortiori* that neglect of a general statute requiring publication would be less serious. It was, indeed, held in 1918 that an order made by the Food Controller did not take effect until it was published: A had sold 1,000 bags of beans to B on 16 May 1917, and on that same day an order was made requisitioning all such beans, but it was not published until the following day; B tried to recover his money from A but failed, since the order was held to take effect only when it was made known.[54] But the true explanation is probably that the order, as construed by the court, was intended to take effect only at that time.

This hypothesis is impliedly supported by a provision of the Statutory Instruments Act 1946. It requires the Stationery Office to publish lists showing the dates on which they issue statutory instruments, and in any proceedings against any person for offending under such statutory instruments

> it shall be a defence to prove that the instrument had not been issued by His Majesty's Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.[55]

It seems to be assumed that non-publication would not by itself be a sufficient defence, and since the provision deals only with criminal liability, it suggests that non-publication would not affect the validity of a statutory instrument altering civil rights. This was the construction adopted in a case of 1954, where a company was prosecuted for infringing an Iron and Steel Prices Order. The order had been printed, but not the schedules for it, which were extensive and bulky. The judge decided that non-publication of the schedules did not invalidate the order, because the Act made an obvious distinction between the making of the instrument and the issue of it, and the provisions for printing and publication were merely procedural.[56] The making of the instrument was complete, in his opinion, when it was made by the minister and (if so required by the empowering statute) laid before Parliament. Since the prosecution were able to prove that reasonable steps had

[52] See above, p. 221. For discussion and criticism see (1974) 37 *MLR* 510 (D. J. Lanham); [1982] *PL* 569 (A. I. L. Campbell); [1983] *PL* 385 (D. J. Lanham).

[53] *Jones* v. *Robson* [1901] 1 QB 673; and see *Duncan* v. *Knill* (1907) 96 LT 911 (order valid although statutory notice not given). But see the views expressed by the High Court of Australia in *Watson* v. *Lee* (1979) 26 ALR 461.

[54] *Johnson* v. *Sargant & Sons* [1918] 1 KB 101.

[55] s. 3(2).

[56] *The Queen* v. *Sheer Metalcraft Ltd.* [1954] 1 QB 586. See also *Smith* v. *Hingston* [2000] GWD 2–62 (s. 3(2) shows unpublished instrument not necessarily a nullity).

been taken for notification by other channels, a conviction followed. The judge's suggestion that validity might depend upon laying before Parliament is in conflict with at least two previous judicial opinions;[57] and it may be held that even that requirement, important though it is, would be held to be directory merely, as being essentially a form of supervision *ex post facto*. As we have seen, Acts of Indemnity have been used to prevent the question arising.[58]

Rules required to be laid before Parliament

We have already noticed how the Rules Publication Act 1893 provided for advance publication of regulations which had to be laid before Parliament. Laying before Parliament is commonly required by the statute under which the regulations are made, as explained below. The Statutory Instruments Act 1946 has the same objective as the Act of 1893, but prescribes a different procedure. It requires the laying to take place before the instrument comes into operation.[59] If, however, it is essential that it should come into operation before it can be laid, it may do so; but a reasoned notification must be sent to both Houses. There will obviously be occasions, especially when Parliament is not sitting, when orders may have to be brought into force urgently. The forty-day period provided by the Act of 1893 has gone, but it gave rise to so many 'provisional orders' ('provisional' merely for the purpose of avoiding it) that the Act of 1946 makes a more realistic compromise.

The Laying of Documents (Interpretation) Act 1948 allowed each House to give its own meaning to 'laying' for the purposes of the Act;[60] the Houses then made standing orders to the effect that delivery of copies to their offices should count as 'laying' at any time when a Parliament was legally in being, even though it was prorogued or adjourned at the time. The safeguards designed in 1893 were thus progressively whittled down as the weight of delegated legislation grew greater and greater.

The timetable for 'laying' has also been made more uniform by the Statutory Instruments Act 1946 in two classes of cases:

(i) instruments which are subject to annulment on an adverse resolution of either House, and

(ii) instruments which must be laid before Parliament in draft, but which may later be made if no hostile resolution is carried.

[57] *Bailey* v. *Williamson* (1873) LR 8 QB 118; *Starey* v. *Graham* [1899] 1 QB 406 at 412. But much depends upon the precise statutory language.

[58] Above, p. 886.

[59] s. 4.

[60] 'Laying' has no technical meaning: see *R.* v. *Immigration Tribunal ex p. Joyles* [1972] 1 WLR 1390 (unsuccessful challenge to validity of the immigration rules of 1970 on the ground that they were presented to Parliament but not 'laid').

The first class is much more common than the second. In order to escape from the provisions of numerous Acts which had laid down different timetables, and in order to provide one timetable for the future, it is now provided that instruments of class (i) shall be duly laid and shall be subject to annulment for forty days, and that instruments of class (ii) shall not be made within forty days of being laid. In counting the forty days, no account is taken of periods when Parliament is dissolved or prorogued, or adjourned for more than four days. It will be observed that no provision is made for regulations which expire within a time-limit unless expressly confirmed by Parliament (of which we have already met examples)[61] or for regulations which do not take effect at all unless so confirmed. In those cases the timetable is usually of intrinsic importance to the subject-matter, and is best left as it is.

PRELIMINARY CONSULTATION

Hearing of objections

In the case of rules and orders which are clearly legislative as opposed to administrative, there is normally no room for the principle of natural justice which entitles persons affected to a fair hearing in advance.[62] But where regulations, though general in form, bear particularly hardly on one person or group, an exception may be made.[63] Orders for such things as housing and planning schemes, although they may affect numerous people, are for this purpose treated by Parliament, and also by the courts, as matters of administration and not of legislation. They are subject to the procedure of preliminary public inquiry under various Acts, and also to the principles of natural justice, as we have seen.[64] The right to reasoned decisions given by the Tribunals and Inquiries Act 1992 is expressly excluded in the case of rules, orders or schemes 'of a legislative and not an executive character'.[65] But it may be presumed that the right extends to all orders and schemes of the kind just mentioned.

In the true sphere of delegated legislation, a limited legal duty to consider objections was imposed by the provision of the Rules Publication Act 1893 that the rule-making authority must consider any written representations made within the forty-day period of preliminary publicity. But this produced so little benefit that it was repealed by the Act of 1946.

[61] Above, p. 867.
[62] Above, p. 552.
[63] See the *United States Tobacco* case, below, p. 898.
[64] Above, p. 484.
[65] s. 10(5)(b).

In this respect English law has moved in the opposite direction from American law.[66] The Federal Administrative Procedure Act of 1946[67] gives a right to 'interested persons' to 'participate in the rule-making through submission of written data, views or arguments', and in some cases Congress has prescribed a formal hearing. Hearings preliminary to rule-making have thus become an important part of the administrative process in the United States. But there is often no right to an oral hearing and there is a wide exception where the authority finds 'for good cause' 'that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest'.

In Britain the practice counts for more than the law. Consultation with interests and organisations likely to be affected by rules and regulations is a firmly established convention,[68] so much so that it is unusual to hear complaint.[69] Whether or not consultation is a legal requirement, once 'embarked upon it must be carried out properly'.[70] This requires consultation while the proposals are still in a formative stage, adequate reasons for the proposals to be given so that those consulted may give an 'intelligent response', adequate time to do so and proper consideration of those responses. It may be that consultation which is not subject to statutory procedure is more effective than formal hearing, which may produce legalism and artificiality.[71] The Cabinet Office has published a Code of Practice on written consultation which will apply to most government initiatives, including delegated legislation. It has no formal legal force[72] but urges timely, thorough and focused consultation.[73]

Statutory consultation and advisory bodies

Particular Acts often require affected interests to be consulted by the responsible minister. Some statutes provide for schemes of control to be formulated by the persons affected themselves. Another device which is often used is that of an advisory committee or council, which is set up under the Act and which must be consulted. The council will usually be constituted so as to represent various interests, and so as to be independent of ministerial control. And, in its turn, it may often consult other persons. Thus many regulations made under the Social Security

[66] For comparative discussion see (1983) 3 *OJLS* 253 (M. Asimow).
[67] s. 4. See Schwartz and Wade, *Legal Control of Government*, 87.
[68] See [1964] *PL* 105 (J. F. Garner); [1978] *PL* 290 (A. D. Jergesen).
[69] A rare exception was *Bates* v. *Lord Hailsham* [1972] 1 WLR 1373; above, p. 884.
[70] *R.* v. *North and East Devon HA ex p. Coughlan* [2001] QB 213 (para. 108) (non-legislative context).
[71] There are arguments that favour pre-legislative consultation (even before primary legislation) as a form of democratic representation. See Forsyth and Hare (eds.), *The Golden Metwand*, 39–64 (P. Cane).
[72] But may give rise to a legitimate expectation of consultation. See above, p. 500.
[73] www.cabinet-office/servicefirst/index/consultation.htm

Acts must be submitted to the Social Security Advisory Committee, and the Committee's report must be laid before Parliament by the minister along with the regulations.[74] Procedural rules for statutory tribunals may be made only after consultation with the Council on Tribunals.[75] In these cases there is no statutory procedure for consulting other interests such as there is with the Social Security Advisory Committee. But these councils may consult other people and hear evidence if they wish, and frequently they do so.

A statutory duty to consult requires that the person or body consulted should be given a reasonably ample and sufficient opportunity to state their views[76] 'before the mind of the executive becomes unduly fixed'.[77] It is not satisfied if it is treated as a mere opportunity to make ineffective representations.[78] Moreover, where there is a history of dealing between consultor and consultee and the impact of the proposed regulations on the consultee's business would be profound, fairness requires disclosure of the reports of independent experts on which the consultor seeks to rely.[79] To this extent the principles of natural justice can apply to delegated legislation.[80] There is no general duty, however, to disclose the representations to any other person.[81]

Failure to consult will normally render the order void, as for neglect of a mandatory requirement.[82]

PARLIAMENTARY SUPERVISION

The trend of the times

One prominent feature of the twentieth century has been a shift of the constitutional centre of gravity, away from Parliament and towards the executive. Mr Lloyd George once said: 'Parliament has really no control over the Executive; it is a pure fiction'.[83] Party discipline gives the government a tight control over

[74] Social Security Administration Act 1992, s. 172.

[75] See below, p. 922.

[76] *Port Louis Corporation* v. *Attorney-General of Mauritius* [1965] AC 1111. See also *Rollo* v. *Minister of Town and Country Planning* [1948] 1 All ER 13; *Re Union of Benefices of Whippingham and East Cowes, St James* [1954] AC 245.

[77] *Sinfield* v. *London Transport Executive* [1970] Ch. 550 at 558.

[78] *Sinfield* (as above) at 558. Compare the question of 'blowing off steam' below, p. 968.

[79] *R.* v. *Secretary of State for Health ex p. United States Tobacco International Inc.* [1992] QB 353 at 369–72 (restriction of trade in oral snuff, only one company severely affected, regulations quashed).

[80] Above, p. 552.

[81] *R.* v. *Secretary of State for Social Security ex p. United States Tobacco International Inc.*, Court of Appeal (Civil Division) 634/1988 unreported but see [1992] QB 353 at 370.

[82] Above, p. 221.

[83] Quoted by Sir Carleton Allen, *Law and Orders*, 3rd edn., 161.

Parliament in all but the last resort; and the current electoral system, tending as it does to eliminate minority parties, normally gives the government a solid basis for its power. But, in addition, the sheer volume of legislation and other government work is so great that the parliamentary machine is unequal to it. This is itself one of the principal reasons for delegated legislation. It is also the reason why it is difficult for Parliament to supervise it effectively. To treat the subject of parliamentary control in any detail would take us beyond administrative law. But mention may be made of a few matters of general interest.[84]

Laying before Parliament

An Act of Parliament will normally require that rules or regulations made under the Act shall be laid before both Houses of Parliament.[85] Parliament can then keep its eye upon them and provide opportunities for criticism. Rules or regulations laid before Parliament may be attacked on any ground. The object of the system is to keep them under general political control, so that criticism in Parliament is frequently on grounds of policy. The legislation concerning 'laying' has already been explained.[86]

Laying before Parliament is done in a number of different ways.[87] The regulations may merely have to be laid; or they may be subject to negative resolution within forty days; or they may expire unless confirmed by affirmative resolution; or they may have to be laid in draft. Occasionally they do not have to be laid at all, because Parliament has omitted to make any provision.[88]

There are two clear categories into which the majority of cases fall. Either the regulations will be of no effect unless confirmed by resolution of each House (or, if financial, of the House of Commons only);[89] or else they will take effect without further formality in Parliament, but subject to annulment in pursuance of a resolution of either House (with some exceptions). These are known as the 'affirmative' and 'negative' procedures respectively. The affirmative procedure is normal for

[84] For a useful discussion including proposals for reform see [1988] *PL* 547 (J. D. Hayhurst and P. Wallington) [1998] 19 Statute LR 155 (T. StJ. N. Bates); Kersell, *Parliamentary Supervision of Delegated Legislation* (1960). The Royal Commission on the Reform of the House of Lords (Cm. 4534, January 2000), describes the existing scrutiny procedure and makes proposals for reform.

[85] Congressional control (the 'legislative veto') is held unconstitutional in the United States: *Immigration and Naturalisation Service* v. *Chadha*, 462 US 919 (1983).

[86] Above, p. 895.

[87] Documents referred to in the regulations but not forming part of them do not have to be laid: *R.* v. *Secretary of State for Social Services ex p. Camden LBC* [1987] 1 WLR 819.

[88] e.g. regulations for Rent Tribunals under the Furnished Houses (Rent Control) Act 1946, s. 8. The omission is inexplicable.

[89] If the Act says 'Parliament' in such a case, this may mean the House of Commons only: *R.* v. *Secretary of State for the Environment ex p. Leicester CC*, The Times, 1 February 1985.

regulations which increase taxes or charges.[90] The negative procedure is normal in the great majority of other cases. Sometimes an Act will employ both procedures[91] and it may even allow a choice between them.[92] But whatever course is adopted, the regulations are either approved or disapproved. Parliament cannot itself amend them.

Opportunities for challenge

Where regulations have merely to be laid, there is no special opportunity for control, and the laying does no more than advertise the regulations to members, who may then put questions to ministers.[93] At the other extreme, where an affirmative resolution is necessary, the government must find time for a motion and debate, so that there is full scope for criticism. In the intermediate and commonest case, where the regulations are subject to annulment, the procedure of the House of Commons allows them to be challenged by any member at the end of the day's business. He must move a 'prayer', because the method of annulment is by Order in Council (as provided by the Statutory Instruments Act 1946),[94] and the motion is for a humble prayer to the Crown that the regulations be annulled. Provided that the necessary quorum of forty can be kept in the House, the annulment procedure ensures an opportunity for debate at the instance of any member. Every member may therefore 'watch and pray'.[95] But the House could not possibly debate all the annullable regulations laid before it. In 1951 there was a sudden spate of 'prayers', allegedly 'for no other reason than the exhaustion of honourable members and Ministers of the Crown'.[96] A Select Committee considered various reforms, but the only outcome was a change of procedure to prevent debates on prayers running on far into the night.

In 1973, however, the House of Commons established a 'merits committee' to consider statutory instruments requiring affirmative resolutions and other cases where there was a prayer for annulment or other hostile motion before the House.[97] But this could be done only on the motion of a minister, and only if twenty members did not object. The purpose of this innovation was to enable the committee to discuss the merits of the instrument, as opposed to its technical

[90] e.g. under Customs and Excise Duties (General Reliefs) Act 1979, s. 17(4); Income and Corporation Taxes Act 1988, s. 788(10).

[91] e.g. Census Act 1920, s. 1(2).

[92] As does the European Communities Act 1972, 2nd sched., para. 2(2).

[93] The Royal Commission (above, para. 7.1) states that more than half of all statutory instruments are subject to 'no Parliamentary procedure', i.e. are simply 'laid'.

[94] s. 5.

[95] Allen (as above), 123.

[96] See Allen (as above), 162.

[97] 853 HC Deb. col. 680 (22 March 1973). This is a standing committee under Standing Order 73A.

propriety—as to which see the following section. The committee can only report that it has considered the instrument; and thereafter it cannot be debated in the Chamber—although a vote will be necessary where an affirmative resolution is required.[98]

The Joint Committee on Statutory Instruments

In 1973, following the Report of a joint committee of Lords and Commons,[99] the two Houses formed the Joint Committee on Statutory Instruments.[1] The Joint Committee has seven members from each House. The Commons' members sit by themselves as a select committee in the case of financial instruments which are laid before the House of Commons only.

The Joint Committee is not concerned with policy but with the manner, form and technique of the exercise of rule-making powers. Consequently it can do its work without party strife, with the single object of keeping statutory instruments up to a satisfactory administrative standard. Its chairman is normally a member of the Opposition in the House of Commons, thus signifying that it exists in order to criticise.

The Joint Committee is required to consider every statutory instrument, rule, order or scheme laid or laid in draft before each House if proceedings may be taken upon it in either House under any statute. The Committee has to decide whether to bring it to the attention of the House on any of the following grounds:[2]

(i) that it imposes a charge on the public revenues, or imposes or prescribes charges for any licence, consent, or service from any public authority;
(ii) that it is made under a statute which precludes challenge in the courts;
(iii) that it purports to have retrospective effect, without statutory authorisation;
(iv) that publication or laying before Parliament appear to have been unjustifiably delayed;
(v) that notification to the Speaker appears to have been unjustifiably delayed, in cases where the Statutory Instruments Act 1946 requires it;[3]
(vi) that there is doubt whether it is intra vires or that it appears to make 'some unusual or unexpected use' of the powers conferred;
(vii) 'that for any special reason its form or purport calls for elucidation';
(viii) 'that its drafting appears to be defective'.

But the Committee may also act 'on any other ground which does not impinge

[98] [1988] *PL* 547, 552 (J. D. Hayhurst and P. Wallington).
[99] See preceding note.
[1] See 850 HC Deb. col. 1217 (13 February 1973). This took the place of the Commons' Scrutiny Committee which had operated since 1944, and the Lords' Special Orders Committee in existence since 1924.
[2] HC 18—iii (1980–81).
[3] Above, p. 895.

on its merits or on the policy behind it'. They therefore have a free rein for non-political comment.

One case of 'unexpected use of the powers' was where the power to prescribe forms was used to enforce metric measurement of the height of stallions instead of the traditional measurement by hands and inches.[4] Another was where rules made for the Employment Appeal Tribunal allowed the tribunal to depart from the rules at its own discretion.[5] The need for elucidation is illustrated by an order under the Sex Discrimination Act 1975 which was not clear and whose explanatory note was misleading.[6] Defective drafting was found in an order designating bodies able to grant permits for the use of minibuses.[7] Defective drafting was also found in a regulation that permitted the tax representatives of overseas insurers to remain in office while they were not qualified to do so.[8] These are examples taken at random from a large number of reports. Much the commonest reasons for reporting an order are that it requires elucidation, or makes an unexpected use of the powers conferred or is marred by defective drafting.[9]

Before reporting an instrument to the two Houses, the Committee must hear the government department's explanations. Contrary to the proposals of 1932, their reports will often not reach the Houses within the forty-day period, if applicable. But where an affirmative resolution is required, the rule in the House of Lords is that the Committee's report must first be made available. There is no such rule in the House of Commons.

The Committee also makes general reports. It has criticised lax departmental practices such as the laying of instruments before Parliament 'in a scruffy form with manuscript amendments, and the omission of necessary details so as to confer wide discretion on ministers and thus bypass Parliament'.[10]

Probably the most important result of the Committee's vigilance is not that it brings regulations to debate in Parliament (though there have been some notable, if rare, examples of this happening), but that it gives government departments a lively consciousness that critical eyes are kept upon them. Relatively few of the instruments scrutinised are reported to the House, but this is in part a measure of the Committee's success in establishing a standard. Its work is another example of

[4] HC 55—iii (1975–76) criticising Horse Breeding (Amendment) Rules 1975 (SI 1975 No. 1777).

[5] HC 54—xxi (1975–76) criticising Employment Appeal Tribunal Rules 1976 (SI 1976 No. 322).

[6] HC 54—iv (1975–76) criticising Sex Discrimination (Designated Educational Establishments) Order 1975 (SI 1975 No. 1902).

[7] HC 33—xv (1978–79), criticising Minibus (Designated Bodies) (Amendment) Order (SI 1978 No. 1930).

[8] HC 456—i (1998–99) criticising the Overseas Insurers (Tax Representatives) Regulations 1999 (SI 1999 No. 81).

[9] Approximately 5 per cent of the instruments considered are reported. For these and other statistics see Hayhurst and Wallington (as above) at 562.

[10] HC 169 (1977–78).

the value of a standing body as opposed to periodical inquests by ad hoc committees.

In particular, the successive committees have been able to secure more satisfactory explanatory notes, which now accompany statutory instruments as a matter of course and are particularly useful when the instrument is complicated. Obscurities have often been criticised, and also the practices of legislating by reference, sub-delegation on dubious authority and (occasionally) retrospective operation. The terms of reference expressly allow a point of ultra vires to be raised, as is done from time to time. A few regulations escape scrutiny, since statutes sometimes omit to provide for them to be laid. But the system extends to much the greater part of delegated legislation which is of national as opposed to local effect. It may be said to be the one successful result of the efforts of reformers to impose discipline on all this legislative activity.

The Joint Committee reports on every instrument within its terms of reference, even if only to say that it has no comment to make. The fruits of its labours are not to be counted in motions carried against the government, but in the improvements in departmental practice which its vigilance has secured. In this respect its work may be compared with that of the Parliamentary Commissioner for Administration—another example of the value of non-political scrutiny of administrative action. The impartial character of the Committee's reports means that they do not have to face the steam-roller of the ruling majority.

Legislation of the European Communities

New problems of parliamentary supervision of regulations arose when the United Kingdom became a member of the European Communities and the European Communities Act 1972 gave the force of law to Community legislation. Under this Act Parliament has renounced its power to legislate contrary to the law of the Communities, as laid down in the case of the European Community by the Council and the Commission in accordance with the Treaty of Rome.[11] So long as this self-denying ordinance is observed, Parliament has no control over Community legislation, even though it automatically becomes part of the law of this country.

Most Community legislation is made by the Council on proposals from the Commission. Each House of Parliament has established a select committee to scrutinise these proposals. Although the Houses have no direct powers, they can call ministers to account for what they do as members of the Council, and a House of Commons resolution (the 'scrutiny reserve resolution') restrains ministers from assenting in the Council to any resolution which is still subject to Parliamentary scrutiny. The object of the two select committees is to keep Parliament informed of Community legislation due to come before the Council, so that pressure can be

[11] European Communities Act 1972, s. 2(4). See above, p. 26.

brought to bear on ministers before they consider it in the Council; and the government undertakes to arrange debates for this purpose.[12] Both Committees make regular reports to their Houses.[13] The Commons Committee scrutinises more than a thousand EU documents per year, mostly legislative proposals, but also pre-legislative documents such as Green and White papers. For each document the Government provides an Explanatory Memorandum setting out its policy. The committee works speedily, reporting weekly. It 'clears' most documents but recommends a small number (2 or 3 p.a.) for debate by the full House, and several dozen for debate in the European Standing Committee. The Committee focuses on the legal and political importance of the proposals.

The House of Lords' Committee is called the European Union Select Committee; it has six sub-committees dealing with different areas of policy. It operates under a similar 'scrutiny reserve resolution' but its focus lies on the merits of the proposal.[14] The House of Commons' Committee is called the European Scrutiny Committee. Community legislation must of course be distinguished from orders and regulations made under the European Communities Act 1972 for enforcing Community law, which are subject to affirmative resolution or annulment in Parliament in accordance with that Act.[15]

[12] See Erskine May, *Parliamentary Practice*, 22nd edn., 829.

[13] Note particularly the Thirtieth Report of the European Scrutiny Committee on the operation of the Committee: www.publications.parliament.uk/pa/cm200102/cmselect/cmenleg/152–xx/15202.htm. The report deprecates the delays caused by failure of EU documents or explanatory memoranda to reach it in time, as well as a tendency to override the scrutiny reserve resolution.

[14] Note the Committee's 1st Report, 2002–03 HL Paper 15 reviewing its scrutiny of EU legislation and making many proposals for improvement.

[15] s. 2 and 2nd sched. See above, p. 194.

23

STATUTORY TRIBUNALS

THE TRIBUNAL SYSTEM

Special tribunals

A prominent feature of the governmental scene is the multitude of special tribunals created by Act of Parliament.[1] Each of these is designed to be part of some scheme of administration, and collectively they are sometimes called administrative tribunals.[2]

A host of these tribunals has arisen under the welfare state, such as the local tribunals which decide disputed claims to benefit under the social security legislation, and employment tribunals which decide many disputes involving employers and employees and often involving the state also. Other tribunals deal with taxation, property rights, immigration, mental health, allocation of pupils to schools and much else. A vast range of controversies is committed to the jurisdiction of these bodies, which is by no means confined to claims against public authorities. Can A resist a notice to quit from his landlord or get his rent reduced? Can B claim jobseeker's allowance or a retirement pension or a redundancy payment? Should C, an alien or Commonwealth citizen, be refused admission to the country? Should E be forbidden to conduct an independent school? These are samples of the many questions which may come before statutory tribunals. The ordinary law-abiding citizen is more likely to find himself concerned with them than with the regular courts of law.

[1] For tribunals see *Report of the Committee of Administrative Tribunals and Enquiries* (the Franks Report), Cmnd. 218 (1957); Wraith and Hutchesson, *Administrative Tribunals* (1973); Farmer, *Tribunals and Government*; Bell, *Tribunals in the Social Services*; Van Dyk, *Tribunals and Inquiries*; Jackson, *The Machinery of Justice in England*, 8th edn. (by J. R. Spencer), pt. 3; Bowers, *Tribunals, Practice and Procedure*. The *Annual Reports* of the Council on Tribunals are an important source. See also the Leggatt Report, *Tribunals for Users—One System One Service* (16 August 2001) (www.tribunals-review.org.uk) which adumbrated significant reform. A White Paper indicating which of the many recommendations in the Report will be implemented is awaited. Details of several of the recommendations are given below, pp. 914–5, 927 and 928. The report recommends a more independent system of tribunals (members appointed by the Lord Chancellor and administrative support being provided by a Tribunals Service in the Lord Chancellor's Department rather than the relevant Department) that will also be more coherent and user friendly.

[2] As explained below, p. 909, this is a misnomer.

Tribunals are conspicuous in administrative law because they have limited jurisdictions and their errors are subject to judicial review in the High Court to the extent already described. In this chapter we are concerned rather with the organisation and normal operation of the tribunal system. This aspect of the machinery of administrative justice is important, for the more satisfactory tribunals are, the less judicial review will be required. Legal technicalities therefore play a relatively small part in this chapter: the problems which arise are mainly of legal policy and organisation. Tribunals exist in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts. The question which runs through the subject is how far the standards set by the courts can be reconciled with the needs of administration. It may be taken for granted that the principles of natural justice must be observed, as illustrated in earlier chapters.[3] These supply the essential minimum of fairness in administration and adjudication alike. But should there be rights of appeal to other tribunals? Or to the courts? Ought reasons always to be given for decisions? Should legal representation always be allowed? And are there too many different tribunals? There is no shortage of questions of this kind.

Tribunals have attracted the attention of the legislature on several occasions. The Tribunals and Inquiries Act 1958 was preceded by the Report of the Committee on Administrative Tribunals and Enquiries (the Franks Committee).[4] This report made a full review of the subject and was the turning-point in its development. Previously tribunals had become too isolated from the rest of the legal system and the standard of justice had suffered. Implementation of the report did much to restore the situation. It has long since been recognised that statutory tribunals are an integral part of the machinery of justice in the state, and not merely administrative devices for disposing of claims and arguments conveniently. The present law is contained in the Tribunals and Inquiries Act 1992, the latest of several consolidating statutes.[5]

Historical antecedents

Tribunals are mainly a twentieth-century phenomenon, for it was long part of the conception of the rule of law that the determination of questions of law—that is to say, questions which require the finding of facts and the application of definite legal rules or principles—belonged to the courts exclusively. The first breaches of this principle were made for the purpose of efficient collection of revenue. The Commissioners of Customs and Excise were given judicial powers by statutes

[3] Tribunals figure in many of the cases cited in Chapters 13 and 14.

[4] Cmnd. 218 (1957).

[5] The Tribunals and Inquiries Act 1971, which repealed the Tribunals and Inquiries Act 1958, was itself repealed by the 1992 Act.

dating from 1660,[6] but though these were criticised by Blackstone[7] and execrated in the definition of 'excise' in Johnson's Dictionary,[8] they were the forerunners of many such powers, such as the General Commissioners of Income Tax, a tribunal established in 1799 which still exists.

The type of tribunal so familiar today, and so prominent in the administration of the welfare state, arrived on the scene with the Old Age Pensions Act of 1908 and the National Insurance Act 1911. The Act of 1908 established local pensions committees to decide disputes, with a right of appeal to the Local Government Board. The Act of 1911, which in important ways was the prototype of modern social legislation, provided for appeals concerning unemployment insurance (now jobseeker's allowance) to go to a court of referees with a further right of appeal to an umpire. Although this agreeable terminology, with its flavour of football and cricket, has long been dropped, the referees and the umpire were the recognisable predecessors of the present-day social security tribunals and commissioners. In particular, the courts of referees contained lay members drawn from panels representative of employers and employees respectively, as do employment tribunals today.

Although several different methods of settling disputes were tried during the early years of the century, it was soon found that the unemployment insurance system was the most successful. As will be seen, it has served as the model for tribunals in other fields. But later developments have modified it in one important respect. It made no provision for reference to the courts of any questions of any kind. The normal rule today is that there is a right of appeal from a tribunal to the High Court on a question of law.

Advantages of tribunals

The social legislation of the twentieth century demanded tribunals for purely administrative reasons: they could offer speedier, cheaper and more accessible justice, essential for the administration of welfare schemes involving large numbers of small claims. The process of the courts of law is elaborate, slow and costly. Its defects are those of its merits, for the object is to provide the highest standard of justice; generally speaking, the public wants the best possible article, and is prepared to pay for it. But in administering social services the aim is different. The object is not the best article at any price but the best article that is consistent with efficient administration. Disputes must be disposed of quickly and cheaply, for the benefit of the public purse as well as for that of the claimant. Thus when in 1946

[6] 12 Charles II, c. 23, s. 31, giving a right of appeal to justices of the peace.

[7] Bl. Comm. iv. 281. See *Report of the Committee on Ministers' Powers*, Cmd. 4060 (1932), 11.

[8] 'A hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid.'

workmen's compensation claims were removed from the courts and brought within the tribunal system much unproductive and expensive litigation, particularly on whether an accident occurred in the course of employment, came to an end. The whole system is based on compromise, and it is from the dilemma of weighing quality against convenience that many of its problems arise.

An accompanying advantage is that of expertise. Under the industrial injuries scheme, for instance, disablement questions are referred to an 'adjudicating medical practitioner', with a right of appeal to a medical appeal tribunal, while other questions go to the ordinary lay tribunals. Qualified surveyors sit on the Lands Tribunal and experts in tax law sit as Special Commissioners of Income Tax. Specialised tribunals can deal both more expertly and more rapidly with special classes of cases, whereas in the High Court counsel may take a day or more to explain to the judge how some statutory scheme is designed to operate. Even without technical expertise, a specialised tribunal quickly builds up expertise in its own field. Where there is a continuous flow of claims of a particular class, there is every advantage in a specialised jurisdiction.

Other characteristics

The system of tribunals has now long been an essential part of the machinery of government. The supplementary network of adjudicatory bodies has grown up side by side with the traditional courts of law. There is a close relationship between the two systems, both because under the ordinary law the tribunals are subject to control by the courts and also because Parliament has in the majority of cases provided a right of appeal from the tribunals to the courts on any question of law. A case which starts, say, in a social security or employment tribunal may therefore end in the House of Lords, having passed through four or five stages of litigation.[9] This is a rare event, since otherwise the tribunal system would be self-defeating. But the tribunals must in some way be integrated with the machinery of justice generally. As will be seen, it has proved necessary to increase the supervisory powers of the courts, as well as to extend rights of appeal.

Tribunals are subject to a law of evolution which fosters diversity of species. Each one is devised for the purposes of some particular statute and is therefore, so to speak, tailor-made. When any new scheme of social welfare or regulation is introduced the line of least resistance is usually to set up new ad hoc tribunals rather than reorganise those already existing. Uncontrolled growth has produced over fifty different types of tribunal falling within the Tribunals and Inquiries Act

[9] As in *R.* v. *National Insurance Commissioner ex p. Hudson* [1972] AC 944, where a special House of 7 Law Lords was divided by 4 to 3 on an important question of the respective jurisdiction of local tribunals and medical boards in industrial injury cases. The decision of the majority was thereupon reversed by National Insurance Act 1972, s. 5.

1992. When all their local subdivisions are aggregated the total (including Scotland) exceeds 2,000. They range from extremely busy tribunals such as those dealing with social security, employment, valuation appeals and rent assessment to tribunals which have no business at all and have therefore never been appointed, such as the mines and quarries tribunals. A detailed catalogue of the tribunals falling within the Act will be found at the end of this chapter, showing also the number of cases disposed of by each in a single year.

The responsibilities of tribunals are in general no less important than those of courts of law. Large awards of money may be made by tribunals, for example, in cases of industrial injuries. Mental health review tribunals[10] determine whether a patient ought to be compulsorily detained, and so lose his personal liberty, whereas the administration of his property is a matter for the courts of law.

The name 'tribunal' is used in a confusing way for some bodies which have the status of superior courts of law. Examples are the Employment Appeal Tribunal, the Immigration Appeal Tribunal and the Patents Appeal Tribunal, over which High Court judges preside. They are to be regarded as courts and not as tribunals of the kind discussed in this chapter.

'Administrative tribunals'

The designation 'administrative tribunals' is misleading in a number of ways. In the first place, no tribunal can be given power to determine legal questions except by Act of Parliament. Normally a tribunal is constituted directly by the Act itself. Sometimes, however, the power to constitute a tribunal may be delegated by the Act to a minister, but in such cases the Act will make it clear that a tribunal is intended.[11] The statute will give power to the relevant minister (or, for some purposes, to the Lord Chancellor) to appoint the members, clerks, and so forth, and to provide facilities, and usually to make procedural rules for the tribunal.

Secondly, the decisions of most tribunals are in truth judicial rather than administrative, in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policy. Such tribunals have in substance the same functions as courts of law. When, for example, jobseeker's allowance is awarded by a social security tribunal, its decision is as objective as that

[10] The tribunals have power to direct the discharge of the patient. Formerly in criminal cases they could only give advice to the Home Secretary, but this restriction was held to violate Art. 5 of the European Convention on Human Rights, which requires access to a court for persons deprived of liberty: *X.* v. *United Kingdom*, ECHR Series A, No. 46 (5 November 1981). The restriction was removed by Mental Health (Amendment) Act 1982, s. 28(4), since replaced by Mental Health Act 1983, s. 79.

[11] Industrial Tribunals Act 1996, s. 1(1); cf. Antarctic Act 1994, s. 14(1)(e).

of any court of law.[12] Only two elements enter into it: the facts as they are proved, and the statutory rules which have to be applied. The rules may sometimes give the tribunal a measure of discretion. But discretion is given to be used objectively, and no more alters the nature of the decision than does the 'judicial discretion' which is familiar in courts of law. These tribunals therefore have the character of courts, even though they are enmeshed in the administrative machinery of the state. They are 'administrative' only because they are part of an administrative scheme for which a minister is responsible to Parliament, and because the reasons for preferring them to the ordinary courts are administrative reasons.

Thirdly, tribunals are not concerned exclusively with cases to which government departments are parties. Rent assessment committees and agricultural land tribunals, for example, adjudicate disputes between landlords and tenants without any departmental intervention.

Fourthly, and most important of all, tribunals are independent. They are in no way subject to administrative interference as to how they decide any particular case. No minister can be held responsible for any tribunal's decision. Nor are tribunals composed of officials or of people who owe obedience to the administration. It would be as improper for a minister to try to influence a tribunal's decision as it would be in the case of a court of law. More will be said about this after tribunals have been distinguished from inquiries.

Tribunals and inquiries contrasted

In principle there is a clear contrast between the function of a statutory tribunal and that of a statutory inquiry of the kind discussed in the next chapter. The typical tribunal finds facts and decides the case by applying legal rules laid down by statute or regulation. The typical inquiry hears evidence and finds facts, but the person conducting it finally makes a recommendation to a minister as to how the minister should act on some question of policy, e.g. whether he should grant planning permission for some development scheme. The tribunal need look no further than the facts and the law, for the issue before it is self-contained. The inquiry is concerned with the local aspects of what will usually be a large issue

[12] In *R.* v. *Deputy Industrial Injuries Commissioner ex p. Jones* [1962] 2 QB 677 at 685. Lord Parker CJ called the Commissioner 'a quasi-judicial tribunal' and so did Lord Diplock in *R.* v. *Deputy Industrial Injuries Commissioner ex p. Moore* [1965] 1 QB 456 at 486. But a quasi-judicial tribunal is concerned with questions of policy (above, pp. 41 and 482) whereas the Commissioner is concerned only with questions of fact and law. Compare *Slaney* v. *Kean* [1972] Ch. 243 at 251 (General Commissioners of Income Tax judicial 'or at least quasi-judicial' in determining tax appeals). In *A.-G.* v. *British Broadcasting Corporation* [1981] AC 303 the House of Lords held that the functions of a local valuation court are 'administrative not judicial' (at 340) although that court is concerned solely with questions of fact and law and Lord Widgery CJ called it 'one of the clearest examples of an inferior court that we meet in the field of administrative justice' ([1978] 1 WLR at 483). See further below, p. 932.

involving public policy which cannot, when it comes to the final decision, be resolved merely by applying law. Tribunals are normally employed where cases can be decided according to rules and there is no reason for the minister to be responsible for the decision. Inquiries are employed where the decision will turn upon what the minister thinks is in the public interest, but where the minister, before he decides, needs to be fully informed and to give fair consideration to objections. In other words, tribunals make judicial decisions, but inquiries are preliminary to administrative or political decisions, often described as quasi-judicial decisions.

But Parliament has experimented with many different bodies and procedures and has in some cases set up tribunals where one would expect to find inquiries and vice versa. Transport licensing, in particular, has been affected by the tradition of employing independent tribunals for deciding what are really questions of policy.

For instance, the Traffic Commissioners remain responsible for public service vehicle operators' licensing, and those appeals now go to the tribunal.[13] But the Secretary of State still takes appeals against traffic regulation conditions attached to licences by traffic commissioners.[14] Air transport licensing, on the other hand, is assigned to the Civil Aviation Authority (which is not a tribunal) from which appeal lies to the Secretary of State.[15]

Where an appeal has to be decided by a minister, he must necessarily appoint someone to hear the case and advise him. The procedure is therefore that of an inquiry,[16] even though the subject matter seems more suitable to a tribunal. This is the situation where ministers have to decide questions of fact and law. For example, in appeals to the Secretary of State from the Civil Aviation Authority, mentioned above, and of appeals to the Secretary of State for Trade by disqualified estate agents.[17] In the latter case the appeal is from the Director General of Fair Trading who for this purpose is a statutory tribunal, so that the procedure consists of tribunal followed by inquiry.

Independence

An essential feature of tribunals, as mentioned already, is that they make their own decisions independently and are free from political influence. In the abnormal cases where appeal lies only to a minister it is true that the minister's policy may influence the tribunal through the minister's appellate decisions; but then this is what Parliament intended. In all other cases tribunals are completely free from

[13] Transport Act 1985, s. 31.
[14] ss. 9, 42.
[15] Civil Aviation Act 1971, ss. 21, 24(6) and 67. The *Laker Airways* case, above, p. 390 concerned the minister's power, since withdrawn, to give mandatory guidance to the authority.
[16] The Tribunals and Inquiries Act 1992 and the jurisdiction of the Council on Tribunals will apply only when the inquiry is obligatory: see below, p. 987.
[17] Estate Agents Act 1979, s. 7; SI 1981 No. 1518.

political control, since Parliament has put the power of decision into the hands of the tribunal and of no one else. A decision taken under any sort of external influence would be invalid.[18]

In order to make this independence a reality, it is fundamental that members of tribunals shall be independent persons, not civil servants.[19] Tribunals have more the character of people's courts than of bureaucratic boards. The Lord Chancellor or the relevant minister will appoint the chairmen and members, but people outside the government service will be chosen.[20] Various devices are employed for insulating tribunals from any possibility of influence by ministers. Often there will be a panel system by which the names on the panel are approved by the Lord Chancellor or the minister but the selection for any one sitting is made by the chairman. The Lord Chancellor is usually made responsible where legal qualifications are required, but he is also sometimes responsible for non-legal members.[21] Rent assessment committees are made up from panels of names supplied both by the Lord Chancellor and by the Secretary of State for the Environment; the chairman must be a 'Lord Chancellor's man', and the other members may or may not be.[22] In order to emphasise independence even further, members of social security unified appeal tribunals are no longer appointed by the Secretary of State but are appointed by the President of those tribunals.[23] Their chairmen are selected from a Lord Chancellor's panel.[24]

The public by no means always gives tribunals credit for their impartiality, often because of minor factors which arouse suspicion. A typical tribunal will have a civil servant as its clerk, who will tell the appellant how to proceed and require him to fill up forms. The tribunal may sit in the department's premises,[25] and the part played by the official representing the department before the tribunal, as well as the position of the clerk, may give an impression of influence. But the truth is to the contrary. Where a large number of more or less routine decisions have to be given in rapid succession, it can sometimes appear that the tribunal and the clerk are

[18] See above, p. 320.

[19] For two exceptional cases see below, p. 913.

[20] The Legatt Report recommends that the Lord Chancellor should be responsible for all tribunal appointments (para. 2.32). The Report also recommends the advertisements of vacancies—emphasising 'the need for interpersonal skills' and automatic renewel of appointments (in the absence of cause) to the retirement age. See paras. 7.7–7.12 for these and other recommendations.

[21] e.g. surveyors as members of the Lands Tribunal (Lands Tribunal Act 1949, s. 2) and medical members of unified appeal tribunals (see below, p. 927) panels (but after consultation with the Chief Medical Officer) (Social Security Act 1998, s. 6(2)) and, of mental health review tribunals (Mental Health Act 1983, 2nd sched.).

[22] Rent Act 1977, 10th sched.

[23] Social Security Act 1998, s. 7(1).

[24] Tribunals and Inquiries Act 1992, s. 6.

[25] A Register of Tribunal Hearing Accommodation is maintained by the Property Advisers to the Civil Estate (an executive agency for the office of Public Service). This ensures that efficient use is made of all tribunal hearing accommodation (which may not be within the department concerned) (*Annual Report*, 1995/96, 42–44).

working hand in glove and in favour of the ministry. Good chairmen take trouble to guard against this misleading impression, and in general they succeed.

Another fundamental feature of the tribunal system is that procedure is adversary, not inquisitorial. In other words, the business of the tribunal is to judge between two opposing contentions, as does a court of law, rather than to conduct the case and call for testimony itself. This aspect of the procedure is explained below.

Membership

The personnel of tribunals varies greatly in accordance with the character of their business. A form frequently adopted is the 'balanced tribunal', consisting of an independent chairman, usually legally qualified and appointed by the Lord Chancellor, and two members representing opposed interests. These two members may be chosen from two different panels of persons willing to serve, not themselves in the employment of the ministry but appointed by the minister as representatives of, for example, employers' organisations on one panel and trade unions on the other. Thus an employment tribunal will usually[26] consist of a chairman from a Lord Chancellor's panel, and one member from each of the Secretary of State's panels.[27] Experience has shown that members selected in this way seldom show bias in favour of the interest they are supposed to represent. The principal purpose of the system is to assure every party before the tribunal that at least one member will understand his interests. In tribunals of this kind the chairman will usually be paid, but the members will sometimes be unpaid, giving their time as a public service in the same way as magistrates.

In other cases expert qualifications are indispensable. The law which tribunals have to apply is often of great complexity, sometimes to a degree which perplexes the courts themselves,[28] and tribunals such as social security tribunals, employment tribunals, the Lands Tribunal and taxation tribunals may be confronted with formidable legal problems. Accordingly the Social Security Commissioners, who hear appeals from decisions of the local social security appeal tribunals on the ground that they are 'erroneous in law', are highly qualified lawyers holding

[26] With the consent of the parties the chairman and one other member may comprise the tribunal (Employment Tribunals Act 1996, s. 4(1)); and on some, primarily legal, questions the chairman alone comprises the tribunal (s. 4(2), (3), (5) and (6)).

[27] In *Smith* v. *Secretary of State for Trade and Industry* [2000] IRLR 6, 69, the question was raised whether employment tribunals were 'independent and impartial' as required by Art. 6(1) of the ECHR (above, p. 445; below, p. 913), especially when hearing claims made against the Secretary of State. The court remitted the case so that this question could be argued. See, however, *Ilangaratne* v. *British Medical Association*, 23 November 2000, unreported Court of Appeal holding Employment Appeal Tribunals Art. 6(1) compliant.

[28] See, e.g., *R.* v. *Industrial Injuries Commissioner ex p. Cable* [1968] 1 QB 729 (difficulties of the 'paired organ' regulations in industrial injury cases); *R.* v. *National Insurance Commissioner ex p. Hudson* [1972] AC 944 (above, p. 908).

full-time appointments; and industrial injury and pensions cases involving personal injury are adjudicated by qualified doctors where the issue requires medical diagnosis. The members of the Lands Tribunal, which adjudicates compensation on compulsory purchase of land, rating appeals, and questions concerning the discharge of restrictive covenants, must be qualified lawyers or surveyors. The Special Commissioners of Income Tax are revenue experts and, exceptionally, some of them are government officials; they are however acknowledged to be wholly independent in practice—if this were not so, officials would have to be disqualified from membership. They are appointed and administered by the Lord Chancellor.[29] Exceptionally, also, officials may be members of health authorities in the national health service, which are statutory tribunals for some purposes.[30] It must be expected, however, that these exceptional arrangements may be challenged under the Human Rights Act 1998 as not providing for an 'independent and impartial tribunal', in appearance at least.

Many tribunals are organised on a presidential system, the president being the chief adjudicator and also having general responsibility for the working of the tribunals. The President of Employment Tribunals,[31] the Chief Social Security Commissioner,[32] the President of Social Security Appeal Tribunals,[33] and the President of Value Added Tax Tribunals[34] thus preside over groups of tribunals, as in effect does the President of the Lands Tribunal.[35] The value added tax tribunals are organised under a president who decides how many of them there shall be and when and where they shall sit.[36] These arrangements promote efficiency in the organisation of business, and guard against the neglect in which some tribunals may be left. Government departments are so respectful of the principle of non-interference with judicial functions that their tribunals may languish in isolation if no one is responsible for general superintendence. The Council on Tribunals favours the presidential system.[37] The Leggatt Report also favours a Presidential System with a 'Senior President', who will be a High Court judge as well as one of the Presidents of an Appeal Tribunal. The report also proposes regional chairmen for first tier tribunals as well as a Tribunals Board. The Board would consist of the 'Senior President' as well as the other Presidents of Appeal Tribunals, the Chief Executive of the Tribunals Service and Chairman of the Council on Tribunals and would advise the Lord Chancellor's Department of the qualifications of members

[29] Finance Act 1984, 22nd sched.

[30] Below, p. 916.

[31] Appointed by the Lord Chancellor under SI 2000 No. 1171, reg. 3. The President has power to determine the number of industrial tribunals (reg. 4).

[32] Appointed by the Crown under Social Security Act 1998, sched. 4.

[33] Appointed by the Lord Chancellor under Social Security Act 1998, s. 5.

[34] Appointed by the Lord Chancellor under Value Added Tax Act 1994, sched. 12.

[35] Appointed by the Lord Chancellor under the Lands Tribunal Act 1949, s. 2.

[36] Value Added Tax Act 1994, sched. 2.

[37] *Annual Report*, 1996/97, Appendix A 'Tribunals: their organisation and independence' (also published as Cm. 3744 (1997)).

as well as coordinating their training and reappointment, recommending changes to the procedural rules and investigating complaints against members of the tribunals.[38]

Tribunals' clerks have an important function and can much assist parties by explaining procedure and other matters. In most cases they are civil servants supplied by the ministry under which the tribunal falls. In some areas the administration of the tribunal system has been transferred to an executive agency.[39]

RIGHTS OF APPEAL

Types of appeal

There are numerous different avenues of appeal from tribunals. No right of appeal exists unless conferred by statute,[40] but Parliament, though it has created many appellate procedures, has followed no consistent pattern. Appeal may lie from one tribunal to another; from a tribunal to a minister; from a tribunal to a court of law; from a minister to a court of law; from a minister to a tribunal; or no appeal may lie at all. An appeal may be on questions of law or fact or both. The position for any given tribunal may be seen from the table at the end of this chapter. Lord Woolf has aptly castigated the various avenues as an 'hotch-potch'[41] and the Leggatt Report recommended simplification.[42] Save in exceptional cases the report recommends that an appeal should lie from the first tier tribunal to an appropriate appeal tribunal. To this end the appeal tribunals should be organised into an appellate division and the first tier tribunals also organised into divisions (some seven are proposed) dealing with coherent areas of work. There should be a separate division to deal with disputes between private parties. Judicial review of the first tier tribunals and the second tier tribunals would be excluded but there would be an appeal, with permission, to the Court of Appeal. A uniform time limit for the appeal of six weeks from the date of issue of the reasoned decision is proposed (paras. 6.12–6.16).

[38] Paras. 6.37–6.39. If this recommendation is adopted the relationship between the Council on the Tribunals and the Board is bound to be difficult.

[39] *Annual Report*, 1997/98, 4, criticising the proposed Appeals Agency in the social security field.

[40] *A.-G.* v. *Sillem* (1864) 10 HLC 704; *R.* v. *Special Commissioners of Income Tax* (1888) 21 QBD 313 at 319.

[41] (1988) Civil Justice Quarterly 44–52.

[42] Paras. 6.9–6.10. See below, 927.

(i) *Inter-tribunal appeals*

Social and regulatory legislation sometimes contains its own built-in appeal structure at more than one level. A good example is the social security system.[43] Claims to benefit are first determined by a departmental official who is not a tribunal, acting on behalf of the Secretary of State.[44] From his decision there is an appeal to a unified appeal tribunal, consisting of one, two or three members drawn from a panel appointed by the Lord Chancellor.[45] From the appeal tribunal appeal lies to a social security commissioner,[46] who is appointed by the Crown and is a barrister or solicitor of at least ten years' standing; but appeal lies only on the ground that the decision is 'erroneous in law',[47] and only with leave of the chairman or the commissioner.[48]

The national health service has an elaborate appeal structure which in some cases allows appeal from one tribunal to another. Complaints by patients against health service practitioners are heard in the first place by the service committees of the health authorities.[49] These are primarily administrative bodies, but for this purpose they and their service committees are tribunals and subject to the Tribunals and Inquiries Act 1992.[50] If the health authorities decide that a practitioner should be removed from the health service, he has a right of appeal to the Family Health Services Appeal Authority.[51]

A two-tier system is also provided for immigration cases. Appeals against refusal of leave to enter, conditions imposed, and deportation and similar orders may be made to an adjudicator appointed by the Lord Chancellor; and from the adjudicator appeal lies to the Immigration Appeal Tribunal, whose members are appointed by the Lord Chancellor.[52] There is a right of appeal on 'a point of law', with

[43] For the adjudicating authorities see Social Security Act 1998, Pt. 1.

[44] Social Security Act 1998, s. 1. The decision may be made by a computer for which the officer is responsible (s. 2).

[45] s. 6. Regulations determine the number of members in particular classes of case (s. 7(6)). One member (who is not necessarily the chairman) is legally qualified (s. 7(2)). This is the result of intervention by the Chairman of the Council on Tribunals (*Annual Report*, 1997/98, 2). The Council opposed this move away from a three man tribunal (*Annual Report*, 1996/97, 5, 6).

[46] For the further appeal to the Court of Appeal see under (iii), below.

[47] Act of 1998, s. 14. This includes challenges to the vires of regulations: *Chief Adjudication Officer* v. *Foster* [1993] AC 754.

[48] Social Security Act 1998, s. 14(10).

[49] National Health Service Act 1977, s. 10, as amended by the National Health Service and Community Care Act 1990, s. 2. The procedural rules (SI 1974 No. 455 as amended) do not allow the complainant to be represented (while the defendant practitioner may be represented by a practitioner) and are flawed in other ways which have caused the Council on Tribunals to criticise them publicly, but without result: *Annual Report*, 1989/90. para. 1.20 and Appendix G.

[50] Same Act, 1st sched., para. 33.

[51] Health and Social Care Act 2001, s. 49S.

[52] Nationality, Immigration and Asylum Act 2002, Part 5.

permission from the IAT to the Court of Appeal.[53] Applicants for political asylum may appeal to an adjudicator but under stringent restrictions.[54] The proposed changes to Immigration Appeals are discussed in Appendix 2.

Appeals from employment tribunals to the Employment Appeal Tribunal are classified under head (iii) below.

All these rights of appeal, except where otherwise mentioned, extend to questions of both fact and law. In a number of cases it is necessary to obtain leave to appeal. An appeal to a social security commissioner may be made only with permission of the tribunal or of the Commissioner.[55] An appeal to the Immigration Appeal Tribunal requires leave either of the adjudicator or of the Tribunal.[56] If leave is wrongfully refused, for example where an adjudicator has misdirected himself in law, judicial review is available.[57]

The title 'appeal tribunal' by no means always indicates that the tribunal hears appeals from a lower tribunal. Unified appeal tribunals and betting levy appeal tribunals, for example, are tribunals of first instance only, hearing appeals against rulings made administratively by officials.

(ii) *Appeals from tribunals to ministers*

This class has always been an object of legal criticism, but it survives in several areas, particularly in two which are rich in anomalies: transport licensing and the national health service. Under the Estate Agents Act 1979 an appeal lies from the Office of Fair Trading, which for this purpose is a tribunal, to the Secretary of State for Trade.[58]

(iii) *Appeals from tribunals to courts of law*

It is now the generally accepted principle that there should be a right of appeal from a tribunal to the High Court on a point of law, in order that the law may be correctly and uniformly applied. Before this need was recognised different local tribunals might be applying the same law in contradictory ways, though this danger was mitigated by the extension of judicial review of errors of law.[59]

The Tribunals and Inquiries Act 1992,[60] following the Acts of 1958 and 1971, confers the right of appeal on a point of law in the case of a number of tribunals

[53] Act of 2002, s. 103.
[54] Act of 2002, sched. 5.
[55] SI 1987 No. 214, reg. 3.
[56] Act of 1999, 4th sched., para. 3; SI 2003 No. 652, reg. 15.
[57] *R.* v. *Immigration Appeal Tribunal ex p. Kumar*, The Times, 13 August 1986.
[58] Act of 1979, s. 7(1) as amended by the Enterprise Act 2002, sched. 25, para. 9(6).
[59] Below, p. 918.
[60] s. 11.

such as the Family Health Services Appeal Authority, rent assessment committees, and Value Added Tax Tribunals; and the statutory catalogue can be extended by order.[61] In other cases the appeal on a point of law may lie direct to the Court of Appeal, as it does from a Social Security Commissioner,[62] the Lands Tribunal,[63] the Financial Services and Markets Tribunal[64] and the Transport Tribunal.[65] In others, again, an appeal to the High Court on a point of law is provided by legislation outside the Tribunals and Inquiries Act, as in the case of the Special Commissioners of Income Tax[66] and the agricultural land tribunals.[67] Occasionally the appeal is not as of right, but only if the tribunal or the court in its discretion so directs.[68] From employment tribunals appeal lies in certain cases to the High Court on a point of law under the Tribunals and Inquiries Act 1992. But in employment protection, equal pay and discrimination cases appeal lies to the Employment Appeal Tribunal under the Employment Rights Act 1996 in most cases on a question of law only, but in certain cases (including trade union membership)[69] also on a question of fact.[70] The Employment Appeal Tribunal is equivalent to the High Court, and therefore not subject to the Act of 1992, although in addition to judges it contains experts on industrial relations appointed by the Lord Chancellor and the Secretary of State jointly, two of whom sit with a single judge.[71] It has the remarkable feature that the two lay members can (and occasionally do) overrule the judge's opinion on a question of law.

Except as above mentioned, these appeals are confined to points of law. What this means, and how the appeal operates, is discussed below.[72]

(iv) *Appeals from ministers to courts of law*

The appeal to the court on a point of law is sometimes given from a minister's decision, e.g. certain decisions of the Secretary of State under planning law.[73]

[61] s. 13(1). But there is no power to include 'ordinary courts of law': s. 13(2).
[62] Social Security Act 1998, s. 15.
[63] Lands Tribunal Act 1949, s. 3(3).
[64] Financial Services and Markets Act 2000, s. 137.
[65] Transport Act 1985, 4th sched.
[66] Taxes Management Act 1970, s. 56.
[67] Agriculture (Miscellaneous Provisions) Act 1954, s. 6.
[68] As from mental health review tribunals to the High Court under Mental Health Act 1983, s. 78(8); and from the Industry Arbitration Tribunal to the Court of Appeal under Industry Act 1975, 3rd sched.
[69] Unreasonable exclusion or expulsion from trade unions is a matter for employment tribunals under Trade Union and Labour Relations (Consolidation) Act 1992, s. 174(5).
[70] Act of 1996, s. 21(1). From the tribunal appeal lies to the Court of Appeal on a question of law. Decisions of the certification officer can also be appealed to the EAT on both fact and law: Act of 1992, s. 9.
[71] Employment Tribunals Act 1996, s. 22.
[72] Below, p. 941.
[73] Above, p. 72.

(v) *Appeals from ministers to tribunals*

This is an unusual avenue of appeal, but it can be illustrated from the Immigration and Asylum Act 1999 under which, as explained elsewhere,[74] appeal sometimes lies from Secretary of State's decisions in immigration and deportation cases to an adjudicator and to the Immigration Appeal Tribunal.

(vi) *No right of appeal*

The earlier philosophy aimed at cutting tribunals off from the rest of the legal system. Thus there remain a number of cases where there is no right of appeal. These are shown in the Table of Tribunals.[75] When, in 1952, the Court of Appeal revived judicial review for error on the face of the record,[76] and in 1958 when the first Tribunals and Inquiries Act gave a right to reasoned decisions on which the revived judicial review could operate,[77] the situation changed radically. Since a decision containing an error of law could thenceforward be quashed on certiorari, the provision of a right of appeal on a point of law no longer seemed necessary. Whatever rights of appeal may or may not have been provided by statute, therefore, it is always necessary to remember that the court has extensive powers of review which may cover much the same ground, unless those powers are themselves removed by statute—see Appendix 2.

PROBLEMS OF TRIBUNALS. THE FRANKS COMMITTEE

Anomalies and complaints

The intensive social legislation which followed the Second World War not only put great trust in tribunals: it was based on an attitude of positive hostility to the courts of law. This was the era when a minister could speak of 'judicial sabotage of socialist legislation'.[78] The policy was to administer social services in the greatest possible detachment from the ordinary legal system, and to dispense with the refined techniques which the courts had developed over the centuries. The result was a mass of procedural anomalies. Some tribunals sat in public, others sat in

[74] Above, p. 79.
[75] Below, p. 959.
[76] Above, p. 270.
[77] Below, p. 938.
[78] 425 HC Deb. 1983 (27 July 1946, Mr A. Bevan).

private. Some allowed unrestricted legal representation, others allowed none. Some followed the legal rules of evidence, others disregarded them. Some allowed full examination and cross-examination of witnesses, others allowed witnesses to be questioned only through the chairman. Some took evidence on oath, others did not. Some gave reasoned decisions, others did not.

It soon became evident that the price to be paid for this policy was more than the public would endure. During the following decade a swelling chorus of complaint forced a reappraisal of the philosophy of the tribunal system. Steps had to be taken to bring the tribunals back into touch with the regular courts, to improve the standard of justice meted out by them and to impose order and discipline generally. The spadework was done by the Committee on Administrative Tribunals and Enquiries (the Franks Committee). The necessary reforms were made by the Tribunals and Inquiries Act 1958 and by administrative changes which accompanied it. As the result of these measures tribunals found their proper place in the legal system, and were able to operate harmoniously with it instead of in opposition.

The Committee on Administrative Tribunals and Enquiries

The Committee presided over by Sir Oliver Franks (as he then was) was commissioned by the Lord Chancellor in 1955 as an immediate, though illogical, result of the *Crichel Down* case of 1954.[79]

The Committee had to make a fundamental choice between two conflicting attitudes, the legal and the administrative. In their Report the Committee came down firmly on the legal side. They said:[80]

> Much of the official evidence, including that of the Joint Permanent Secretary to the Treasury, appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the government must retain a close and continuing responsibility. Thus, for example, tribunals in the social service field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases Parliament has deliberately provided for a decision independent of the Department concerned . . . and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.

To make tribunals conform to the standard which Parliament thus had in mind, three fundamental objectives were proclaimed: openness, fairness and impartiality.

> In the field of tribunals openness appears to us to require the publicity of proceedings and

[79] *Report of the Inquiry by Sir Andrew Clarke QC*, Cmnd. 9176 (1954). This was a case of maladministration for which the correct remedy was the ombudsman, but the time for him was not yet ripe.

[80] Cmnd. 218 (1957), para. 40.

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.

The Committee's central proposal was that there should be a permanent Council on Tribunals in order to provide some standing machinery for the general supervision of tribunal organisation and procedure. It was to consist of both legal and lay members, with lay members in the majority—thus manifesting the spirit which ran all through the Report, that tribunal reform was to be based on general public opinion, and was not a kind of lawyers' counter-revolution against modern methods of government and the welfare state. Such a body would provide the focal point which had previously been lacking. It was to be appointed by the Lord Chancellor and to report to him, so that the Lord Chancellor would undertake a general responsibility for the well-being of tribunals, in somewhat the same way as he already did for the courts of law.

The Committee also made many recommendations in matters of detail for improving the organisation, membership and procedure of tribunals,[81] which formed the basis of the reforms described below.

THE REFORMS OF 1958

The Tribunals and Inquiries Act

The Tribunals and Inquiries Act 1958 gave effect to the policy of the Franks Committee's report, though with some variations in detail. The Act was short and did not present the whole picture, since important reforms were also made by changes of administrative regulations and practice. It was replaced, first, by the Tribunals and Inquiries Act 1971, and, then, by the Tribunals and Inquiries Act 1992, both of which are consolidating Acts which make no change of substance.

The Act of 1958 provided first for the Council on Tribunals.[82] It has a maximum membership of sixteen,[83] but there is special provision for a Scottish Committee of the Council, consisting partly of persons not members of the Council itself.[84] The

[81] Details were given in earlier editions of this book.

[82] ss. 1–3.

[83] Including the Parliamentary Commissioner for Administration: above, p. 84.

[84] Following devolution, it is expected that the Scottish Committee will be renamed the Scottish Council on Tribunals with an obligation to report to the Scottish Parliament (*Annual Report*, 1997/98, 19, 1996/97, 14). Arrangements for Wales are unchanged save that the obligation to consult on procedural rules now rests on Welsh ministers (Government of Wales Act 1998, 12th sched. para. 33).

Council emerged as a purely advisory body, without the function of appointing tribunal members, but with general oversight over tribunals and inquiries. The tribunals under its superintendence were listed in a schedule, which included the great majority of those considered by the Committee. It was probably right that such a body, which is intended to be a watch-dog and independent of ministerial control, should not be given executive functions; it was designed to bark but not to bite.[85] It is not therefore a court of appeal, or a council of state on the French or Italian model. But it has to keep under review the 'constitution and working' of the listed tribunals, and report on any other tribunal questions which the government may refer to it. In practice it receives complaints from individuals and invites testimony from witnesses. It is also frequently consulted by government departments in the ordinary course of their work. Its annual report must be laid before Parliament. It is specifically empowered to make *general* recommendations as to the membership of the listed tribunals, and it must be consulted before any new procedural rules for them are made.[86] Some particulars of the Council's work will be found below.

As the Franks Committee had recommended, the Council consists partly of lawyers and partly of lay members, the lay members being in the majority. The purpose of the lay majority is to make sure that the Council's guiding principle shall be the ordinary person's sense of justice and fair play, freed so far as possible from legal technicality.

Other reforms made by the Act of 1958

The Tribunals and Inquiries Act 1958 also made the following provisions.

1. Chairmen of rent tribunals[87] and of tribunals dealing with national insurance, industrial injuries, national assistance, and national service were to be selected by their ministries from panels nominated by the Lord Chancellor.[88]
2. Membership of any of the listed tribunals, or of a panel connected with it, could be terminated only with the Lord Chancellor's consent.[89]
3. No procedural rules or regulations for the listed tribunals might be made without consultation with the Council on Tribunals.[90]
4. A right of appeal to the High Court on a point of law was given in the case of a number of specified tribunals, including rent tribunals,[91] and tribunals dealing with

[85] Lord Woolf considers that this remark underestimates the Council's positive role in maintaining the standard of justice: Council on Tribunals, *Annual Report*, 1991/92, 83.
[86] Act of 1992, ss. 5, 8.
[87] Formerly rent tribunals.
[88] Tribunals and Inquiries Act 1992, s. 6(1).
[89] Act of 1992, s. 7.
[90] Act of 1992, s. 8.
[91] Rent assessment committees were added by the Act of 1971, s. 13.

children, employment, schools, nurses and mines.[92] In various other cases this right already existed, as explained earlier.

5. Other tribunals could be brought within the Act by ministerial order.[93] Since Parliament has continued to create new tribunals as fast as ever, many additions have been made to the schedule, including mental health review tribunals, betting levy appeal tribunals, employment tribunals, rent assessment committees, immigration tribunals, VAT tribunals, school allocation appeal committees, the data protection tribunal, the financial services tribunal, the Antarctic Act tribunal, schools exclusion appeal panels and the parking adjudicator.
6. Judicial control by means of certain remedies (certiorari and mandamus) was safeguarded. This is discussed elsewhere.[94]
7. The Act gave a legal right to a reasoned decision from any of the listed tribunals, provided this was requested on or before the giving or notification of the decision. This is discussed below.[95]
8. The ministers responsible under the Act, and to whom the Council on Tribunals was to report, were the Lord Chancellor and the Secretary of State for Scotland (replaced for this purpose in 1973[96] by the Lord Advocate).[97]

The Act fell short of the Committee's recommendations in certain respects, for instance in its arrangements as to the appointment of chairmen and members of tribunals. Perhaps the most notable divergence was in the failure to provide for appeals on questions of fact and merits. The Committee recommended a right of appeal on 'fact, law and merits', but the Act provided only a right of appeal on a question of law.[98]

The schedule of tribunals covered by the Act includes almost all tribunals. But where they have executive as well as judicial functions, the Act does not apply to the former.[99] The few remaining exceptional cases to which the Act does not apply at all are social fund adjudicators;[1] (components of the social security system); the tribunal constituted under the Interception of Communications Act 1985;[2] and 'tribunals' of High Court status, such as the Employment Appeal Tribunal.[3] The Foreign Compensation Commission, which assesses claims for loss of foreign property, was excluded originally but is now included.[4] The Act was not concerned with domestic tribunals, as they are often called, even when established by

[92] Act of 1992, s. 11.
[93] Act of 1992, s. 13.
[94] Above, p. 727.
[95] Below, p. 938.
[96] SI 1972 No. 2002.
[97] Act of 1992, ss. 2, 4.
[98] The Council has accepted that the balance of advantage lies in preserving the finality of tribunals' decisions on matters of fact: *Annual Report*, 1962, para. 50.
[99] Act of 1992, s. 14(1).
[1] See above, p. 73.
[2] s. 7.
[3] Industrial Tribunals Act 1996, s. 20.
[4] Tribunals and Inquiries Act 1992, sched. 1, Pt. 1.

statute, e.g. the Disciplinary Committee of the Law Society, or the General Medical Council; or with non-statutory bodies such as trade unions and their disciplinary committees, or with professional associations, universities and colleges.

Administrative reforms

The Tribunals and Inquiries Act 1958 was accompanied by many administrative reforms which did not require legislation. The inconsistencies in national insurance and industrial injuries tribunals as regards sitting in public and the right of legal representation were removed by order.[5] The successors of these tribunals (the unified appeal tribunals)[6] sit in public unless the tribunal otherwise directs, and the right to representation (legal or otherwise) is unrestricted. Administrative steps were also taken to ensure that most chairmen of tribunals should have legal qualifications.

Work of the Council on Tribunals

The work of the Council on Tribunals is explained in its annual reports and, in particular, in its special report on its functions published in 1980.[7]

Although the Council has no legal right to be consulted about Bills in Parliament constituting or affecting tribunals, it is in practice consulted as the Franks Committee intended. The Council comments on Bills in much the same way as it does on procedural rules, and in particular it attempts to help departments drafting provisions for new tribunals. In this way it has been able, for example, to secure a statutory right to be heard for a licence-holder threatened with cancellation of his licence.

In some cases the Council has not been satisfied with the reception of its suggestions about Bills, which are sometimes too far advanced before the Council is consulted. The Council has also proposed that there should be some procedure for making its views publicly known when Bills are debated, since otherwise Parliament may be unaware that important questions of tribunal policy arise. Formal representations were made on these matters to the Lord Chancellor,[8] but in vain.

Confronted with these and other impediments, the Council in 1980 made a special report[9] on its functions, reviewing its constitution, staffing, responsibilities and effectiveness. It recommended, *inter alia*, that it should be consulted

[5] SI 1958 Nos. 701, 702 and SI 1967/157.
[6] Social Security Act, 1998, s. 4.
[7] Cmnd. 7805.
[8] Council on Tribunals, *Annual Report*, 1970/71, p. 4 and Appendix A.
[9] Cmnd. 7805.

with the whole area of administrative adjudication, that it should have a statutory right to be consulted on draft legislation, that its comments on draft legislation and regulations should be laid before Parliament at the time, and that it should have statutory power to deal with complaints and call for papers. The government rejected all these recommendations, though accepting that the arrangements for consultation about procedural rules should be clarified and that informal guidelines might be formulated for consultation about draft Bills.[10] The Council later drew up a code of practice for consultation which it asked government departments to follow.[11]

The Council has had most impact in a miscellany of relatively minor matters. It has secured many amendments to draft Bills, rules and regulations. It has made various studies, for example of rent tribunals[12] and supplementary benefit appeal tribunals.[13] It has investigated various complaints made to it by dissatisfied parties, and in some cases has been able to obtain reform of tribunals' practices. It has secured improvements in tribunals' accommodation by following up complaints, and also as a result of its members' visits to tribunal hearings. It has thus acted as a kind of ombudsman in the sphere of tribunals, as also in that of inquiries, though with a view to the improvement of the system rather than the remedying of individual cases. For some years now the flow of complaints about tribunals has been much reduced. The Council does not itself train tribunal members but has surveyed all tribunals to determine the extent of training.[14]

The Council remains handicapped by its weak political position and its scanty resources.[15] By comparison with the Parliamentary Commissioner for Administration, who is equipped with effective powers and a large staff, the Council has proved relatively impotent in securing attention for its recommendations except in minor matters. It has not succeeded in establishing any connection with Parliament of the kind which gives such strength to the Parliamentary Commissioner. It therefore remains an inconspicuous advisory committee. Its heterogeneous membership, furthermore, is not well suited to its work, much of which requires the ability to handle technical legal material and also some systematic knowledge of administrative law. Compared with the Australian Administrative Review Council,[16] which is concerned with the whole field of judicial review as well as with the organisation and procedure of tribunals, the Council on Tribunals is confined

[10] 419 HL Deb. 118 (27 April 1981).
[11] *Annual Report*, 1981/82. Appendix C.
[12] *Annual Report*, 1962, Pt. IV.
[13] Special Report on Functions of the Council (above), Appendix 3.
[14] *Annual Report*, 1996/97, 8–11.
[15] *Annual Report*, 1985/86, para. 3.73. In 1997–98 the cost of the Council (excluding accommodation) was less than £600,000 (*Annual Report*, 1997/98, Appendix A).
[16] Constituted by the Administrative Appeals Tribunal Act 1975, s. 51. See Robertson, 'Monitoring Developments in Administrative Law: the Role of the Australian Administrative Review Council' in Harris and Partington, *Administrative Justice in the 21st century* (1999), 491–518.

within narrow limits. But at least it provides a permanent body which can study and advise on some important problems of administrative justice as they arise, and which can comment and criticise from an independent standpoint.[17]

The Leggatt Report recognised many positive aspects of the work of the Council on Tribunals and that its model rules 'are a major achievement'.[18] But it also remarked that it had failed to gain publicity for the criticisms its Annual Reports make of the operation of the systems of tribunals. It recommends, however, that the Council should be retained but given important new roles. These are articulated at an abstract level—'the Council's primary role should be to act as the hub of the wheel of administrative justice'—but a coordinating role is envisaged and that the Council should champion the cause of users of tribunals.[19] Full comment must await clarity on exactly what is proposed but it seems that many of the structural weaknesses of the Council will remain leaving it a Cinderella body. And its relationship with the proposed Tribunals Board is likely to be problematical.[20]

REORGANISATION OF TRIBUNALS

The tribunal system has an inherent resistance to uniformity and simplicity. When legislation is in preparation the line of least resistance is usually to create new tribunals rather than to reorganise those already existing. This tendency, if unchecked, leads to a jungle of different jurisdictions which are as inconvenient to the citizen as they are bewildering.

The policy, therefore, should be to constitute fewer and stronger tribunals by amalgamating or grouping the existing tribunals according to their functions, as by unifying those concerned with social security benefits, those concerned with land, those concerned with national health service, and so on. The Franks Committee saw little scope for this at the time of their report. But subsequently the local tribunals dealing with family allowances and industrial injuries were merged in the national insurance tribunals.[21]

These were thereafter amalgamated with supplementary benefits appeal tribunals to form social security appeal tribunals.[22] A further reorganisation has led to the establishment of unified appeal tribunals.[23] These tribunals have had

[17] The Lord Chancellor's Department in 1997 began a quinquennial review examining the purpose, operations and achievements of the Council (*Annual Report*, 1997/98, 55).
[18] See below, p. 929.
[19] Paras. 7.45–7.51.
[20] As recommended in para. 6.40.
[21] Family Allowances Act 1959, s. 1; National Insurance Act 1966, s. 8.
[22] Health and Social Services and Social Security Adjudications Act 1983, ss. 1, 2.
[23] Social Security Act 1998, s. 4.

transferred to them all the functions of the social security appeal tribunals, disability appeal tribunals, medical appeal tribunals, child support appeal tribunals and vaccine damage tribunals.[24] There has thus been a thorough unification of appellate tribunals in the area of social security and, if nothing else, a considerable simplification of the law has been achieved.

Employment tribunals provide a further example of the grouping of a number of different jurisdictions in one strong tribunal. These tribunals have grown greatly in importance and have developed into labour courts with wide jurisdiction and a heavy case-load. After they were first constituted for the sole purpose of hearing industrial training levy appeals,[25] they were called upon to deal with redundancy payments[26] and disputes about statements of terms of employment.[27] In addition they have been given extensive jurisdiction over employment questions, including unfair dismissal,[28] equal pay,[29], sex[30] and race[31] discrimination and unreasonable exclusion or expulsion from trade unions.[32] In addition, claims for damages for breach of a contract of employment may be heard by an employment tribunal.[33]

A major recommendation of the Leggatt Report is tribunals should be reorganised into a single, overarching structure, giving access to all tribunals.[34] To this end the first tier tribunals should be organised into eight Divisions to deal with the disputes between citizen and the state and one Division to deal with disputes between parties. When a new tribunal was established it would be allocated by Practice Direction, with the concurrence of the Senior President of Tribunals, to a particular Division. Each of the Divisions would group related tribunals together. The Divisions proposed are immigration, social security and pensions, land and valuation, financial, transport, health and social services, education and regulatory and the citizen and state Divisions. The party and party Division would consist primarily of the employment tribunals. If it takes place, such a reorganisation of the tribunals systems will lead to greater clarity and coherence.

[24] Ibid.
[25] Industrial Training Act 1964, s. 12 (since repealed).
[26] Employment Protection (Consolidation) Act 1978, s. 91 (now Employment Rights Act 1996, ss. 140, 160).
[27] Employment Protection (Consolidation) Act 1978, s. 11 (now Employment Rights Act 1996, s. 11).
[28] Employment Rights Act 1996, s. 11.
[29] Equal Pay Act 1970, s. 2.
[30] Sex Discrimination Act 1975, s. 63.
[31] Race Relations Act 1976, s. 54.
[32] Trade Union and Labour Relations (Consolidation) Act 1992, s. 174.
[33] Employment (previously Industrial) Tribunals Act 1996, s. 3, but the jurisdiction of the courts is not excluded (s. 3(4)); damages for personal injury are excluded (s. 3(3)).
[34] Paras. 6.3–6.52.

PROCEDURE OF TRIBUNALS

Article 6(1) of the Human Rights Convention

Since tribunals often determine 'civil rights and obligations',[35] Article 6(1) requiring 'a fair and public hearing' before 'an independent and impartial tribunal' will generally be applicable. Since the coming into force of the Human Rights Act 1998 it is necessary to ensure that there is compliance with Article 6(1). Compliance with Article 6(1), including the curative effect of access to a court of 'full jurisdiction' is discussed elsewhere.[36]

Adversary procedure

It is fundamental that the procedure before a tribunal, like that in a court of law, should be adversary and not inquisitorial.[37] The tribunal should have both sides of the case presented to it and should judge between them, without itself having to conduct an inquiry of its own motion, enter into the controversy, and call evidence for or against either party. It if allows itself to become involved in the investigation and argument, parties will quickly lose confidence in its impartiality, however fair-minded it may be. This principle is observed throughout the tribunal system, even in the adjudging of small claims before social security local tribunals and supplementary benefit appeal tribunals by a departmental officer. Naturally this does not mean that the tribunal should not tactfully assist an applicant to develop his case, particularly when he has no representative to speak for him,[38] just as a judge will do with an unrepresented litigant.

However, tribunals concerned with financial business are often given investigatory functions. Two recent examples are the Financial Services and Markets Tribunal,[39] and the Insolvency Practitioners Tribunal.[40]

[35] Above, pp. 445 and 447 noting inconsistencies in the application of Article 6(1) to social security payments.

[36] Above, p. 448. The Leggatt Report (para. 2.17) recommends that no distinction be drawn between tribunals to which Article 6(1) applies and those to which it does not.

[37] It does not follow that a party can always withdraw: *Hanson* v. *Church Commissioners* [1978] QB 823.

[38] Legal aid is seldom available for proceedings before tribunals and the unrepresented applicant is common.

[39] Financial Services and Markets Act 2000, s. 132.

[40] Insolvency Act 1986, s. 396, sched. 7, criticised by the Council on Tribunals. *Annual Report* 1985/86, para. 4.19. Another example, for which there are special reasons, is the tribunal established by the Regulation of Investigatory Powers Act 2000, s. 65 (with which the Council on Tribunals is not concerned).

Procedural rules

Tribunal procedures ought to be simple and not legalistic, but this ideal is difficult to attain when the statutes and regulations to be applied are complex, as they are most conspicuously in the field of social security. However, the Council has to be consulted before procedural rules are made for any of the tribunals under its supervision.[41] In scrutinising procedural rules the Council endeavours to promote simplicity, intelligibility and consistency, with particular attention to matters such as publicity of hearings, the right of representation and the right of cross-examination.

Moreover, the Royal Commission on Legal Services called for a general review of procedure by the Council, so that applicants might be able to conduct their own cases whenever possible.[42] This has now borne fruit with the publication by the Council of 'Model Rules of Procedure for Tribunals'.[43] The Model Rules are intended to provide a store of useful rules from which departments and tribunals, whether under the supervision of the Council or not, engaged in drafting or amending procedural rules may select and adopt what they need. The Model Rules are aimed primarily at appellants and applicants who will not be used to reading statutory instruments. Thus the rules are designed to provide guidance to such applicants until such time as the tribunal itself provides further guidance (as it is required to do under the Model Rules). They have also influenced other departmental rules, such as the model appeal rules against enforcement action taken by regulators.[44]

Hearings. Evidence. Precedent

The great majority of tribunals give oral hearings, and probably have a legal duty to do so.[45] But there are some exceptions.[46] Appeals to the Secretary of State from the Civil Aviation Authority may be made in writing only[47] and so may appeals to the Immigration Appeals Tribunal, if the appellant is neither in this country nor has a

[41] Act of 1992, s. 8.

[42] Cmnd. 7648 (1979), i. 170.

[43] Cm. 1434 (1991). The Model Rules are more than mere rules; the notes on each rule contain much useful discussion of the law applicable and the pitfalls that may attend the application of the rule. The Council has been advised that 'with limited exceptions' the Model Rules are compatible with the Human Rights Convention. None the less, it has commenced a revision of the rules (*Annual Report*, 1998/99, 7–9). Revised Model Procedural Rules were under consultation in January 2003.

[44] Deregulation (Model Appeal Provisions) Order 1996 (SI 1996 No. 1678); see *Annual Report*, 1995/96, 14, noting reservations.

[45] See *R.* v. *Immigration Tribunal ex p. Mehmet* [1977] 1 WLR 795.

[46] See the criticisms of the Council on Tribunals, *Annual Report* (1971/72), 14, 18.

[47] 1991 No. 1672, reg. 27.

representative in it, or if, in certain cases, the Tribunal is satisfied that a hearing is not warranted.[48] The social security commissioners have power to dispense with oral hearings and decide many cases without them,[49] though not without giving the appellant an opportunity to contest the case against him.[50] The Lands Tribunal has a similar power.[51] The unified appeal tribunals, though obliged to give oral hearings if desired, in practice dispose of numerous appeals on paper. Where an oral hearing is given, it must be in accordance with the principles of natural justice which, as explained elsewhere, require the reception of relevant evidence, its disclosure to all parties, the opportunity to question witnesses and the opportunity for argument.[52] Natural justice therefore provides a broad basis for fair tribunal procedure. Statutory rules of procedure also commonly provide for the right to call, examine and cross-examine witnesses.

A statutory tribunal is not normally bound by the legal rules of evidence. It may therefore receive hearsay evidence, provided always that the party affected is given a fair opportunity to contest it, as natural justice requires.[53] Thus in an industrial injury case the commissioner was entitled to receive evidence at the hearing about previous medical reports which technically would have been inadmissible as hearsay.[54] Even a court of law, when acting in an administrative capacity in hearing licensing appeals, is not bound by the legal rules;[55] for otherwise it might have to decide on different evidence from that which was before the licensing officer. Nor need a tribunal's decision be based exclusively on the evidence given before it: it may rely on its own general knowledge and experience, since one of the reasons for specialised tribunals is that they may be able to do so.[56] But this does not entitle it

[48] SI 1984 No. 2041, r. 20, upheld as intra vires in *R.* v. *Immigration Appeal Tribunal ex p. Jones (Ross)* [1988] 1 WLR 477 (see now SI 2000 No. 2333, reg. 1(2)). See also *R.* v. *Immigration Appeal Tribunal ex p. Enwia* [1984] 1 WLR 117. An appellant in this country should be given an oral hearing: *R.* v. *Diggines ex p. Rahmani* [1986] AC 475.

[49] SI 1999 No. 1495, reg. 23. See *R.* v. *Deputy Industrial Injuries Commissioner ex p. Jones* [1962] 2 QB 677.

[50] Sir R. Micklethwait, *The National Insurance Commissioners*, 48.

[51] SI 1996 No. 1022, reg. 27.

[52] Above, p. 513.

[53] *R.* v. *Hull Prison Visitors ex p. St Germain* (No. 2) [1979] 1 WLR 1401 (prisoners' punishments quashed for failure to allow them to call witnesses to contravene hearsay evidence). Where hearsay is properly before the decision-maker, the court, on an application for judicial review or habeas corpus, may consider the same evidence after making appropriate allowance: *R.* v. *Home Secretary ex p. Rahman* [1998] QB 136 (CA).

[54] *R.* v. *Deputy Industrial Injuries Commissioner ex p. Moore* [1965] 1 QB 456.

[55] *Kavanagh* v. *Chief Constable of Devon and Cornwall* [1974] QB 624 (licensing of firearms); *R.* v. *Aylesbury Crown Court ex p. Farrer*, The Times, 9 March 1988 (similar); *R.* v. *Licensing Justices of East Gwent ex p. Chief Constable of Gwent* [illegible] (public house).

[56] *R.* v. *City of Westminster Assessment Committee ex p. Grosvenor House (Park Lane) Ltd.* [1941] 1 KB 53; *R.* v. *Brighton and Area Rent Tribunal, ex p. Marine Parade Estates (1936) Ltd.* [1950] 2 KB 410; *Crofton Investment Trust Ltd.* v. *Greater London Investment Committee* [1967] 1 QB 955; *Metropolitan Properties Ltd.* v. *Lannon* [1969] 1 QB 577. See [1975] *PL* 65 (J. A. Smillie). *Dugdale* v. *Kraft Foods* (below) and *Queensway Housing Association Ltd* v. *Chiltern, Thames and Eastern Rent Assessment Committee* (1998) 31 HLR 945; The Times, 11 December 1998.

to make use of its members' specialised knowledge,[57] or an independent expert's report,[58] without disclosing it so that the parties can comment. An appeal tribunal may refuse to receive evidence not given in the proceedings at first instance.[59]

Some tribunals are equipped with compulsory powers to summon witnesses and to order production of documents.[60] In the case of employment tribunals disobedience is a punishable offence[61] and in the case of the Lands Tribunal it may be penalised in costs.[62] In other cases a party may be able to use a High Court subpoena, as explained below.

A statutory tribunal has inherent power to control its own procedure. It has power to require evidence to be given on oath,[63] but most tribunal proceedings are conducted informally without requiring witnesses to be sworn.[64]

Pre-hearing assessments or reviews are provided for in the rules of some tribunals, so that the nature of the case can be assessed in advance and time saved at the hearing itself.[65]

In the use of its own precedents a tribunal is, as explained earlier,[66] in a radically different position from a court of law. Its duty is to reach the right decision in the circumstances of the moment, any discretion must be genuinely exercised, and there must be no blind following of its previous decisions. This does not mean that discretion cannot be exercised according to some reasonable and consistent principle. Nor does it mean that no regard may be had to previous decisions. It is most desirable that the principles followed by tribunals should be known to the public,

[57] *Hammington* v. *Berker Sportcraft Ltd.* [1980] ICR 248; *Dagg* v. *Lovett* [1980] Est. Gaz. Dig. 27; *Dugdale* v. *Kraft Foods Ltd* [1976] 1 WLR 1288.

[58] *R.* v. *City of Westminster Assessment Committee* (above); *R.* v. *Deputy Industrial Injuries Commissioner ex p. Jones* (above); and see above, p. 514.

[59] *National Graphical Association* v. *Howard* [1985] ICR 97. An immigration adjudicator has no power to take account of facts occurring after the Secretary of State's initial decision: *R.* v. *Immigration Appeal Tribunal ex p. Weerasuriya* [1983] 1 All ER 195; nor may he or the appeal tribunal take account of facts existing but unknown at the time of that decision: *R.* v. *Immigration Appeal Tribunal ex p. Nashouki*, The Times, 17 October 1985. See also *Brady* v. *Group Lotus Car Plc* [1987] 2 All ER 674 (tax case remitted to special commissioners; new evidence not admissible).

[60] An employment tribunal had no power to order interrogatories or the production of a schedule of facts where there was no documentation on which to base the schedule: *Carrington* v. *Helix Lighting Ltd.* [1990] ICR 125. But see SI 2001 No. 1171, sched. 1, rule 4(5).

[61] Employment Tribunals Act 1996, s. 7(3), (4).

[62] SI 1996 No. 1022, reg. 46.

[63] The Evidence Act 1851, s. 16, confers this power on every person authorised by law or by consent of parties to receive evidence. See *General Medical Council* v. *Spackman* [1943] AC 627 at 638 (Lord Atkin), correcting *Board of Education* v. *Rice* (above, p. 476). The Act was also overlooked in *R.* v. *Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1 at 7. Sometimes the power is conferred expressly, e.g. on Mental Health Review Tribunals by SI 1983 No. 942, r. 14.

[64] See the Franks Report, Cmnd. 218 (1957), para. 91.

[65] SI 2001 No. 1171 (employment tribunals); SI 1996 No. 1022 (Lands Tribunal).

[66] Above, p. 325. Approved in the Leggatt Report, para. 6.17.

and for this purpose selected decisions of the more important tribunals are published.[67]

Sittings. Publicity. Membership

Tribunals being part of the machinery of justice, they ought in principle to sit in public. But where tribunals have to inquire into intimate personal circumstances, private sittings are naturally preferred by most applicants and tribunal rules provide accordingly.[68] Tribunals which sit in private are the General and Special Commissioners of Income Tax,[69] Betting Levy Appeal Tribunals,[70] Mental Health Review Tribunals,[71] Service Committees of Health Authorities in the National Health Service,[72] agricultural arbitrators[73] and social security adjudicating authorities where the claimant so requests or where, in a hearing by a Commissioner, intimate personal circumstances or public security are involved.[74] The rules make provision for members of the Council on Tribunals to attend private hearings in the course of their supervisory duties, and sometimes also for research workers and others to whom the tribunal may give leave. On an appeal to the High Court the right of privacy is lost, as may be seen from the details of tax cases and supplementary benefit cases in the law reports.

Many applications, particularly if of a preliminary or subsidiary character, may be disposed of without any sitting at all: the papers may be circulated to the members, who may express their opinions in writing to the chairman.[75] The majority of social security cases, including appeals to a Commissioner, are in practice disposed of in this way.[76]

Where a tribunal consists of a fixed number of members it is necessary that all should participate;[77] but if timely objection is not made it may be held to have been waived.[78] In one case of ambiguity the statute was construed as creating, in

[67] Government departments publish selected social security commissioners' decisions (the practice goes back to 1914), employment tribunal reports, and value added tax tribunal reports. Many decisions of the Lands Tribunal are reported in the Property and Compensation Reports, the *Estates Gazette* and elsewhere. Many more decisions are now accessible at the various tribunal websites (although some are still only 'selected decisions') and through the Court Service (www.courtservice.gov.uk/tribunals/).

[68] Art. 6(1) does not insist on public hearings where 'the interests of morals, public order or national security, . . . the interests of juveniles . . . the protection of the private lives of the parties [or] the interests of justice' require otherwise. See above, p. 479.

[69] Though the Taxes Management Act 1970, s. 50, so provides only by implication.

[70] Unless the appellant requests otherwise: SI 1963 No. 748, r. 7.

[71] SI 1983 No. 942, r. 21 (the tribunal may direct otherwise).

[72] SI 1992 No. 664, sched. 4.

[73] Agricultural Holdings Act 1986, 11th sched.

[74] SI 1999 No. 1495, reg. 24(5) hearing in public in absence of 'special reasons'.

[75] See *Howard* v. *Borneman* (No. 2) [1975] Ch. 201 (determination of prima facie case of tax avoidance) (upheld on appeal [1976] AC 301).

[76] Above, p. 929.

[77] *R.* v. *Race Relations Board ex p. Selvarajan* [1975] 1 WLR 1686 at 1695.

[78] *Turner* v. *Allison* [1971] NZLR 833.

effect, a panel, so that a lesser number sufficed.[79] The same members who heard the evidence must give the decision.[80] Where a tribunal has power to use an assessor, and does so at an oral hearing, the assessor must sit with the tribunal throughout that part of the hearing in which the evidence is given on which his assistance is required.[81] Administrative or investigatory functions are another matter: all the members of a board or committee need not then participate.[82]

A tribunal may itself make an inspection, e.g. of a site or building, though it should do so with the knowledge of the parties[83] and preferably in their presence.[84] It must always be careful not to take evidence without disclosing it to all of them,[85] and it must remember that to make an inspection is to take evidence.[86]

Contempt of court. Subpoena

The High Court will sometimes use its own inherent powers in order to aid and protect inferior courts which do not themselves possess the power to punish for contempt of court. The High Court's powers at common law, however, did not extend to the protection of tribunals.[87] Thus the House of Lords has held that a local valuation court (a tribunal subject to the supervision of the Council on Tribunals), although acting judicially, discharged administrative functions and was not a court of law.[88] The House, therefore, refused to intervene where it was claimed that a religious sect's application for exemption from rates before the local valuation court would be prejudiced by a television programme about the sect. Only where a tribunal is expressly given the status of a court, like the Transport Tribunal, the Employment Appeal Tribunal and the Iron and Steel Arbitration Tribunal,[89] or where it has a distinct legal status, like the Lands Tribunal,[90] will it

[79] *Howard* v. *Borneman* (above). As to non-members see above, p. 312.

[80] *Irish Land Commission* v. *Hession* [1978] ICR 297.

[81] *R.* v. *Deputy Industrial Injuries Commissioner ex p. Jones* [1962] 2 QB 677.

[82] *R.* v. *Race Relations Board ex p. Selvarajan* (above).

[83] *Hickmott* v. *Dorset CC* (1977) 35 P & CR 195.

[84] See *Salsbury* v. *Woodland* [1970] 1 QB 324. Rent Assessment Committees may make inspections at any stage of the proceedings but must allow the parties to attend: SI 1971 No. 1065, reg. 7.

[85] See above, p. 513, also *Wilcox* v. *H.G.S.* [1976] ICR 306.

[86] *Gould* v. *Evans & Co.* [1951] 2 TLR 1189.

[87] There is likewise no protection for commissions or committees of inquiry: *Badry* v. *Director of Public Prosecutions* [1983] 2 AC 297.

[88] *A.-G.* v. *British Broadcasting Corporation* [1981] AC 303 at 339–40 (Lord Dilhorne). Lord Salmon reserved the question whether the High Court might protect such tribunals in case of obstruction of their proceedings. But the majority held that protection was not available at all. For comment see [1982] *PL* 418 (N. V. Lowe and H. F. Rawlings) and D. Eady and A. T. H. Smith, *Arlidge, Eady and Smith on Contempt*, 2nd edn. (1999), 818–27.

[89] Made courts of record by their constituent statutes.

[90] Yet the Lands Tribunal is often composed of a single non-lawyer, thus not meeting the requirement suggested by Lord Denning MR in the *BBC* case (above) at 314. The reasons for singling it out from other tribunals do not appear.

qualify for the protection of the High Court at common law.[91] In other cases a tribunal will have no such protection. If its proceedings are disrupted by misconduct, that is a matter for the criminal law.[92] If they are subjected to prejudicial comment, that is within the right of free speech.[93]

The Contempt of Court Act 1981, however, provides that for the purposes of the Act 'court' 'includes any tribunal or body exercising the judicial power of the State'.[94] The Act expressly confers limited contempt powers upon magistrates but none upon tribunals.[95] None the less, the House of Lords has held that a Mental Health Review Tribunal was a 'court' and protected by the law of contempt.[96] But this was because these tribunals have power to order the release of patients;[97] and deciding on the liberty of the subject must be the task of a court. An employment tribunal has also been held to be a court.[98] Whether the same result will be reached when the tribunal determines less important rights remains to be seen.[99]

The High Court's powers are available to tribunals on a more generous basis for the purpose of enforcing the attendance of witnesses and the production of documents by subpoena. High Court subpoenas are obtainable without restriction by parties appearing before tribunals, so that they have the same facilities for this purpose as before courts of law.[1] In principle subpoenas are available in aid of any tribunal discharging judicial or quasi-judicial functions, for example a police disciplinary hearing.[2] The recipient of a subpoena may apply to the court for it to be set aside and he has a right of appeal to the court.

[91] See the *BBC* case at 338 (Lord Dilhorne).

[92] At 362 (Lord Scarman).

[93] At 342 (Lord Salmon).

[94] s. 19. Other statutes sometimes make provisions for a particular tribunal (Data Protection Act 1998, sched. 6, para. 8 (Information Tribunal)).

[95] s. 12.

[96] *Pickering* v. *Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370, overruling *A.-G.* v. *Associated Newspaper Group Plc* [1989] 1 WLR 322. An additional ground for the decision was that s. 12(1)(b) of the Administration of Justice Act 1960 implied that it was contempt to publish information concerning the Mental Health Review Tribunal's proceedings.

[97] Prior to the Mental Health Act 1983 the tribunals could only recommend release.

[98] *Peach Grey & Co* v. *Sommers* [1995] 2 All ER 513. And *Vidler* v. *Unison* 1999 ICR 746.

[99] The Professional Conduct Committee of the General Medical Council, although statutory, does not exercise 'the judicial power of the state': *General Medical Council* v. *BBC* [1998] 1 WLR 1573. Similarly, *Subramanian* v. *G.M.C.* [2002] UKPC 64, paras. 11–12. The reasoning in the *Peach Grey* case (above), however, was that since the employment tribunal 'sat in public, was established by Parliament, allowed legal representation, administered oaths, compelled attendance, gave reasons and awarded costs', it was a court, is potentially applicable to many tribunals. In *Re Ewing* [2002] All ER (D) 350 the Information Tribunal, however, was found to be a court for the purpose of the Supreme Court Act 1981, s. 42 (vexatious litigants).

[1] *Soul* v. *Inland Revenue Commissioners* [1963] 1 WLR 112.

[2] *Currie* v. *Chief Constable of Surrey* [1982] 1 WLR 215. Contrast *Re Sterritt* [1980] N. Ireland Bulletin No. 11 (police complaint investigation: subpoenas set aside).

Immunity and privilege

Whether members of tribunals, and parties and witnesses who appear before them, are entitled to the same personal immunities as apply in courts of law is a doubtful question.[3] The problem of the liability of members will rarely arise; the only tribunals with power to affect personal liberty are immigration tribunals and mental health review tribunals, and members of the latter are given statutory protection while acting in good faith and with reasonable care.[4] It has been held in New Zealand that a witness at a tribunal may claim the usual privilege against self-incrimination, provided that it does not stultify the statutory scheme.[5] But where a professional body's rules exclude the privilege, it is waived on joining.[6]

Witnesses before tribunals appear to enjoy absolute privilege, so that they cannot be made personally liable if their evidence is defamatory. This follows *a fortiori* from the House of Lords' decision that witnesses at inquiries enjoy this protection.[7]

Legal representation. Legal aid. Costs. Fees

As a general rule, any party before a tribunal may be represented by a lawyer or by anyone else. Whether this is a legal right is not at all clear. It is not certain that it is covered by the principles of natural justice.[8] In practice the position is that representation is freely permitted except in rare cases where it is restricted by regulation. The procedural rules of many tribunals give an unrestricted right of representation, which the Council on Tribunals encourages.[9] Representation by an experienced trade union representative or social worker may often be the most effective, and this is very common before social security tribunals and comparable bodies.[10]

Representation is restricted before service committees of family health services authorities in the national health service, in order that patients making complaints against their doctors are not confronted with a professional lawyer defending the doctor. But a barrister or solicitor, if unpaid, may assist a party in the capacity of a friend.[11]

In courts of law there is a legal right for a party appearing in person to have the

[3] For which see above, p. 789.

[4] Mental Health Act 1983, s. 139. Actions may be brought only with leave of the High Court. See *Winch* v. *Jones* [1986] QB 296.

[5] *Taylor* v. *New Zealand Poultry Board* [1984] 1 NZLR 394.

[6] *R.* v. *Institute of Chartered Accountants ex p. Nawaz* [1997] COD 111.

[7] See below, p. 985.

[8] Above, p. 520.

[9] See Council on Tribunals, *Annual Report*, 1964, 10, 16.

[10] See [1972] *PL* 278 (J. E. Alder).

[11] SI 1992 No. 664.

assistance of someone to give advice and take notes,[12] and this right presumably applies equally before tribunals, at any rate when they sit in public. Legal aid (representation as opposed to advice and assistance) is at present available for these tribunals only, the Employment Appeal Tribunal, Mental Health Review Tribunals, Immigration Adjudicator, Immigration Appeal Tribunal, Special Immigration Appeals Commission, and the Protection of Children Act Tribunal.[13] In practice the proceedings in many tribunals are inexpensive and informal, so that legal representation is often not a necessity. But difficult problems of law and fact are always prone to occur, particularly under complicated regulations. It has often been recommended that legal aid should be provided for those appearing before tribunals,[14] and legal aid is now available for proceedings before the tribunals mentioned as well as the Restrictive Practices Court.[15] But legal advice and assistance (though not representation) is available for tribunal proceedings, and the adviser may assist the client at the hearing though he may not take part in it otherwise.

Parties usually bear their own costs in cases involving expense.[16] The Lands Tribunal has power to award costs and normally exercises it in favour of the successful party in the same way as a court of law.[17] An employment tribunal will not normally award costs, but may do so against a party who acts unreasonably.[18] The power of a value added tax tribunal under its procedural rules to order one party to pay the other party 'such sum as it may determine on account of the costs of the other party' is confined to such sums as are recoverable at common law. In the case of litigants in person such recovery is limited to out-of-pocket expenses.[19] Under the Litigants in Person (Costs and Expenses) Act 1975 the Lord Chancellor

[12] *McKenzie* v. *McKenzie* [1971] P 33. The right to a 'McKenzie friend' is simply a consequence of the public's right of access to public proceedings; thus where the proceedings are not public (e.g. before a board of prison visitors) the tribunal has a discretion whether to allow the adviser access: *R.* v. *Home Secretary ex p. Tarrant* [1985] QB 251 and *R.* v. *Bow County Court ex p. Pelling* [1999] 1 WLR 1807 (no right of access by 'McKenzie friend' to chambers proceedings but 'normally allowed'). Even where the proceedings are public the courts (and presumably also tribunals) can restrict or exclude the adviser if it is apparent that his assistance is unreasonable or not bona fide or inimical to the proper administration of justice: *R.* v. *Leicester City Justices ex p. Barrow* [1991] 2 QB 260. See [1992] *PL* 208 (P. A. Thomas). See also *Izzo* v. *Philip Ross & Co* [2001] The Times, 9 August.

[13] www.legalservices.gov.uk

[14] Council on Tribunals, *Annual Report*, 1976–77, 6; Legal Aid Advisory Committee's Report, HC 160 (1979–80), 97 (mental health review tribunals); and Royal Commission on Legal Services, Cmnd. 7640 (1979), 172. But the Leggatt Report only recommended the 'encouragement' of *pro bona* representation and that, 'exceptionally', the remit of the Community Legal Service might be extended to 'specific cases or classes of case' (para. 4.22).

[15] Access to Justice Act 1999, s. 106 and SI 2000 No. 774.

[16] No change was recommended by the Leggatt Report, para. 4.20.

[17] Lands Tribunal Act 1949, s. 3(5). See *Pepys* v. *London Transport Executive* [1975] 1 WLR 235.

[18] SI 2001 No. 1171, sched. 1.

[19] *Customs and Excise Commissioners* v. *Ross* [1990] 2 All ER 65 applied *Customs and Excise Commissioners* v. *Raz* [1995] STC 14. See also *Buckland* v. *Watts* [1970] 1 QB 27.

has power[20] to extend the Act to specified tribunals, but this has never been done. If the Act did apply, the costs of preparing the litigation would be recoverable.

Tribunals normally have no power to award interest on delayed payments of compensation.[21] Judges presiding over the Employment Appeal Tribunal have called this a blot on the administration of justice in cases where, for example, redundancy payments have been long delayed.[22] But European law may override and require interest to be paid to secure full compensation.[23]

Many tribunals charge a small fee for the use of their services. But the imposition of large fees undermines that cheapness and accessibility long recognised as important advantages of tribunals over courts. Thus the Council was critical of the decision to impose full cost fees upon the users of leasehold valuation tribunals, and after opposition in Parliament the government agreed to an upper limit of £500.[24] The imposition of full cost fees is particularly objectionable in matters—such as leasehold valuation—which would otherwise fall within the jurisdiction of the county court and be eligible for legal aid.

Decisions

The general rule is that a tribunal, like a court of law, may decide by a majority of its members and need not be unanimous.[25] In addition its rules of procedure may provide for majority decisions; but even where they do not, the general rule will apply in the absence of contrary intent in the statute. It has been held that a rent assessment committee may decide by majority in accordance with the general rule.[26] It does not appear to make any difference that the tribunal may be composed of members chosen from panels representative of opposed interests; or that two lay members overrule a legal chairman on a question of law.[27] In two earlier cases

[20] s. 1.

[21] *Marshall* v. *Southampton Health Authority* (No. 2) [1991] ICR 136. The Lands Tribunal can award interest on claims in the nature of debt or damages under Law Reform (Miscellaneous Provisions) Act 1934, s. 3(1): *Knibb* v. *National Coal Board* (1986) 52 P & CR 354. And see *Aslam* v. *South Bedfordshire DC* [2001] The Times, 18 January.

[22] See *Caledonian Mining Co.* v. *Bassett* [1987] ICR 425.

[23] *Marshall* v. *Southampton Health Authority* [1994] QB 126 (ECJ); [1994] AC 530 (HL).

[24] Housing Act 1996, ss. 83, 86; *Annual Report*, 1995/96, 4–5.

[25] *Picea Holdings Ltd.* v. *London Rent Assessment Panel* [1971] 2 QB 216. For the principle see *Grindley* v. *Barker* (1798) 1 B & P 229. If a member dies, the others can still give a majority decision: *R.* v. *Greater Manchester Valuation Panel ex p. Shell Chemicals Ltd.* [1982] QB 255 (local valuation court). If there is no clear majority decision the tribunal may refer the case to a differently constituted tribunal, where that is possible: *R.* v. *Industrial Tribunal ex p. Cotswold Collotype Ltd.* [1979] ICR 190. Similarly, distinguishing *Shell Chemicals*: *R.* v. *Dept. of Health ex p. Bhangeerutty* [1998]. The Times, 1 May.

[26] Same case, approving *Atkinson* v. *Brown* [1963] NZLR 755 and referring to *Grindley* v. *Barker* (1798) 1 B & P 229. This is now confirmed by procedural regulations: SI 1980 No. 1700, reg. 8.

[27] As in *President of the Methodist Conference* v. *Parfitt* [1984] ICR 176; but the Court of Appeal reversed them: [1984] QB 368.

it had been held that the decisions of pensions appeal tribunals must be unanimous[28] but these were treated as special cases and their correctness must be doubted.

Once a tribunal has announced its decision it has, as a general rule, no power to reconsider it or to reopen the case,[29] unless of course its decision is quashed by the High Court.[30] This applies equally where one of the parties later discovers fresh evidence which might well alter the decision, and in such a case the court has no power to assist by quashing.[31] But there is an exceptional power to reopen the case where the tribunal's decision is given in ignorance that something has gone wrong, e.g. that a notice sent to one of the parties has miscarried. But this power must be exercised sparingly and only where the party prejudiced by the mistake has a reasonable excuse.[32] There are also important statutory exceptions. Social security tribunals have been given wide power to review their own decisions,[33] and so have employment tribunals.[34]

A binding decision by a tribunal is res judicata and cannot be relitigated by the same parties.[35]

Reasons for decisions

Perhaps the most important of all the Franks Committee's achievements in the sphere of tribunal procedure is the rule which gives a right to a reasoned decision. Reasoned decisions are not only vital for the purpose of showing the citizen that he is receiving justice: they are also a valuable discipline for the tribunal itself.

[28] *Brain* v. *Minister of Pensions* [1947] KB 625; *Minister of Pensions* v. *Horsey* [1949] 2 KB 526.

[29] *Akewushola* v. *Home Secretary* [2000] 1 WLR 2295, followed several times since (e.g. *R. (Home Secretary)* v. *Immigration Appeal Tribunal* [2001] QB 1224). An oral decision of an employment tribunal, communicated to the parties but not recorded in a document signed by the chairman (as required by the procedural rules), is a decision of the tribunal and cannot be reopened: *Spring Grove Services Group Plc* v. *Hickinbottom* [1990] ICR 111; and see *Guinness (Arthur) Son & Co. (Great Britain) Ltd.* v. *Green* [1989] ICR 241. Even though an interlocutory order, such as a striking out order, is not a 'decision' by the tribunal in terms of its procedural rules, the chairman of the tribunal has no power to reconsider that order: *Casella London Ltd.* v. *Banai* [1990] ICR 215. Cf. *Re Darley's Application* [1997] NI 384. Above, p. 230.

[30] The Administrative Court on judicial review may 'stay' a decision of a tribunal, even after it has been implemented: *R. (H)* v. *Ashworth Special Hospital* [2003] EWCA Civ. 923; [2003] 1 WLR 127 (CA).

[31] Above, p. 279. See also *Jones* v. *Douglas Ltd.* [1979] ICR 278 (new point requiring evidence not entertained by Employment Appeal Tribunal).

[32] *R.* v. *Kensington & Chelsea Rent Tribunal ex p. MacFarlane* [1974] 1 WLR 1486; and see *Charman* v. *Palmers Ltd.* [1979] ICR 555 (power to order rehearing); *Hanks* v. *Ace High Productions Ltd.* [1978] ICR 1155.

[33] Social Security Administration Act 1998, s. 8; cf. s. 17. See [1992] *PL* 238, 240–42 (N. Wikeley and R. Young) discussing earlier provisions.

[34] SI 2001 No. 1171, sched. 1; *Acrow (Engineers) Ltd.* v. *Hathaway* [1981] 2 All ER 161 (second complaint of constructive dismissal vexatious since miscarriage of justice arising from first complaint could be corrected by applying for review).

[35] Above, p. 243.

The Tribunals and Inquiries Act 1992, replacing similar provisions in the earlier Acts, requires the tribunals listed in the Act

> to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decision, to state the reasons.[36]

A request therefore has to be made before the right to a reasoned decision arises. It has been held that the word 'on' is capable of 'an elastic meaning' in such a context,[37] so that a reasonably prompt request made after receipt of a tribunal's decision ought to satisfy the Act. In fact the policy of the Council on Tribunals has been to require that procedural rules for particular tribunals should incorporate an unqualified duty to give reasoned decisions, and this has been done in many cases.

One important feature of the Act is the provision that reasons, when given, 'shall be taken to form part of the decision and accordingly to be incorporated in the record'.[38] This is a warrant of parliamentary approval for the court's jurisdiction to quash decisions of tribunals for error on the face of the record. It must, apparently, apply even where the reasons are stated orally, despite the incongruity of an oral 'record'.[39]

The Act contains a number of exceptions from the duty to give reasons. It does not apply to decisions in connection with a scheme or order 'of a legislative and not an executive character'. Reasons may also be withheld or restricted on grounds of national security; and they may be withheld from a person not primarily concerned where to furnish them would be contrary to the interests of any person primarily concerned. Nor does the Act apply where any other Act or regulation governs the giving of reasons. Thus under the Mental Health Act 1959 reasons need not necessarily be given by Mental Health Review Tribunals,[40] for in some cases this may be contrary to the interests of the patient.

There is also power to dispense tribunals from the duty to give reasons where the Lord Chancellor is of opinion that the giving of reasons is 'unnecessary or impracticable', subject to consultation with the Council on Tribunals.[41] One exemption granted under this provision has been in favour of certain tax tribunals, not because they should not give reasons but because there are other statutory provisions under which they can be required to do so.[42] Social security commissioners are not required to give reasons for decisions refusing leave to appeal.[43] But no general use of the escape clause has been made. On the other hand there are many cases where extensive reasons cannot be given, for example where the

[36] s. 10. See (1970) 33 *MLR* 154 (M. Akehurst).

[37] *Scott* v. *Scott* [1921] P 107. See also *R.* v. *Special Commissioners of Income Tax* (1888) 21 QBD 313.

[38] s. 10(6). For this see above, p. 271.

[39] See above, p. 271, for this question.

[40] Mental Health Act 1983, s. 78(2)(i). On these tribunals see Peay, *Tribunals on Trial.*

[41] Tribunals and Inquiries Act 1992, s. 10(7).

[42] Council on Tribunals, *Annual Report*, 1959, paras. 61–64.

[43] SI 1999 No. 1495, reg. 28. See *R.* v. *Secretary of State for Social Services ex p. Connolly* [1986] 1 WLR 421.

tribunal merely finds facts on evidence. No tribunal can be expected to give fuller reasons than the nature of the case admits.[44] For this reason an application for dispensation of agricultural arbitrators was rejected by the government, on the advice of the Council on Tribunals.[45] Although in many cases these arbitrators will merely form an expert opinion of the value of farmland or of agricultural buildings, for which elaborate reasons can hardly be given, this does not mean that reasons cannot be shortly stated. Such cases do not therefore qualify for exemption.

In some cases formal and exiguous reasons may be held adequate, as where an immigration officer stated simply that 'I am not satisfied that you are genuinely seeking entry only for this limited period'.[46] But the Master of the Rolls indicated that the court would intervene if it appeared that such a formula was used merely as a 'ritual incantation'. A case of that kind was where the court allowed an appeal from a mental health review tribunal which had merely recited the statutory words which empowered it to refuse to discharge a patient.[47]

The duty to state reasons is now so generally accepted that the Industrial Relations Court held that it applied to an employment tribunal in the same way as it applied to that court itself, since otherwise parties would be deprived of their right of appeal on questions of law.[48] No mention was made of the Tribunals and Inquiries Act or of any need for a request.

The Court of Appeal has emphasised that the statutory duty to give reasons 'is a responsible one and cannot be discharged by the use of vague general words'.[49] It requires, as the High Court has held, 'proper, adequate reasons', being 'reasons which will not only be intelligible but which deal with the substantial points which have been raised'. In the same case the court treated inadequacy of reasons as error on the face of the record, so that an inadequately reasoned decision could be quashed, even if the duty to give reasons was not mandatory.[50]

[44] See *Metropolitan Property Holdings Ltd.* v. *Lauter* (1974) 29 P & CR 172; *Guppy's (Bridport) Ltd.* v. *Sandoe* (1975) 30 P & CR 69; *Elliott* v. *Southwark LBC* [1976] 1 WLR 499 (two-line reason for demolition rather than rehabilitation upheld by Court of Appeal); *Westminster CC* v. *Great Portland Estates Plc* [1985] AC 661. Reasons for refusing to adjourn a hearing need not be given: *Carpenter* v. *Secretary of State for Work and Pensions* [2003] EWCA Civ. 33.

[45] Council on Tribunals, *Annual Report*, 1959, para. 68.

[46] *R.* v. *Home Secretary ex p. Swati* [1986] 1 WLR 477; *R.* v. *Home Secretary ex p. Cheblak* [1991] 1 WLR 890.

[47] *Bone* v. *Mental Health Review Tribunal* [1985] 3 All ER 330; and see *R.* v. *Mental Health Review Tribunal ex p. Clatworthy* [1985] 3 All ER 699.

[48] *Norton Tool Co. Ltd.* v. *Tewson* [1973] 1 WLR 45. See also *Alexander Machinery (Dudley) Ltd.* v. *Crabtree* [1974] ICR 120; *Beardmore* v. *Westinghouse Brake Co.* [1976] ICR 49; *Green* v. *Waterhouse* [1977] ICR 759; *Albyn Properties Ltd.* v. *Knox* 1977 SC 108; *Cairns (R. W.) Ltd.* v. *Busby Session* 1985 SLT 493.

[49] *Elliott* v. *Southwark LBC* (above). See similarly *Dagg* v. *Lovett* [1980] Est. Gaz. Dig. 27. The duty was described in detail in *R. (W)* v. *National Care Standards Commission* [2003] EWHC 621, para. 36.

[50] *Re Poyser and Mills' Arbitration* [1964] 2 QB 467 (vague reasoning concerning dilapidations not remedied: decision quashed). See likewise *R.* v. *Industrial Injuries Commissioner ex p. Howarth* (1968) 4 KIR 621 (ambiguous reasons: decision quashed); *Elliott* v. *University Computing Co.* [1977] ICR 147 (adequate findings required).

Sir John Donaldson has said that 'in the absence of reasons it is impossible to determine whether or not there has been an error of law. Failure to give reasons therefore amounts to a denial of justice and is itself an error of law'.[51] Lord Lane CJ, while not wishing to go so far, has held that a statement of reasons must show that the tribunal has considered the point at issue between the parties and must indicate the evidence for its conclusion.[52] Where there is a conflict of evidence, the tribunal ought to state its findings.[53]

As explained earlier, the duty to state reasons is normally held to be mandatory, so that a decision not supported by adequate reasons will be quashed or remitted to the deciding authority.[54]

APPEALS ON QUESTIONS OF LAW AND DISCRETION

Appeal on a point of law

Where statute gives a right of appeal from a tribunal to a court of law, it is usually confined to a right of appeal on a point of law. The wide extension of this right as part of the reform of the tribunal system has already been noted.[55] It is of great importance that it should be generally available, so that the courts may give guidance on the proper interpretation of the law and so that there may not be inconsistent rulings by tribunals in different localities.[56] It is through appeals that the courts and the tribunals are kept in touch, so that the tribunals are integrated into the machinery of justice. Difficult questions of law can if necessary be carried to the appellate courts, and thus they may reach the House of Lords.[57]

The Tribunals and Inquiries Act 1992[58] gives a right of appeal to a party 'dissatisfied in point of law' with a decision of one of the tribunals specified, and the party may appeal to the High Court, or require a case to be stated to the High Court, as rules of court may provide. In fact the rules of court provide for both

[51] In the *Alexander Machinery* case (above) at 122.

[52] *R.* v. *Immigration Appeal Tribunal ex p. Khan (Mahmud)* [1983] QB 790. It is sufficient if the adjudicator's reasons tell the applicant 'why he lost on the particular issue': *R. (Bahrami)* v. *Immigration Appeal Tribunal* [2003] EWHC 1453.

[53] *Levy* v. *Marrable & Co. Ltd.* [1984] ICR 583.

[54] Above, p. 226.

[55] Above, p. 922.

[56] See *Pearlman* v. *Harrow School Governors* [1979] QB 56.

[57] Supplementary benefit appeals reached the House of Lords in *Supplementary Benefits Commission* v. *Jull* [1981] AC 1025.

[58] s. 11. See *Esso Petroleum Co. Ltd.* v. *Ministry of Labour* [1969] 1 QB 98 at 110 for a suggested but questionable restriction on raising new points of appeal.

procedures.[59] The Act also gives power for the tribunal itself to state a case to the High Court on any question of law arising in the course of its proceedings.[60] Other Acts sometimes provide for appeals to go straight to the Court of Appeal.[61]

The Act of 1992 and the rules of court also authorise the High Court, on any such appeal, to give any decision which might have been given by the tribunal, to remit the case for rehearing or determination by the tribunal in accordance with the court's opinion, and to give directions to the tribunal.[62] The case should be remitted to the tribunal where a question of fact has been decided under a misconception as to the law, since questions of fact are for the tribunal alone, unless the tribunal's decision is unarguably right.[63]

To find facts based on no evidence is, by a well-established rule, an error of law. In principle, therefore, a tribunal's findings of fact can be challenged by way of appeal on a point of law if they are based on no evidence, within the meaning of the rule discussed in an earlier chapter.[64] But in the case of many tribunals this rule is severely qualified by their liberty to act on their own knowledge and experience. Thus if no evidence of facts bearing on the right level of rent is given before a rent tribunal or rent assessment committee, the tribunal must nevertheless determine the statutory rent as best it can, and its determination cannot be challenged on the basis of lack of evidence.[65] Furthermore, the courts are inclined to be tolerant in reviewing the decisions of specialised tribunals, provided that they have not misdirected themselves on the facts or gone wrong in law.[66]

Since appellate courts are concerned almost exclusively with questions of law, there should be little difference in practice between an unrestricted right of appeal and a right of appeal on a point of law only. But the definition of 'law' for this purpose is liable to be narrowed artificially, so that many questions of legal interpretation which appellate courts can suitably resolve are not regarded as questions of law and are therefore not appealable. As explained above,[67] the breadth of a right of appeal may bear on whether there is compliance with Article 6(1) of the Human Rights Convention.

[59] RSC Ord. 94 rr. 8, 9. See *Hoser* v. *Minister of Town and Country Planning* [1963] Ch. 428 (RSC Ord. 94 is reproduced unaltered in the new Civil Procedure Rules introduced in 1999, Vol. 2, 1st sched.).

[60] s. 13(2); RSC Ord. 94 r. 9A. As to appeals on interlocutory decisions see *R.* v. *Lands Tribunal ex p. City of London Cpn.* [1982] 1 WLR 258.

[61] See above, p. 917.

[62] s. 11(4); RSC Ord. 55 r. 7 (RSC Ord. 55 is reproduced unaltered in the new Civil Procedure Rules, 1999, Vol. 2, 1st sched.).

[63] *Dobie* v. *Burns International Security Services Ltd.* [1985] 1 WLR 43.

[64] Above, p. 276.

[65] See above, p. 909 n. 54, and especially the discussion in the *Crofton Investment Trust* case.

[66] *Retarded Children's Aid Society Ltd.* v. *Day* [1978] ICR 437; and see above, p. 271.

[67] Above, p. 449.

What is 'law'?

Questions of law must be distinguished from questions of fact, but this has always been one of the situations where the rules have taken different forms under judicial manipulation.[68] The House of Lords has made determined efforts to clarify them, but two rival doctrines are still contending for supremacy.

The simpler and more logical doctrine has been recognised in many judgments.[69] This is that matters of fact are the primary facts of the particular case which have to be established before the law can be applied, the 'facts which are observed by the witnesses and proved by testimony',[70] to which should be added any facts of common knowledge of which the court will take notice without proof. Whether these facts, once established, satisfy some legal definition or requirement must be a question of law, for the question then is how to interpret and apply the law to those established facts.[71] If the question is whether some building is a 'house' within the meaning of the Housing Acts, its location, condition, purpose of use, and so forth are questions of fact. But once these facts are established, the question whether it counts as a house within the meaning of the Act is a question of law.[72] The facts themselves not being in dispute, the conclusion is a matter of legal inference.

It follows that such questions as 'is the building a house?', or 'did the defendant cause the accident?' cannot be characterised as questions of fact or questions of law without knowing what is in issue. If the question is whether the defendant's act was part of the chain of events, that is a question of fact. But if the question is whether it was sufficiently proximate to amount in law to the real cause, that is a question of law.[73] Where both questions are in dispute the question is sometimes called a mixed question of law and fact, or a question of mixed law and fact. The former expression is the more accurate, since law and fact are two different things which ought not to be mixed. As Sir John Donaldson MR has said, 'the appeal tribunal has no jurisdiction to consider any question of

[68] See Emery and Smythe, *Judicial Review*, chs. 2, 3; (1982) 98 *LQR* 587 (E. Mureinik); (1984) 4 *OJLS* 22 (J. Beatson); (1987) 104 *LQR* 264 (C. T. Emery); (1984) 100 *LQR* 612 (C. T. Emery and B. Smythe); (1998) 114 *LQR* 292 (T. Endicott).

[69] One of the earliest and clearest is *Johnstone* v. *Sutton* (1785) 1 TR 510 at 545 (Lords Mansfield and Loughborough): 'The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law'. Other examples are cited below.

[70] *Bracegirdle* v. *Oxley* [1947] KB 349 (Denning J).

[71] See below, p. 946.

[72] *Re Butler* [1939] 1 KB 570; *Quiltotex Co. Ltd.* v. *Minister of Housing and Local Government* [1966] 1 QB 704; *Lake* v. *Bennett* [1970] 1 QB 663; *Tandon* v. *Trustees of Spurgeon's Homes* [1982] AC 755; *R.* v. *Camden LBC ex p. Rowton Ltd.* (1983) 82 LGR 614.

[73] On causation see *Hoveringham Gravels Ltd.* v. *Secretary of State for the Environment* [1975] QB 754.

mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law'.[74]

According to this analysis, an appeal on a point of law should be available on every question of legal interpretation arising after the primary facts have been established. It ought to cover all legal inferences of the kind mentioned above. But although judges have frequently acted upon this principle, and still do so, the reigning rule today is more sophisticated and less logical. It is designed to give greater latitude to tribunals where there is room for difference of opinion. The rule is, in effect, that the application of a legal definition or principle to ascertained facts is erroneous in point of law only if the conclusion reached by the tribunal is unreasonable. If it is within the range of interpretations within which different persons might reasonably reach different conclusions, the court will hold that there is no error of law. In his above-quoted judgment the Master of the Rolls thus explained the limited function of the appellate court or tribunal:

> Unpalatable though it may be on occasion, it must loyally accept the conclusions of fact with which it is presented and, accepting those conclusions, it must be satisfied that there *must* have been a misdirection on a question of law before it can intervene. Unless the direction of law has been expressed it can only be so satisfied if, in its opinion, no reasonable tribunal, properly directing itself on the relevant questions of law, could have reached the conclusions under appeal. This is a heavy burden on the appellant.

An alternative but substantially similar doctrine is that 'the meaning of an ordinary word in the English language is not a question of law', unless the tribunal's interpretation is unreasonable; but that where the word is used 'in an unusual sense' the appellate court will determine the meaning.[75]

The truth is, however, that there can hardly be a subject on which the courts act with such total lack of consistency as the difference between fact and law. The House of Lords has indeed laid down the rule explained in the following paragraphs, but it is commonplace to find courts proceeding in complete disregard of it. It may be that judges instinctively agree with an American comment:[76]

> No two terms of legal science have rendered better service than 'law' and 'fact' . . . They are the creations of centuries. What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy.

The House of Lords' attempts at definition have had, as will be seen, only partial success.

[74] *O'Kelly* v. *Trusthouse Forte Plc* [1984] QB 90. In fact the Court of Appeal followed *Edwards* v. *Bairstow* (below), holding that the Employment Appeal Tribunal was not entitled to interfere with an employment tribunal's reasonable findings on whether applicants were 'employees' under a 'contract of employment'.

[75] *Cozens* v. *Brutus* [1973] AC 854 at 861 (Lord Reid), not followed in *ACT Construction Ltd.* v. *Customs & Excise Cmrs.* [1979] 1 WLR 870, affirmed [1981] 1 WLR 1542. Compare *Inland Revenue Commissioners* v. *Lysaght* [1928] AC 235 at 246 and 247.

[76] Leon Green, *Judge and Jury*, 270.

Leading cases on 'law'

The House of Lords has expounded the law authoritatively in two tax cases, where appeal lay from the inland revenue commissioners to the High Court only on a point of law. The question was whether transactions amounted to 'trade' for tax purposes. In the first case[77] there had been a purchase and sale of machinery as an isolated transaction, and the facts themselves were not in dispute. All the lower courts nevertheless held that the question whether this amounted legally to 'trade' was 'purely a question of fact'. The House of Lords held that it was a question of law, since on the particular facts no reasonable person could fail to conclude that the transaction was 'trade' within the meaning of the Act. Lord Radcliffe said:

> If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there too, there has been an error in point of law. I do not think it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three ...

Lord Radcliffe emphasised, however, that there were many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other on the same facts. And he added:

> All these cases in which the facts warrant a determination either way can be described as questions of degree and, therefore, as questions of fact.

This last statement is the basis of the expression 'questions of fact and degree'[78] which is often applied to conclusions which fall within the permitted range of reasonableness and which the court holds to be ineligible for appeal on a point of law.

[77] *Edwards* v. *Bairstow* [1956] AC 14 applied *Shaw (Inspector of Taxes)* v. *Vicky Construction Ltd*, The Times, 27 December 2002. See (1946) 62 *LQR* 248, (1955) 71 *LQR* 467 (A. Farnsworth).

[78] See, e.g., *Birmingham Cpn.* v. *Habib Ullah* [1964] 1 QB 178; *Marriott* v. *Oxford & District Co-operative Society Ltd.* [1969] 1 WLR 254; *Global Plant Ltd.* v. *Secretary of State for Health and Social Security* [1972] 1 QB 139. Earlier decisions equating questions of degree with questions of fact are *Currie* v. *IRC* [1921] 2 KB 332; *Inland Revenue Commissioners* v. *Lysaght* [1928] AC 234.

In the second case,[79] where the House of Lords held that on the facts it could not reasonably be concluded that there was 'trade', Lord Wilberforce similarly said:

> Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed. The present is not such a case: it involves the question as one of recognition whether the characteristics of trade are sufficiently present.

Lord Simon also explained how the facts may fall into three categories: if they plainly amount to trade, or plainly do not, the court must reverse any decision to the contrary as erroneous in law; but between these extremes is the third category which depends on the evaluation of the facts, and is suitably called one of 'fact and degree'.

Logic versus legal policy

The House of Lords' third or intermediate category, as defined above, may be vulnerable to logical analysis in that, once the facts of the case are established, the application to them of some legal definition or test is in its nature a matter of law. Law and fact are two different things, and a question of law should not become one of fact merely because it is one on which opinions may reasonably differ. Questions of degree are not 'therefore' questions of fact. In one case, where the question was whether there had been a 'transfer' of a business, two industrial tribunals (now employment tribunals) came to different conclusions on the same established facts: one of them must therefore have erred in law, and the court naturally entertained an appeal on 'law'.[80] Citing this in a similar case, Lord Denning MR held that if a tribunal drew a wrong conclusion from the primary facts, thus misinterpreting the statute, they went wrong in law.[81] The House of Lords' doctrine that the error must be one which a reasonable tribunal could not make is frequently disregarded,[82] and judges willingly revert to the simpler and more logical doctrine as stated in a typical income tax case of 1915 by Lord Parker:[83]

[79] *Ransom* v. *Higgs* [1974] 1 WLR 1594. See also *Taylor* v. *Good* [1974] 1 WLR 556; *Central Electricity Generating Board* v. *Clwyd County Council* [1976] 1 WLR 151; *Furniss* v. *Dawson* [1984] AC 474.

[80] *Huggins* v. *Gordon (A. J.) Ltd.* (1971) 6 ITR 164.

[81] *Woodhouse* v. *Brotherhood Ltd.* [1972] 2 QB 520 at 536, rejecting the 'fact and degree' category; see similarly *British Railways Board* v. *Customs and Excise Commissioners* [1971] 1 WLR 588.

[82] In the *Huggins* case (above) both decisions might have been reasonable.

[83] *Farmer* v. *Cotton's Trustees* [1915] AC 922 at 932. See similarly *R.* v. *Port of London Authority* [1920] AC 1 at 31; *Great Western Rly* v. *Bater* [1922] AC 1 at 22.

> My Lords, it may not always be easy to distinguish between questions of fact and questions of law . . . The views from time to time expressed in this House have been far from unanimous, but in my humble judgment where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only.

There have been many similar statements and they show no sign of ceasing.[84] Where a tribunal has misconstrued and misapplied the law the urge to intervene is often more than an appellate court can resist, whether or not there is room for reasonable difference of opinion.

The House of Lords' 'fact and degree' doctrine, on the other hand, provides a more tolerant and flexible rule for appeals than would exist under a rigid dichotomy where the court was obliged to substitute its own opinion in every borderline case of legal interpretation. Courts are in any case reluctant to reverse the conclusions of expert tribunals on matters falling peculiarly within their province, for example where an employment tribunal has to apply the complicated classification of industrial operations.[85] The principle expounded by Lord Radcliffe, as quoted above, has obvious affinities both with the doctrine of reasonableness[86] and with the doctrine of review for 'no evidence'.[87] Here, as elsewhere, the courts have been working towards a broad power to review unjustifiable decisions while always leaving to the administrative authority or tribunal a reasonable margin of error. American administrative law has taken a similar direction in evolving the substantial evidence rule for testing the reasonableness of findings of fact and the 'reasonable basis' rule for testing determinations of law.[88]

The courts ought, however, to guard against any artificial narrowing of the right of appeal on a point of law, which is clearly intended to be a wide and beneficial remedy.[89] Very difficult questions of law have to be determined by many tribunals and for the sake of consistency and fairness it is important that the guidance of the courts should be available. On an appeal from an employment tribunal in a redundancy payment case, where the question was whether a certain term could be implied in the claimants' contracts of employment, the Queen's Bench Divisional Court held that this was a question of fact, so that the appeal was incompetent; but the Court of Appeal reversed them, holding that it was clearly a question of law, and allowed the appeal.[90] In another case, where it was held that an official referee

[84] e.g. *British Launderers' Research Association* v. *Hendon Rating Authority* [1949] 1 KB 462 at 471; *Morren* v. *Swindon BC* [1965] 1 WLR 576 at 583; *R.* v. *Kelly* [1970] 1 WLR 1050; *Woodhouse* v. *Peter Brotherhood Ltd.* [1972] 2 QB 520 at 536; *Pearlman* v. *Harrow School Governors* [1979] QB 56; *ACT Construction Ltd.* v. *Customs & Excise Cmrs.* [1981] 1 WLR 49, affirmed ibid., 1547.

[85] As in *Maurice (C.) & Co. Ltd.* v. *Ministry of Labour* [1969] 2 AC 346; *Esso Petroleum Co. Ltd.* v. *Ministry of Labour* [1969] 1 QB 98. Compare *Libman* v. *General Medical Council* [1972] AC 217 disapproved in *Selvanathan* v. *GMC*, The Times, 26 October 2000 (PC).

[86] Above, p. 351. See *Griffiths* v. *J. P. Harrison (Watford) Ltd.* [1963] AC 1 at 15–16.

[87] Above, p. 276.

[88] See Schwartz and Wade, *Legal Control of Government*, 228.

[89] See the discussion on material error of fact being 'a point of law', above, pp. 277–78.

[90] *O'Brien* v. *Associated Fire Alarms Ltd.* [1969] 1 WLR 1916.

had exercised his discretion wrongly in striking out a claim for want of prosecution, Lord Denning MR said:[91]

> There are many tribunals from which an appeal lies only on a 'point of law': and we always interpret the provision widely and liberally.

The extension in recent years of the right of appeal on questions of law has, as already noted, done much to assist the integration of the tribunal system with the general machinery of justice. Judicial policy ought to reinforce this beneficial trend.

Appeals against discretionary decisions

Where appeal lies only on a point of law, an appeal against an exercise of discretion by a tribunal should succeed, in theory at least, only where the decision is vitiated by unreasonableness, self-misdirection, irrelevant considerations or some other legal error. For otherwise no point of law arises.[92] But in fact the court may allow such an appeal if it appears that the tribunal's decision produces 'manifest injustice'[93] or is 'plainly wrong'.[94] In any case, unreasonableness, self-misdirection, and so forth are grounds which are 'so many and so various that it virtually means that an erroneous exercise of discretion is nearly always due to an error in point of law'.[95]

It is where the right of appeal is unrestricted that judges are inclined to restrict it. It has many times been said in the House of Lords that the appellate court ought to interfere with an exercise of discretion by a lower court or tribunal only where there has been disregard of some legal principle and not merely where it would itself exercise the discretion differently.[96] In addition, an appellate court is naturally disinclined to intervene where the tribunal's decision is based on its own observance of witnesses and its assessment of oral evidence.[97] Where, on the other hand, the evidence is entirely documentary the appellate court is in an equally good position to exercise the discretion.[98] The same may be true of interlocutory orders made before any evidence has been heard.[99] Although there are different

[91] *Instrumatic Ltd.* v. *Supabrase Ltd.* [1969] 1 WLR 519.
[92] *Nelsovil Ltd.* v. *Minister of Housing and Local Government* [1962] 1 WLR 404.
[93] *Wootton* v. *Central Land Board* [1957] 1 WLR 424 at 432.
[94] *Instrumatic Ltd.* v. *Supabrase Ltd.* (above).
[95] *Re DJMS* [1977] 3 All ER 582 at 589 (Lord Denning MR). See, e.g., *Priddle* v. *Fisher & Sons* [1968] 1 WLR 1478; *Hadmor Productions Ltd.* v. *Hamilton* [1983] 1 AC 191.
[96] *Zacharia* v. *Republic of Cyprus* [1963] AC 634 at 661; *Shiloh Spinners Ltd.* v. *Harding* [1973] AC 691 at 727; *Duport Steels Ltd.* v. *Sirs* [1980] 1 WLR 142 at 171; *Customs and Excise Cmrs.* v. *J. H. Corbitt (Numismatics) Ltd.* [1981] AC 22 at 52.
[97] *Blunt* v. *Blunt* [1943] AC 517 at 526–27.
[98] *Osenton (Charles)* v. *Johnston* [1942] AC 130; *Blunt* v. *Blunt* (above).
[99] *British Library* v. *Palyza* [1984] ICR 504 (industrial tribunal's order for discovery of documents held fully reviewable on appeal).

nuances in the judicial statements, which mostly concern appeals from courts of law, the correct position is probably as explained by Lord Atkin:[1]

> I conceive it to be a mistake to hold ... that the jurisdiction of the Court of Appeal on appeal from such an order is limited so that ... the Court of Appeal have no power to interfere with [the judge's] exercise of discretion unless we think that he acted upon some wrong principle of law. Appellate jurisdiction is always statutory: there is in the statute no restriction on the jurisdiction of the Court of Appeal; and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it.

Appellate courts therefore keep their options open, and in practice they are likely to allow an appeal when they think that a substantial mistake has been made. Much may depend upon the legal context. In appeals against refusal of leave to apply for judicial review,[2] for example, the Court of Appeal uses its own discretion freely.

Unappealable discretion

Where a right of appeal is subject to leave from a court or tribunal, there is no right of appeal from a refusal of leave[3] or from a refusal to extend the time for appeal,[4] unless it is expressly conferred in those cases. Otherwise appeals would be multiplied in situations where it is thought necessary to restrict them.[5]

Appeal in relation to review

The existence of a statutory right of appeal does not deprive the High Court of its ordinary powers of quashing a tribunal's decision which is ultra vires or erroneous in law. It has been noticed already that the law often allows alternative remedies, despite a variety of judicial dicta to the contrary, and a decision which is open to appeal may nevertheless be quashed on certiorari.[6]

Appeal and review are in principle two distinct procedures, appeal being

[1] *Evans* v. *Bartlam* [1937] AC 473 at 480. See similarly Lord Wright's speech. See also *Tsai* v. *Woodworth*, The Times, 30 November 1983, holding that the right of appeal would be nugatory unless Lord Atkin's principle was accepted.

[2] Above, p. 657.

[3] *Re Poh* [1983] 1 WLR 2 (immigration appeal). But significant doubt has been cast on this case. *R. (Burkett)* v. *Hammersmith LBC* [2002] 1 WLR 1593 (HL), paras. 10–14. And see above, p. 657.

[4] *White* v. *Chief Adjudication Officer* [1983] 1 WLR 262 (social security pension appeal).

[5] See authorities cited in *Bland* v. *Supplementary Benefit Officer* [1983] 1 WLR 262.

[6] Above, p. 703.

concerned with merits and review being concerned with legality.[7] But in practice an appellant will often wish to raise questions which strictly are questions of legality, such as violation of natural justice or some objection to the tribunal's jurisdiction. It is important that this should be freely allowed, since otherwise many cases could not be fully disposed of on appeal.

But in several appeals under the Tribunals and Inquiries Act the court has acted as if jurisdictional questions could not be decided on appeal, and has permitted conversion of the proceedings into review by certiorari.[8] This would restrict the right of appeal for purely technical reasons and would make unnecessary difficulties for appellants wishing to appeal both on the merits and on some question of jurisdiction. There is abundant authority to the effect that jurisdictional questions can be raised by way of appeal,[9] and the implication of the Act is to the same effect, since the appellant need only be 'dissatisfied in point of law'. And now that it is held that a tribunal exceeds its jurisdiction if it makes any error of law,[10] there would be virtually no scope for appeals if jurisdictional questions could not be raised.

It is true that judges have occasionally professed themselves puzzled as to how, if a tribunal's decision is held to be a nullity, there can be an appeal against it.[11] One ingenious answer is that the tribunal's decision implies a decision that it has jurisdiction, that this is a question of law which the tribunal necessarily has jurisdiction to determine (though not conclusively),[12] and that an appeal therefore lies against the determination.[13] A more direct path to the same result is to hold that the 'decision' from which the statute gives an appeal need not be a valid decision, since 'otherwise the statute would be futile and unworkable'.[14] This was said by the Privy Council in holding that a committee of the Australian Jockey Club could

[7] Above, p. 33. Today all errors of law are jurisdictional (save very exceptionally). Thus there is necessarily an overlap between appeal on a point of law and judicial review on the ground of error of law. See above, p. 264.

[8] *Metropolitan Properties Ltd.* v. *Lannon* [1968] 1 WLR 815 at 822, reversed on the merits, [1969] 1 QB 577; *Chapman* v. *Earl* [1968] 1 WLR 1315; *Picea Holdings Ltd.* v. *London Rent Assessment Panel* [1971] 2 QB 216 at 218. See also *Henry Moss Ltd.* v. *Customs and Excise Commissioners* [1981] 2 All ER 86, where Lord Denning MR suggested the same restriction, but refrained from enforcing it. In *Hanson* v. *London Rent Assessment Committee* [1978] QB 823 an appeal and an application for certiorari were heard together; certiorari was granted.

[9] In *R.* v. *Inland Revenue Commissioners ex p. Preston* [1985] AC 835 at 862 Lord Templeman expressly states that on appeal the High Court can correct all kinds of errors of law including errors which might otherwise be the subject of judicial review. Other similar examples are plentiful, e.g. *R.* v. *Minister of Housing and Local Government ex p. Finchley Borough Council* [1955] 1 WLR 29 at 35; *Re Purkiss' Application* [1962] 1 WLR 902 at 914; *Essex CC* v. *Essex Incorporated Church Union* [1963] AC 808; *Shell* v. *Unity Finance Co. Ltd.* [1964] 2 QB 203; *Arsenal Football Club* v. *Ende* [1977] QB 100 at 116.

[10] Above, p. 264.

[11] *Harman* v. *Official Receiver* [1934] AC 245 at 251 (Lord Tomlin); *McPherson* v. *McPherson* [1936] AC at 177 at 189 (Lord Macmillan); *White* v. *Kuzych* [1951] AC 585 (PC).

[12] Above, p. 254.

[13] *Re Padstow Total Loss Assurance Association* (1882) 51 LJ Ch. 344 at 348 (Jessel MR); *Re Purkiss' Application* (above) at 914 (Diplock LJ). See Rubinstein, *Jurisdiction and Illegality*, 50–2.

[14] See *R.* v. *Secretary of State for the Environment, Transport and the Regions* [1999] 1 WLR 1759.

validly determine an appeal from a decision of the stewards which was claimed to be void for breach of natural justice.[15] It was pointed out that the decision was in fact effective unless and until challenged, and that to hold it legally non-existent would be wholly unreal. The judgment corroborates the point made earlier, that 'void' has a relative rather than an absolute meaning.[16] Its evident good sense has been endorsed by the House of Lords.[17]

TABLE OF TRIBUNALS

This table is based on that appended to the *Annual Report* of the Council on Tribunals for 2002/03. In the case of recently established tribunals for which statistics are not yet available, the figures for the predecessor tribunals, if any, are given. Some titles have been rearranged. Scotland is excluded.

Where procedural regulations have been amended, the latest amending order is shown in brackets. 'C. Act' means the tribunal's constituent Act, as is shown under its title; 'T & I Act' means the Tribunals and Inquiries Act 1992, s. 11, as extended by order under s. 13; '(law)' means that the appeal is on a point of law only.

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Agriculture and Food				
Agricultural Land Tribunals (Agriculture Act 1947, s. 73)	1978/259 1984/1301	High Court (law) (Ag. Misc. P. A. 1954, s. 6)	36	77
Arbitrators (Agricultural Holdings Act 1986, sched. 11)	C. Act, sched. 11	County Court (law) (C. Act, sched. 11)	0	0
Dairy Produce Quota Tribunal (SI 2000/457)	2000/457	None	0	0
Meat Hygiene Appeal Tribunals (Food Safety Act, 1990, Part II)	1992/2921	None	1	0
Aircraft and Shipbuilding				
Aircraft and Shipbuilding Industries Arbitration Tribunal (Aircraft and Shipbuilding Industries Act 1977, s. 42)		Court of Appeal (C. Act, sched. 7)	0	0

[15] *Calvin v. Carr* [1980] AC 574. Although the right of appeal was given by statute, it was held that the jurisdiction of the committee was 'founded on consensual acceptance', i.e. based upon contract. But in contractual cases the question is whether there has been a breach of contract. It is not easy to see what 'void' can mean in this context or how the supposed difficulty about appeal can arise.

[16] Above, p. 300.

[17] *London & Clydeside Estates Ltd. v. Aberdeen DC* [1980] 1 WLR 182 for which see above, p. 302.

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Antarctica				
Antarctic Act Tribunal (Antarctic Act 1994, s. 14(1)(e) and SI 1995/490, reg. 11)	1995/490	None	0	0
Banking				
See Financial Services				
Betting Levy				
Horse Race Betting Levy Appeal Tribunal (Betting, Gaming and Lotteries Act 1963, s. 29)		None	0	0
Building Societies				
See Financial Services				
Care Standards				
Care Standards Tribunal[a] (*inter alia* Protection of Children Act 1999)	2002/816 (2003/626) (2003/1060) (2003/2043)	High Court (law) (T & I Act)	31.5	32
Children				
Child Support Commissioners[b] (Child Support Act 1991, s. 22)	1999/1305 2000/3185 2000/119	Court of Appeal (law) (C. Act, s. 25)	3,700	8,110
Civil Aviation				
Civil Aviation Authority (Civil Aviation Act 1982, s. 2)	(2001/2448)	Sec. of State	4	4
Commons				
Commons Commissioners and Assessors (Commons Registration Act 1965, s. 17)			8	5
Competition				
Competition Appeal Tribunal (Enterprise Act 2002, s. 12)	2003/1372	Court of Appeal (law or size of penalty)	5.5	3
Consumer Credit				
Office of Fair Trading (Enterprise Act 2002 and Consumer Credit Act 1974, as amended by 2002 Act)	1976/191	Sec. of State, then High Court (law) (C. Act, s. 41, T & I Act)	Not available	91
Conveyancing				
Conveyancing Appeals Tribunal (Courts and Legal Services Act 1990, s. 41)	None	High Court (law) (C. Act, s. 42)	0	0

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Copyright and Patents				
Comptroller-General of Patents, Designs and Trade Marks (Patent and Designs Act 1907, s. 63) and other authorised officers (Deregulation and Contracting Out Act 1994, s. 74)	1995/2093 (1999/1092) (1999/1899) (1999/3197) (2001/1412) (2002/529) (2003/513)	Patent Court (Patents Act 1977, s. 97)	39[c]	2,412
Copyright Tribunal (Copyright, Designs and Patents Act 1988, s. 145)	1989/1129 *(1991/201)* 1992/467	High Court (law)	1	7
Criminal Injuries				
Criminal Injuries Adjudicators (Criminal Injuries Compensation Act 1995, s. 5; known as Criminal Injuries Compensation Appeal Panel)	2001 Scheme	None	512.5	3,149
Data Protection				
Information Commissioner (Data Protection Act 1998, s. 6)	Freedom of Information Act 2000, s. 50 (and 2000/185 2000/184 2000/186 2000/190 2000/1865 2000/419 2001/3214 2000/188 2002/2905 2000/417 2000/414 2000/413 2000/415 2001/3214)	Information Tribunal (C. Act, s. 48 and Information Tribunal (Freedom of Information Act 2000, s. 57))	Not available	12,746
Information Tribunal (Data Protection Act 1998, ss. 6 and 49)	2000/189 (2002/2722) 2000/206 2000/731	High Court (law) (C. Act, s. 49 and Freedom of Information Act 2000, s. 59)	0.5	0
Education				
Independent Schools Tribunal[d] (Education Act 1996, s. 476 and Sched. 34)	19568/519 (1972/42)	High Court (law) (T & I Act)	0	0
Exclusion Appeal Panels[e] (Education Act 2002, s. 52)	Wales: 2003/287 England: 2002/3179 2002/3178	Local Education Authority	Not available	1,060

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Admission Appeal Panels[f] (School Standards and Framework Act 1998, ss. 94(5) and 95(3))	2002/2899	Local Education Authority	Not available	66,145
Schools Adjudicator[g] (Schools Standards and Framework Act 1998, s. 25)	1998/1286 (2001/1139)	None	Not available	84
Special Educational Needs and Disability Tribunal[h] (England: Disability Discrimination Act, s. 28H; Wales: Education Act 2002, s. 195)	2001/600 (2002/2787) (2002/1985)	High Court (law) (T & I Act)	219[i]	1,118
Registered Inspectors of Schools Tribunal (Schools Inspections Act 1996, sched. 2)	1999/265	High Court (law) (T & I Act)	0	0
Estate Agents				
Office of Fair Trading (Estate Agents Act 1979, s. 7, as amended by Enterprise Act 2002)	1981/1581	Sec. of State (C. Act, s. 7)	Not available	10[j]
Financial Services				
Financial Services and Markets Tribunal[k] (Financial Services and Markets Act 2000, s. 132)	2001/2476 and s. 133 of C. Act	Court of Appeal (C. Act, s. 137)	0	0
Foreign Compensation				
Foreign Compensation Commission (Foreign Compensation Act 1950, s. 1)	1956/962 (1964/638) 1968/164		0	0
Friendly Societies				
Friendly Societies Appeal Tribunal (Friendly Societies Act 1992, s. 59)	1993/2002	High Court (law) (C. Act, s. 61)	Constituted as required	0
Forestry				
Forestry Committees (Forestry Act 1967, ss. 16, 17B, 20, 21, 25)	None	None	Not available	1
Immigration and Asylum				
Immigration Adjudicators (Nationality, Immigration and Asylum Act 2002, s. 81)	2003/652	Immigration Appeal Tribunal (C. Act, s. 100)	25,023	88,738
Immigration Appeal Tribunal (Nationality, Immigration and Asylum Act 2002, s. 100)	2002 Act, ss. 104–108	Court of Appeal (law) C. Act, s. 103)	3,229	37,070
Asylum Support Adjudicator (Immigration and Asylum Act 1999, s. 102)	2000/451 2003/1735	None	1,528	2,301
Immigration Services Commissioner (Immigration and Asylum Act 1999, s. 83)	C. Act. Sched. 5	Immigration Services Tribunal (C. Act, s. 87)	Not available	114

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Immigration Services Tribunal (Immigration and Asylum Act 1999, s. 87)	2000/2739 2002/1716	None	15	6
Industry and Employment				
Industry Arbitration Tribunal (Industry Act 1975, sched. 3)	C. Act, sched. 3	Court of Appeal (law) (C. Act, sched. 3)	0	0
Industrial Training Levy Exemption Referees (Industrial Training Act 1982, s. 14)	1974/1335	High Court (law) (T & I Act)	0	0
Employment Tribunals (Employment Tribunals Act 1996, s. 1)[1] (a) C. Act (Unfair Dismissal); (b) Equal Pay Act 1970; (c) Sex Discrimination Act 1975; (d) Race Relations Act 1976; (e) Industrial Training Act 1982; (f) Trade Union & Labour Relations (Consolidation) Act 1992; (g) Disability Discrimination Act 1995; (h) Employment Rights Act 1996; (i) National Minimum Wage Act 1998; (j) This Act; (k) Working Time Regulations 1998; (l) Transnational Information and Consultation of Employees Regulations 1999; (m) Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000; (n) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.	(2001/1170) (2001/1171)	Employment Appeal Tribunal (mostly law) (C. Act, s. 21); High Court (law) (T & I Act)	26,996	103,377
Employment Appeal Tribunals (Employment Tribunals Act 1996, s. 20)	1993/2854 (2001/1128) (2001/1476)	Court of Appeal (C. Act, s. 37) (law)	Not available	Not available
Insolvency				
Insolvency Practitioners Tribunal (Insolvency Act 1986, s. 396)	1986/952	High Court (law) (T & I Act)	0	0
Justices and Clerks Indemnification				
Appointed Persons (Justices of the Peace Act 1997, s. 54(6))	1965/1367	None	0	0

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Land				
Adjudicator for HM Land Registry (Land Registration ACt 2002, s. 107)		High Court	0	0
The Lands Tribunal (Lands Tribunal Act 1949, s. 1) See also Commons, Rent	1996/1022 (1998/22)	Court of Appeal (law) (C. Act, s. 3)	155	83
Local Government				
Adjudication Panels for England and Wales (Local Government Act 2000, s. 76)			0	0
Local Taxation				
Valuation Tribunals (Local Government Finance Act 1988, sched. 11)	1989/439 1989/2261 (1991/1) (1991/1189) (1991/210) (1992/1529) (1993/290) 1993/291 1993/292 (1995/363) (1995/368) (1993/615) 1995/3056 1996/43 1997/75 1997/2954 (2000/409) (2000/598) (2000/792) (2001/1439)	High Court (law) (1989/439) Lands Tribunal (non-domestic rating appeals) (1993/291)	480[m]	36,031
London Building Acts				
London Building Acts Tribunals (London Building Acts (Amendment) Act 1939)	None	High Court (law) (C. Act, s. 116)	0	0
Mental Health				
Mental Health Review Tribunals (Mental Health Act 1983, s. 65)	1983/942 (1998/1189)	High Court (law) (C. Act, s. 78)	490	10,657
Mines and Quarries				
Mines and Quarries Tribunals (Mines and Quarries Act 1954, s. 150)	C. Act, sched. 3	High Court (law) (T & I Act)	0	0

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Misuse of Drugs				
Misuse of Drugs Tribunal (Misuse of Drugs Act 1971, sched. 3)	1974/85	None	0	0
National Health Service				
Primary Care Trusts or Health Authorities and Discipline Committees (1992/664 as amended)	2002/2375 (2003/1497)	Family Health Services Appeal Authority (NHS Act 1977, as amended by Health and Social Care Act 2001)	Not available	Not available
Family Health Services Appeal Authority (National Health Service Act 1977, s. 49S)	C. Act, sched. 9A 2001/3750 (2002/1921) 2001/3743	None	8	7
National Lottery				
National Lottery Commission (National Lottery Act 1993, ss. 10, 10A, sched. 3)	1999/137	High Court (C. Act, s. 10B, sched. 3)	0	0
National Savings and National Savings Stock Register				
Adjudicators for National Savings and Investments (Friendly Societies Act 1992, s. 84)	None	None	19	19
Pensions				
Fire Service Appeal Tribunals (Fire Services Act 1947, s. 26 and SI 1992/129)	1992/129	High Court (law) (C. reg.)	0	0
Occupational Pensions Regulatory Authority (Pensions Act 1995, s. 1)	1997/794	High Court (law) (C. Act, s. 97)	28	77
Pensions Appeal Tribunals (War Pensions (Admin. Provisions) Act 1919, s. 8 and Pension Appeal Tribunals Act 1943)	1980/1120 (1986/366) 1998/1201 (2001/1031) (2001/1032) (2001/1183) (2001/3506)	High Court (law) (C. Act, s. 6)	835	3,882[a]
Police Pensions Appeal Tribunals (Police Pensions Act 1976, s. 1 and SI 1987/257)	1987/257 (2003/27) (2002/3202) (2000/843)	High Court (law) (C. reg.)	0	0
Pensions Ombudsman (Pensions Schemes Act 1993, Pt. X)	1995/1053 (1996/2638)	High Court (law) (C. Act, s. 151)	Not available	24

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Pensions Compensation Board (Pensions Act 1995, s. 78) Also see Appeals Service Tribunal, under Social Security, below.	1997/724	None	2	2
Plant Varieties and Seeds				
Controller of Plant Varieties Rights (Plant Varieties Act 1997, sched. 1)	None	Plant Varieties etc. Tribunal (C. Act, s. 26)	0	0
Plant Varieties and Seeds Act Tribunal (Plant Varieties Act 1997, s. 42 and sched. 1)	1974/1136 (2002/3198)	High Court (law) (C. Act, s. 45)	0	0
Police				
Police Appeal Tribunals (Police Act 1996, sched. 6)	1999/818	None	Not available	53[o]
National Criminal Intelligence Service/National Crime Squad Appeals Tribunals (Police Act 1997, ss. 38, 82)	1998/639 1998/640	None	Not available	53[p]
Registered Homes				
See Care Standards				
Rents and Enfranchisement				
Rent Assessment Committees[q] (Rent Act 1977, sched. 10)	2003/2098 2003/2099 2003/2269 2003/2270 Commonhold and Leasehold Reform Act 2002	High Court (law) (T & I Act); Lands Tribunal (C. Act, sched. 22)[r]	4,576[s]	4,748
Reserve Forces				
Reserve Forces Reinstatement Committees (Reserve Forces (Safeguarding of Employment) Act 1985, sched. 2)	None	Reinstatement Umpire (C. Act, s. 9)	0	0
Reserve Forces Reinstatement Umpires (Reserve Forces (Safeguarding of Employment) Act 1985, sched. 2)	None	None	0	0
Reserve Forces Appeal Tribunals (Reserve Forces Act 1996, Pt. IX)	1997/798	None	0	0
Revenue				
General Commissioners of Income Tax (Taxes Management Act 1970, s. 2)	1994/1812 (1999/3293) (2002/2976)	High Court (law) (C. Act, s. 56)	2,371	9,822

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Special Commissioners of Income Tax (Taxes Management Act 1970, s. 4)	1994/1811 (1999/3292) (2000/288) (2002/2976) (2003/968)	High Court or Court of Appeal (law) (C. Act, s. 56A) (C. Act, s. 56A)	142	93
Section 706 (Tax Avoidance) Tribunal (Income and Corporation Taxes Act 1988, Pt. VII)	None	High Court (law) (C. Act, s. 705A)	0	35[1]
VAT and Duties Tribunals (Value Added Tax Act 1994, sched. 12)	1986/590 (1991/186) (1994/1978) (1994/2176) (1997/255) (2001/3073) (2002/2851)	High Court (law) (T & I Act)	1,030	837
Sea Fisheries				
Sea Fish Licence Tribunal (Sea Fish (Conservation) Act 1967, s. 4AA)	None	High Court (law) (T & I Act)	0	0
Social Security				
Appeals Service[u] (Social Security Act 1998, Pt. 1, Ch. 1)	1999/991 (2003/916) (2003/1050)	Social Security or Child Support Commissioners (law)	23,565	271,649
Social Security Commissioners[v] (Social Security Act 1998, sched. 4)	1999/1305 Child Support Pensions and Social Security Act 2000 (2000/3185) (2000/119) 1999/1495 (2001/1095) 2002/3237	Court of Appeal (law) (C. Act, s. 15)	3,700	8,110
Transport (road)				
Parking Adjudicator (Road Traffic Act 1991, s. 73)	1993/1202 (1999/1205) 1999/1918	None	391	34,956
Road User Charging Adjudicator (SI 2001/2313)			Not available	Not available
Traffic Commissioners (Public Passenger Vehicles Act 1981, s. 4)	1986/1629 (1993/2754) 1995/2868 1995/2908	Sec. of State (Transport Act 1985, ss. 9, 42) and Transport Tribunal (C. Act, s. 50; Goods Vehicle (Licensing of Operators) Act 1995, s. 37)	Not available	9168[w]

Tribunals and constituent Act	Procedural regulations	Body to which appeal lies	Days sat 2002–03	Cases decided 2002–03
Transport Tribunal (Transport Act 1985, sched. 4)	1986/1547 2000/3226 (2001/4041) (2002/643)	Court of Appeal (law)[x]	30	97
Wireless Telegraphy				
Wireless Telegraphy Appeal Tribunal (Wireless Telegraphy Act 1949, s. 9)	1998/3036	High Court (law) (T & I Act)	0	0[y]

[a] Considers appeals in relation to: (a) decisions of the Secretary of State for Education and Skills in relation independent schools and child safety; and (b) decisions of the National Care Standards Commission in England and the National Assembly for Wales in respect of the registration of various establishments including children's homes, care homes, fostering agencies and nurses agencies.

[b] Figures are those for the Social Security and Child Support Commissioners together.

[c] Includes *inter parte* and *ex parte* hearings.

[d] Since October 2003 absorbed into the Care Standards Tribunal, established under the Care Standards Act 2000.

[e] Figures refer to the 2001/02 school year.

[f] Figures refer to the 2001/02 school year.

[g] Figures refer to the 2001/02 school year. 9 of the referrals were multiple objection—i.e. from different sources regarding the same admission arrangements.

[h] Previously one tribunal, the 2002 Act created a separate jurisdiction for a new Special Educational Needs Tribunal for Wales.

[i] Figure is for England only; no figure available for Wales as new tribunal.

[j] Figure is for Estate Agent cases only.

[k] The Financial Services and Markets Tribunal has taken over the jurisdiction of, *inter alia*, the Banking Appeal Tribunal, the Building Societies Appeal Tribunal and the Friendly Societies Appeal Tribunal.

[l] Previously the Industrial Tribunals Act 1996.

[m] Figure is for Wales only. No figure available for England.

[n] This figure includes withdrawn and deferred cases, as well as decided cases.

[o] Figures are for 2000–01 and include Police Appeal Tribunals (under the 1996 Act) and National Criminal Intelligence etc Tribunals (under the 1997 Act).

[p] Figures are for 2000–01 and include Police Appeal Tribunals (under the 1996 Act) and National Criminal Intelligence etc Tribunals (under the 1997 Act).

[q] Includes Leasehold Valuation Tribunals (Housing Act 1980, s. 142) and Rent Tribunals (Housing Act 1980, s. 72).

[r] Appeal to the High Court lies from the Rent Tribunals and Rent Assessment Committees. Appeal to the Lands Tribunal lies from the Leasehold Valuation Tribunals.

[s] Figure is for England only; no figure available for Wales.

[t] Figures relate to references by the Inland Revenue as to whether there was a case to answer. No appeals were subsequently lodged.

[u] Launched in April 2000, this Service hears appeals relating to social security, child support, housing benefit, council tax benefit, vaccine damage, tax credit, compensation recovery, child tax credit and pensions credit.

[v] Figures are those for the Social Security and Child Support Commissioners toge ther.

[w] 2001–02 figures.

[x] No appeal lies on questions of fact or locus standi: C. Act., 4th sched. para. 14(2).

24

STATUTORY INQUIRIES

THE SYSTEM OF INQUIRIES

An administrative technique

The statutory inquiry is the standard device for giving a fair hearing to objectors before the final decision is made on some question of government policy affecting citizens' rights or interests.[1] Any project such as the compulsory acquisition of land, the siting of a power station or an airport or the building of a motorway will provide for a public inquiry as a preliminary to the decision; and the same applies to some very common procedures such as planning appeals. People who wish to object have important procedural rights, derived partly from statute and partly from the principles of natural justice and regulated in some respects by the Tribunals and Inquiries Act 1992.

The distinction between tribunals and inquiries—that tribunals are concerned with finding facts and applying legal rules to those facts, while inquiries, although also concerned with fact-finding are directed towards making recommendations on questions of policy[2]—is based on the difference between judicial and administrative power. Inquiries are part of the procedure for ensuring that administrative power is fairly and reasonably exercised, so that they have the same purpose as the legal principles of natural justice. Many statutes themselves provide for inquiries or hearings and lay down a mandatory procedure for dealing with objections. But the statutory procedure is usually only a framework, within which the principles of natural justice operate to fill in details and ensure that fair procedures are followed.[3]

Although a main object of these inquiries is to assuage the feelings of the citizen, and to give his objections the fairest possible consideration, they have given rise to many complaints. They are a hybrid legal-and-administrative process, and for the very reason that they have been made to look as much as possible like judicial

[1] For a detailed treatment of public inquiries and their problems see Wraith and Lamb, *Public Inquiries as an Instrument of Government*. See also Ganz, *Administrative Procedures*, 39 and [1996] *PL* 359–527 (discussion by several authors of the *Report of the Scott Inquiry* (below, p. 996)). And see Appendix Two.

[2] Above, p. 910.

[3] Above, p. 506.

proceeding, people grumble at the fact that they fall short of it. They were reviewed both by the Ministers' Powers Committee of 1932 and by the Committee on Tribunals and Enquiries (the Franks Committee) of 1957. The first report had little practical effect; but the government's acceptance of the Franks Committee's principal recommendations marked a turning-point at which repeated criticisms at last achieved results.

Statutory inquiries are now so common that it is unusual to find a statute concerned with planning control or with the acquisition of land, or indeed with any important scheme of administrative control, which does not provide this machinery for one or more purposes. Acts concerned with housing, town and country planning, roads, agriculture, health, transport, police, local government as well as the compulsory acquisition of land all utilise this technique. Moreover, the Parliamentary Private Bill procedure as a means of obtaining authorisation for railway, tramway and other transport works has been replaced by a system of Ministerial Orders preceded where appropriate by a public local inquiry.[4]

Planning inquiries are the most numerous class, since they are held not only before the adoption of planning schemes of a general character but also in many cases of individual appeals against refusal of planning permission or against conditions imposed by a local planning authority. The Planning Inspectorate[5] which arranges inquiries concerning local authorities and some central departments, as well as housing and planning cases has in England a corps of over 400 inspectors responsible for about 17,000 inquiries of all types a year. The Planning Inspectorate has, since April 1992, been established as an executive agency.[6] The Council on Tribunals has accepted that this poses no danger to the independence and adjudicative standards of the inspectorate.[7]

Relation of law and policy

In the vast majority of cases in which statutory inquiry procedures are employed the ultimate decision is one of policy. It is essentially for such decisions that the

[4] Transport and Works Act 1992, ss. 1–3, 6–7. Where the proposed scheme is, in the Secretary of State's opinion, of national significance, approval (by resolution) of both Houses of Parliament is required. This approval will precede the public local inquiry (Council on Tribunals, *Annual Report*, 1991–92, para. 2. 105).

[5] The Inspectorate publishes Annual Reports and Statistical Reports on its web-site (www.planning-inspectorate.gov.uk). The figures below are drawn from the 2001–02 reports. Further information is found in the Annual Reports of the Council of Tribunals (www.council-on-tribunals.gov.uk). See also, D. Hanchet, (2001) *Journal of Planning Law* (Supp.) 24 for discussion of the operation of the Inspectorate.

[6] See above, p. 47, for discussion of executive agencies. Previously the Inspectorate fell under the Department of the Environment; it is now under the office of the Deputy Prime Minister.

[7] *Annual Report*, 1991–92, para. 1. 67.

technique of inquiries has been developed. Should the minister confirm a scheme for the motorway? Should he confirm a compulsory purchase order? Should he allow an appeal against refusal of planning permission by the local authority? The answers will depend on what he decides is expedient in the public interest.[8] They cannot be found by applying rules of law, and the problems are therefore unsuitable for independent tribunals.

The inquiries which matter most in administrative law are those which are required by statute before the minister may lawfully make some order. This is the situation in most of the examples discussed in this book. If some part of the statutory procedure has not been properly followed, or there has been a breach of natural justice, there will have been no valid inquiry and any order made in consequence, if challenged within any statutory time limit, can be quashed by the court.[9] Legal irregularity here has a clear legal result.

But inquiries are set up by ministers in many other situations where they have no effect on the validity of any particular act or order. An Act will often give power for the minister to hold an inquiry, if he thinks fit, into any matter connected with his functions under the Act, as for instance do the National Health Service Act 1977,[10] the Town and Country Planning Act 1990[11] and the Local Government Act 1972.[12] There are also many specific cases where the Act makes the holding of the inquiry discretionary. Some attention must be paid to discretionary inquiries since many of them are within the Tribunals and Inquiries Act 1992.[13] Furthermore, it would be rash to say that irregularity in an inquiry of this class could never affect the validity of a ministerial order, even though the minister could have dispensed with the inquiry altogether had he wished.

Evolution of the inquiry system

The statutory inquiries which are the subject of this chapter came into prominence along with the expansion of central and local government powers in the nineteenth century.[14] When it became impossible to provide for all the details of government by Act of Parliament, inquiries were adopted as a kind of substitute, in the administrative sphere, for the parliamentary process which accompanied legislation.

At first the statutory authority would be given power, after holding a public inquiry and considering objections, to make a provisional order. This would not take effect until confirmed by Act of Parliament. A further simplification was made

[8] Exceptionally a minister may be required to decide a question of fact or law (above, 911).
[9] For examples see above, p. 513.
[10] s. 84.
[11] s. 282.
[12] s. 250.
[13] Below, p. 987.
[14] But Wraith and Lamb, *Public Inquiries as an Instrument of Government*, 17, point out that the Domesday surveys may be considered the first public inquiries.

by the Statutory Orders (Special Procedure) Act 1945 which, for matters within its scope, substituted a procedure whereby the provisional order took effect if not annulled by either House of Parliament. In due course, Parliament's role was reduced still further with the minister being given power to confirm the provisional order. This familiar combination of public inquiry followed by ministerial order, made without reference to Parliament, is the standard pattern today.

Specimen procedure

The procedure of statutory inquiries has now become standardised. No single statute lays down the procedure, but the numerous modern statutes which prescribe inquiries follow a common pattern, with only a few significant variations. The compulsory purchase for slum clearance procedure[15] under the Housing Acts provides a typical example.

The first step is for the local authority to pass a resolution defining the clearance area, which they are obliged to do if satisfied as to certain facts. The resolution is only a preliminary step to prepare the way for either a compulsory purchase order or else a purchase by agreement. A compulsory purchase order requires the consent of the Secretary of State before it can become effective, and the time for making objections is between the making of the order and the Secretary of State's decision upon it. Before the local authority may submit a clearance order to the Secretary of State they must make it available for inspection and advertise it in the local press. They must also notify owners, occupiers and mortgagees of the land, and inform them of their opportunities for making objections. If no objection is made, the Secretary of State may confirm the order with or without modification. But the important provision is to the following effect:[16]

> If any objection duly made is not withdrawn, the Secretary of State shall, before confirming the order, either cause a public local inquiry to be held or afford to any person by whom an objection has been duly made and not withdrawn an opportunity of appearing before and being heard by a person appointed for the purpose, and, after considering any objection not withdrawn and the report of the person who held the inquiry or was so appointed, may confirm the order with or without modification.

It has been held that the final words empower the Secretary of State to modify an invalid order so as to make it a valid one, at least in cases where the flaw is not of a fundamental character;[17] and that an order of this two-stage type is legally 'made'

[15] See Housing Act 1985, Part IX read with the relevant parts of the Acquisition of Land Act 1981.

[16] Acquisition of Land Act 1981, s. 13(2), slightly paraphrased.

[17] *Minister of Health* v. *The King ex p. Yaffé* [1931] AC 494. See also *Re Bowman* [1932] 2 KB 621; *Legg* v. *Inner London Education Authority* [1972] 1 WLR 1245 (Secretary of State's power to approve with 'modifications' exceeded); *R.* v. *Secretary of State for the Environment ex p. Berkshire CC* (1996) 160 JP Rep. 516.

when it is confirmed by the Secretary of State, since before then it has no operative force in law.[18]

If the order is confirmed, the local authority must again advertise it and inform objectors. A period of six weeks is then allowed within which anyone who wishes to challenge the order on legal grounds (e.g. ultra vires) must apply to the High Court. Subject to any legal dispute, the order becomes operative at the end of the six weeks, and thereafter 'shall not be questioned in any legal proceedings whatsoever'. The significance of this drastic clause is explained elsewhere.[19] Standardised provisions of the same kind are found in many other Acts governing the compulsory purchase of land such as the Water Resources Act 1991 and the Forestry Act 1967.[20]

Hearing, report and decision

Where there is opposition to the order, the usual sequence of events is that objection is formally lodged and a public local inquiry is held. In fact the statutory formula allows the Secretary of State to hold either a public local inquiry or a hearing, which suggests that a hearing need not be public.[21] But other statutes speak merely of a 'local inquiry',[22] and it is not clear how this is intended to differ from a hearing, although the words seem to indicate an investigation going beyond a hearing of those who have lodged formal objections.[23] It may be that the word 'public' is omitted in order to prevent the validity of the inquiry being questioned if the public, or members of it, are excluded, for instance where they try to disrupt the inquiry by misbehaviour. The regular practice, in any case, is to hold public inquiries rather than hearings,[24] thus giving the public an opportunity to participate and giving the minister the benefit of all points of view. The Tribunals and Inquiries Act 1992 will apply in either case,[25] but in other statutes there may be differences.[26]

[18] *Iveagh (Earl)* v. *Minister of Housing and Local Government* [1964] 1 QB 395 (historic building preservation order).

[19] Above, pp. 727–728.

[20] See above, p. 70.

[21] Cf. [2001] *JPL* 1109 (Freer) suggesting that in a 'hearing' there was an inquisitional burden on the inspector which was absent in a public inquiry.

[22] e.g. Town and Country Planning Act 1990, s. 320; Local Government Act 1972, s. 250; Highways Act 1980, 1st sched., para. 7. 'Public local inquiries' are required in compulsory purchase cases under the Acquisition of Land Act 1981, s. 13 and 1st sched., para. 4. The procedural rules for the public local inquiry are in SI 1994/3264.

[23] See below, p. 970. Where there are statutory rules of procedure (below, p. 982) they normally apply to both inquiries and hearings.

[24] A hearing rather than an inquiry is now exceptional: Parliamentary Commissioner for Administration, *Annual Report for 1974* (HC 1974–5 No. 126), 7. See also Wraith and Lamb, *Public Inquiries as an Instrument of Government*, 159.

[25] Below, p. 970.

[26] As in the matter of costs: below, p. 985.

The person appointed by the Secretary of State to hold the inquiry or hearing is in most cases an inspector from the Planning Inspectorate. The 'case' is thus 'heard' before an official who is not from the department concerned. The local authority and the objectors may be legally represented, and an important inquiry will have some of the atmosphere of a trial. The inspector may conduct the inquiry as he wishes, subject in some cases to procedural regulations. The objectors will call witnesses and examine them, and the local authority's representatives may cross-examine them. The authority will also frequently call witnesses of its own. The inspector, like a judge, will often take very little part in the argument; his task is to hear the objections and the arguments and then give advice to the minister. Despite the implications of 'inquiry', the procedure is basically adversary, i.e. between opposing parties, and not inquisitorial.[27]

In due course the inquiry is closed, and the inspector makes his report. Until 1958 the normal practice was to refuse disclosure of this report to the objectors: it was treated as an official document like any other paper on the department's files, and like any other report from a civil servant to his department, it was treated as confidential.[28] Eventually the minister's decision would be given; but usually it would be unaccompanied by reasons. The failure to disclose the report and to state reasons was the source of much of the dissatisfaction with inquiries before the reforms of 1958. Although the controversies which raged round these questions have now passed into history, they provide a classic illustration of the clash between the legal and administrative points of view.

Statutory inquiries and natural justice

A statutory inquiry is a formalised version of the fair hearing which is required by the common law according to the principles of natural justice. It does not displace natural justice:[29] it should be regarded rather as a framework within which natural justice can operate and supply missing details. The common law's presumption that Parliament intends power to be exercised fairly is all the stronger where Parliament itself has provided for a hearing.

Natural justice has in fact been applied in a long series of cases to the whole procedure of a public inquiry, comprising the inspector's and the minister's functions alike.[30] The principle of these cases was that the law could not be content with seeing merely that the form of the statutory procedure had been followed. The

[27] For the argument that fairness in inquiries should not be viewed 'through the prism of adversarialism' see [1996] *PL* 508 (M. C. Harris).

[28] Above, p. 484.

[29] In *Bushell* v. *Secretary of State for the Environment* [1981] AC 75 at 95 Lord Diplock preferred the terminology of 'fairness', which had come into vogue since the earlier decisions.

[30] Above, p. 513.

same applies to the statutory rules of procedure which have been made for many inquiries, as explained later.[31]

COMPLAINTS AND REFORMS

Lawyers' criticisms

Lord Hewart spoke for many lawyers when he made his attack on the then prevailing procedures in his book *The New Despotism*, published in 1929 when he was Lord Chief Justice. He wrote of inquiries:[32]

> It is sometimes enacted that, before the Minister comes to a decision, he shall hold a public inquiry, at which interested parties are entitled to adduce evidence and be heard. But that provision is no real safeguard, because the person who has the power of deciding is in no way bound by the report or the recommendations of the person who holds the inquiry, and may entirely ignore the evidence which the inquiry brought to light. He can, and in practice sometimes does, give a decision wholly inconsistent with the report, the recommendations, and the evidence, which are not published or disclosed to interested individuals. In any case, as the official who decides has not seen or heard the witnesses, he is as a rule quite incapable of estimating the value of their evidence . . . the requirement of a public inquiry is in practice nugatory. . . . It seems absurd that one official should hold a public inquiry into the merits of a proposal, and that another official should be entitled, disregarding the report of the first, to give a decision on the merits.

The essential compromise

The fact that these criticisms failed to face was that where the decision is one of policy there is no reason why the final decision should be based exclusively on evidence given at the inquiry—and often it will not be. Suppose, to take the case of the new town at Stevenage,[33] that the local residents oppose the scheme for a new town on the grounds that there will be serious difficulties of water supply and sewage disposal. The objections are merely one factor which must be weighed by the minister and his advisers against the demands of national policy. It may be that these objections apply to all the other eligible sites for the new town. It may be, also, that the need to develop new towns is so great that the expense of overcoming serious physical obstacles will justify itself. It may be, again, that the other

[31] Below, p. 982.
[32] p. 51.
[33] Above, p. 473.

advantages of the site outweigh the objections. These are eminently the sort of matters upon which the final decision will turn. But it is impossible to bring them all to a head at a public inquiry in the same way in which a legal issue can be brought to a head in a court of law.[34]

A minister's decision on a planning scheme or a clearance scheme is a different kind of mental exercise, for there is the whole exterior world of political motive.[35] It is fundamental that political decisions should be taken by a minister responsible to Parliament, and that the political responsibility should rest entirely upon him and not upon his officials or advisers. Furthermore, the place where policy should be explained is Parliament, where the responsibility lies. Nothing, therefore, can prevent the ultimate responsibility lying outside the forum of an inquiry, whereas it must lie inside the forum of a court of law.

Nevertheless there are exceptional cases. Courts of law may appear to take decisions of policy and ministers may decide particular cases into which policy does not seem to enter. For reasons of convenience inspectors hearing planning appeals have been empowered to decide a great many of the cases themselves.[36] This does not alter the fact that legal decisions and political decisions are different things and require different procedures.

'Blowing off steam'

These realities often leave objectors with a sense of frustration, feeling that they are fighting a phantom opponent, and that they have no assurance of coming to grips with the real issues which are going to decide the case. In the *Stevenage* case the judge of first instance said:[37]

> To take any other view [sc. than that the minister must have reasonable grounds for his decision] would reduce the provisions for objections, the holding of a local public inquiry, the report of the officer who holds it, and the consideration of that report by the Minister to an absurdity, because when all has been said and done the Minister could disregard the whole proceedings and do just as he pleased. The Attorney-General argued that that was, indeed, the position, and that the sole use of the liberty to make objections was that the objectors (I am quoting his words) might 'blow off steam' and so rally public opinion to which alone the Minister might bow.

[34] The minister may naturally use knowledge required elsewhere: *Price* v. *Minister of Health* (1947) 116 LJP 291. This is subject to the limits indicated below, p. 978.

[35] See *Johnson (B.) & Co. Ltd.* v. *Minister of* [illegible] [1947] 2 All ER 395 at 399 (Lord Greene MR).

[36] SI 1997 No. 420. With the consent of the parties most of these are dealt with by way of written representations without any hearing (SI 2000 No. 1628). For the relevant procedural rules, see SI 2000 No. 1624. There are now separate rules for Wales (SI 2003 No. 1267 (Determination by Inspectors); SI 2003 No. 1266 (procedure)).

[37] [1947] 1 All ER at 398.

But as is obvious, and as the appellate courts held,[38] the minister's decision cannot be dictated to him by the inspector's conclusions from the inquiry.

To conclude from this that the inquiry is merely an opportunity to blow off steam is cynical and unrealistic. The important thing is not that the decision should be dictated by the report but that the objectors' case should be fairly heard and should be fairly taken into account. The law can ensure that their case is heard. But it cannot ensure that any particular weight is given to it.[39] That, after all, is precisely the basis on which the judges have developed the principles of natural justice. The real risk is not that the minister will perversely disregard the evidence but that he will be tempted to act before he has discovered that there is another side to the case. The statutory inquiry has proved to be an essential piece of mechanism and the committees who have reported upon it have been unable to suggest anything better.

The Franks Committee (1957)

The Committee on Tribunals and Inquiries (the Franks Committee) surveyed the whole ground in its report of 1957.[40] This was an extensive, factual and practical report, and it caught a favouring tide of public opinion. The Committee made many proposals for improving the existing system, which have greatly reduced the volume of public complaint. Of outstanding importance were the recommendations (accepted) that inspectors' reports should be published and that objectors should be able to know as early as possible what case they had to meet.

Just as in the case of tribunals,[41] the Committee contrasted 'two strongly opposed views': the 'administrative' and the 'judicial' views.[42] The administrative view, which had been dominant previously, stressed that the minister was responsible to Parliament and to Parliament only for his decision, and that it could not in any way be governed by rules. The judicial view held that an inquiry was something like a trial before a judge and that the decision should be based wholly and directly on the evidence. Both these extremes were rejected—and this involved rejecting the established philosophy that was supposed to justify non-disclosure of the government's case and non-disclosure of the inspector's report. The Committee said:[43]

> If the administrative view is dominant the public enquiry cannot play its full part in the total process, and there is a danger that the rights and interests of the individual citizens

[38] Above, p. 473.

[39] Subject to the rules as to judicial review for unreasonableness, etc.: above, p. 351.

[40] Cmnd. 218 (1957). This ground was first surveyed in the Report of the Ministers' Powers Committee, Cmnd. 4060 (1932). Although that report recommended that reasons should be given for decisions and that inspectors' reports should be published, nothing was done.

[41] Above, p. 920.

[42] Para. 262.

[43] Paras. 273–74.

affected will not be sufficiently protected. In these cases it is idle to argue that Parliament can be relied upon to protect the citizen, save exceptionally. ... If the judicial view is dominant there is a danger that people will regard the person before whom they state their case as a kind of judge provisionally deciding the matter, subject to an appeal to the Minister. This view overlooks the true nature of the proceedings, the form of which is necessitated by the fact that the Minister himself, who is responsible to Parliament for the ultimate decision, cannot conduct the enquiry in person.

The Committee rejected the notion that objectors could not expect the same standard of justice when the scheme was initiated by the same minister who had ultimately to decide its fate rather than by some other authority. The Committee put fallacious distinctions firmly aside:[44]

These and other possible distinctions are useful in considering detailed aspects of the various procedures, but they are misleading when what has to be considered is their general nature. Not only is the impact of these various procedures the same so far as the individual citizen is concerned, for he is at issue with a public authority in all of them, but they also have basic common features of importance when regarded from a wider point of view. All involve the weighing of proposals or decisions, or provisional proposals or decisions, made by a public authority on the one hand against the views and interests of individuals affected by them on the other. All culminate in a ministerial decision, in the making of which there is a wide discretion and which is final.

The plan of reform

Two primary recommendations were that there should be a permanent and independent body, the Council on Tribunals, and that the Council should formulate rules of procedure for inquiries which would have statutory force The Council on Tribunals was constituted by the Tribunals and Inquiries Act 1958 (now replaced by the Tribunals and Inquiries Act 1992) but as a purely advisory body. As regards inquiries, it has to consider and report on such mattes as may be referred to it by the Lord Chancellor, or as it may itself determine to be of special importance, concerning 'administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry'.[45] A statutory inquiry is defined as 'an inquiry or hearing held or to be held in pursuance of a duty imposed by any statutory provision'—that is to say, an inquiry which the minister is obliged to hold—with the addition of such other inquiries or hearings as may be designated by order.[46] This latter limb of the definition dates from 1966 and is explained below.[47]

[44] Para. 267.
[45] s. 1(1)(c) of the Act of 1992.
[46] Tribunals and Inquiries Act 1992, s. 16(1).
[47] Below, p. 987.

Standing machinery is thus provided for dealing with the problems of inquiries as and when they arise. The work of the Council will be illustrated under a number of different headings. As it has developed, the Council has entertained complaints from members of the public about inquiries. Thus the Council has, in its limited sphere of operation, undertaken the work of an ombudsman. Its constitution and other activities have been explained in the previous chapter.

Power to make procedural rules for inquiries was given by an Act of 1959.[48] The power is conferred on the Lord Chancellor, acting by statutory instrument and after consultation with the Council on Tribunals. Rules have been made for a number of the commoner types of inquiries, as explained below.[49] In Scottish affairs the Secretary of State for Scotland acts in place of the Lord Chancellor.[50]

Of the Committee's detailed recommendations about inquiries the following were the most noteworthy.

1. A public authority initiating a scheme or order should be required to make available, in good time before the inquiry, a written statement giving full particulars of its case.
2. The minister who will ultimately decide the case should, whenever possible, make available before the inquiry a statement of the policy relevant to the particular case; but he should be free to direct that the statement be wholly or partly excluded from discussion at the inquiry.
3. If the policy changes after the inquiry, the letter conveying the minister's decision should explain the change and its relation to the decision.
4. The main body of inspectors should be placed under the control of the Lord Chancellor.
5. The initiating authority (including a minister) should explain its proposals fully at the inquiry and support them by oral evidence.
6. Statutory codes of procedure should be formulated by the Council on Tribunals.
7. Public inquiries are preferable to private hearings in cases of compulsory acquisition of land, development plans, planning appeals and clearance schemes.
8. The inspector should have power to administer the oath and subpoena witnesses.
9. Costs should be more generally awarded and the Council on Tribunals should keep the subject under review.
10. The inspector's report should be divided into two parts: (i) summary of evidence, findings of fact and inferences of fact; and (ii) reasoning from facts including application of policy and (normally) recommendations.
11. The complete text of the report should accompany the minister's letter of decision and also be available on request centrally and locally.
12. If any of the parties wish for an opportunity to propose corrections of fact, the first part of the report should, as soon as possible after the inquiry, be sent both to the authority and to the objectors. They should have fourteen days in which to propose corrections.

[48] That power is now vouchsafed by the Tribunals and Inquiries Act 1992, s. 9.
[49] Below, p. 982.
[50] Act of 1992, s. 9(4); SI 1999 No. 678.

13. The minister should be required to submit to the parties for their observations any new factual evidence, including expert evidence, obtained after the inquiry.
14. The minister's letter of decision should set out in full his findings and inferences of fact and the reasons for the decision.

The great majority of these recommendations were accepted and put into effect. Only numbers 2 and 4 were rejected outright, though numbers 9 and 12 were reserved for further consideration. The remainder were declared to be 'wholly or partly acceptable'—a form of acceptance which left open a way of retreat, as appeared later in connection with number 13.[51]

The necessary changes were effected more by administrative directions than by alteration of the law. The powers of the Council on Tribunals to consider and report on relevant questions have already been mentioned.[52] The Act of 1958 (and its successors) also provided for reasons to be given for decisions. The statutory rules of procedure which have now been made for some inquiries also give legal force to some of the other improvements. These various matters are explained below. But the chief instrument of reform has been the ministerial circular, a document which has no legal operation but which 'invites' local authorities and other bodies to make arrangements suggested by the minister, or else explains the minister's own departmental practice. Many important reforms, such as the publication of inspectors' reports and the giving of reasoned decisions, could be made merely by changes of practice and without any alteration of the law. These changes were therefore explained in circulars, which were published documents freely available to all concerned.

LAW AND PRACTICE TODAY

The right to know the opposing case

One important requirement of natural justice is that the objector should have the opportunity to know and meet the case against him.[53] 'The case against him', in the context of an inquiry, will be some scheme or order proposed by some public authority, such as a compulsory purchase order, or some adverse decision such as the refusal of planning permission.

In accordance with a recommendation of the Franks Committee, ministerial instructions ask local authorities to prepare written statements setting out the

[51] See below, p. 981.
[52] Above, pp. 921 and 924.
[53] Above, p. 512.

reasons for their proposals and to make these available to objectors in good time before the inquiry. This has now become standard practice. In the cases where the rules of procedure now apply, they require the authority to serve on the objector, usually at least twenty-eight days before the inquiry, a written statement (known as the 'policy statement') of their reasons for seeking confirmation of their order or else a written statement of the submissions which they will make at the inquiry. If directions or opinions of other government departments are to be relied upon, they must be disclosed in advance. Facilities must be given for inspection and copying of relevant documents and plans. Where the minister is himself the originating authority, he will act similarly.

Although the government rejected the recommendation that the deciding minister, as opposed to the initiating authority, should provide a statement of policy before the inquiry, there has been an improvement in the issue of explanatory material, particularly from the Department of the Environment.

Inspectors' reports

None of the reforms achieved by the Franks Committee was of greater importance than the successful conclusion of the long struggle to secure publication of inspectors' reports. Before the Committee there was strong official opposition to the proposal. Much of this opposition was based on the well-worn objections of the secretive civil servant. To reveal the report would be administratively inconvenient; it would embarrass the minister; it would reduce the candour with which the report was written; and would not be understood by the objectors. Even though the official case was not so weak as might be thought from some of these arguments used to defend it, the overriding fact was that it was impossible to persuade people that they had received justice if they were not allowed to see the document which conveyed their objections to the minister.

Since 1958 it has been the standard practice for a copy of the report to accompany the minister's letter of decision. Where statutory rules apply, they require this specifically. Where they do not, there is no legal right to disclosure of the report, but in practice it is supplied. None of the evils that were feared seem to have resulted. Inspectors gained in public respect, since it could be seen how fairly they handled cases. At the same time it is easier for objectors to tell whether legal remedies may be open to them or whether there is cause for complaint to the Council on Tribunals. The public's sense of grievance has been assuaged. Good administration and the principles of justice have once again proved to be friends, not enemies. The departments that were most tenacious of secrecy have found that it has done them good to abandon it.

The government however rejected the recommendation that the first part of the report, dealing with the evidence and findings of fact, should be disclosed in time for the parties to suggest corrections before the decision. In Scotland this practice is

not only followed but is legally mandatory;[54] and in principle England ought to follow suit.[55] But in England the delays caused by intricate procedures, particularly for development plans and planning appeals, are so serious that any increase in the time taken by an inquiry is unacceptable. Administrative congestion has here affected procedural fairness. Inspectors' findings of fact are a rare subject of complaint; but a decision may be quashed if the inspector omits to report evidence of importance.[56]

The minister is in no way bound to follow the recommendations of the report: his duty is to decide according to his own independent view,[57] taking account of all relevant information.[58] It is not necessary that the inspector should always make recommendations[59] or that he should make findings on all the issues raised.[60]

Reasons for decisions

The Tribunals and Inquiries Act 1992[61] provides, as did the Acts of 1958 and 1971, for the giving of reasons for decisions. This is a matter of great importance. It enables the citizen to understand the connection between the inspector's report and the minister's decision. It also enables the court to quash the decision if the reasons are not adequately given,[62] thus making a notable extension of judicial control over inquiry procedures.

As regards inquiries the Act provides that where

> any Minister notifies any decision taken by him after a statutory inquiry has been held by him or on his behalf, or in a case in which a person concerned could (whether by objecting or otherwise) have required the holding as aforesaid of a statutory inquiry, it shall be the duty . . . of the Minister to furnish a statement of the reasons for the decision.[63]

The meaning of 'statutory inquiry' is explained below.[64] The second limb of the provision covers cases where a party may waive his right to a formal hearing, as is common in planning appeals.[65]

[54] See e.g. Town and Country Planning Appeals (Inquiry Procedure) (Scotland) Rules SI 1997 No. 796 and *Kirkpatrick (J. & A.)* v. *Lord Advocate* 1967 SLT (Notes) 27 (decision of Secretary of State quashed for failure to observe this rule); similarly *Paterson* v. *Secretary of State for Scotland* 1971 SC 1; *Wordie Property Co. Ltd.* v. *Secretary of State for Scotland* 1984 SLT 345.

[55] But there is no such obligation in law: *Steele* v. *Minister of Housing and Local Government* (1956) 6 P & CR 386.

[56] *East Hampshire DC* v. *Secretary of State for the Environment* [1979] Est. Gaz. Dig. 1048.

[57] *Nelsovil Ltd.* v. *Minister of Housing and Local Government* [1962] 1 WLR 404.

[58] See *Prest* v. *Secretary of State for Wales* (1982) 81 LGR 193, allowing the use of evidence which was not available at the inquiry.

[59] *R.* v. *Secretary of State for Transport ex p. Gwent CC* [1988] QB 429.

[60] *London & Clydeside Estates Ltd.* v. *Aberdeen DC* 1984 SLT 50.

[61] s. 10.

[62] See above, p. 940.

[63] s. 10(1)(b).

[64] p. 987.

[65] See below, p. 989.

The terms and qualifications of the Act were explained in the chapter on tribunals, where it is noted that the reasons may be written or oral, and that the statutory duty applies only where reasons are requested.[66] But in practice a reasoned decision letter is now sent out as a matter of course. Where procedural rules have been made (as explained below),[67] they impose an unqualified duty to give reasons, so that there is no need to make any request.

It has been held that reasons given under the rules must be as full and as adequate as reasons given under the Act, though if they are clear and adequate they may be briefly stated.[68] Where a bad decision letter leaves real and substantial doubts as to the minister's reasons,[69] or fails to deal with a substantial objection,[70] or does not explain a departure from the development plan[71] or the minister's published policy[72] or is misleading,[73] the decision may be quashed on the same grounds as apply in the case of tribunals. In another case[74] Lord Denning MR said:

> Section 12(1) of the Tribunals and Inquiries Act 1958 says that the minister must give his reasons, and that his reasons are to form part of the record. The whole purpose of that enactment is to enable the parties and the courts to see what matters he has taken into consideration and what view he has reached on the points of fact and law which arise. If he does not deal with the points that arise, he fails in his duty, and the court can order him to make good the omission.

However, the pendulum has begun to swing in the other direction. The House of Lords has held that decision letters should be read 'with a measure of benevolence' and that the duty to give reasons does not require the decision-maker 'to dot every i and cross every t'.[75] 'Excessively legalistic textual criticism of planning decision

[66] Above, p. 939.

[67] p. 983.

[68] *Westminster CC* v. *Great Portland Estates Plc* [1985] AC 661. As to structure plans see below, p. 979.

[69] *Givaudan & Co. Ltd.* v. *Minister of Housing and Local Government* [1967] 1 WLR 250 (obscurely worded decision quashed under Town and Country Planning Act 1962, s. 179, applying the reasoning of *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, above, p. 918). See similarly *French Kier Developments Ltd.* v. *Secretary of State for the Environment* [1977] 1 All ER 296; *Niarchos* v. *Secretary of State for the Environment* [1977] 76 LGR 480; *Strathclyde Passenger Executive* v. *McGill Bus Service* 1984 SLT 377.

[70] *Barnham* v. *Secretary of State for the Environment* (1985) 52 P & CR 10 (structure plan).

[71] *Reading BC* v. *Secretary of State for the Environment* (1985) 52 P & CR 385.

[72] See the *Barnham* case (above).

[73] *London Residuary Body* v. *Secretary of State for the Environment*, The Times, 30 March 1988.

[74] *Iveagh (Earl)* v. *Minister of Housing and Local Government* [1964] 1 QB 395. And see *R.* v. *Secretary of State for Transport ex p. Cumbria CC* [1983] RTR 129 (reasons particularly important when minister differs from inspector).

[75] *Save Britain's Heritage* v. *No. 1 Poultry Ltd.* [1991] 1 WLR 153 at 164. Thus deficiencies in the Secretary of State's reasoning could be remedied by an exemplary inspector's report, where the Secretary of State had impliedly adopted the inspector's reasoning by using the same words as the inspector.

letters', the House of Lords has said, 'is something the court should strongly discourage'.[76]

The Act has been made applicable also to inspectors who decide planning appeals themselves.[77] But otherwise it has no application where the inquiry is held by or on behalf of someone other than a minister or a board presided over by a minister.[78]

The right to participate

A 'public local inquiry', and likewise a 'local inquiry', implies that there will be a right of audience for all persons in the locality who are genuinely concerned for good reasons, and not merely for those who have legal rights at stake. In the *Arlidge* case Lord Moulton said:[79]

> The effect of the insertion of the word 'public' appears to me to be that every member of the public would have a locus standi to bring before the inquiry any matters relevant thereto so as to ensure that everything bearing on the rights of the owner or occupier of the house affected, or the interests of the public in general, or of the public living in the neighbourhood in particular, would be brought to the knowledge of the Local Government Board for the purpose of enabling it to discharge its duties in connection with the appeal.

These members of the public are allowed to give evidence and cross-examine opposing witnesses, but the inspector has a wide discretion to curb irrelevance and repetition, and to control the proceedings generally.[80]

But the statutory procedural rules which have been made for certain classes of inquiries confer the right of appearance and participation only upon parties who have legal rights which are in some way in issue, and allow other members of the public to appear only in the inspector's discretion. In so far as these restrictions conflict with the judicial statement just quoted, their validity may be open to question, since the power to make procedural rules can hardly avail to cut down rights of participation granted by Act of Parliament. But the question has not yet arisen before a court, since in practice public inquiries and local inquiries, including planning appeals, are open freely to all comers.[81] This is good administration, since neighbours, amenity societies and other third parties may often be able to make important contributions, and the object is to enable the best decision to be made in the public interest. This does not mean that third parties have in practice

[76] *South Lakeland DC* v. *Secretary of State for the Environment* [1992] 2 AC 141 at 148.

[77] Town and Country Planning Act 1990, 6th sched., para. 8.

[78] Tribunals and Inquiries Act 1992, s. 10(1).

[79] *Local Government Board* v. *Arlidge* [1915] AC 120 at 147; above, p. 484. And see *Wednesbury Corporation* v. *Ministry of Housing and Local Government* (No. 2) [1966] 2 QB 275 at 302 (Diplock LJ).

[80] *Wednesbury Corporation* case (ibid.).

[81] On the position of third parties see Wraith and Lamb, *Public Inquiries as an Instrument of Government*, 253.

all the advantages of those whose legal rights are affected. They may sometimes be unable to challenge the validity of the proceedings as 'persons aggrieved'[82] and they have a number of disadvantages in cases covered by procedural rules, as explained below.[83]

Scope of inquiries: the problem of policy

The parties who participate in an inquiry, whether as of right or otherwise, are entitled to a fair hearing of their cases or objections. For this purpose statutory rights and the principles of natural justice operate in conjunction, as explained elsewhere.[84] But these rights cannot be used to carry the inquiry beyond its proper scope. Even where the Act says that the minister 'shall consider all objections' he need not consider objections which do not fairly and reasonably relate to the true purpose of the inquiry or which merely repeat objections made more suitably at an earlier inquiry.[85]

The central difficulty is to know how far matters of general policy should be open to question. The place for debating general policy is Parliament, and at an inquiry there should be no 'useless discussion of policy in the wrong forum'.[86] The purpose of a local inquiry is to provide the minister with information about local objections so that he can weigh the harm to local interests and private persons against the public benefit to be achieved by the scheme.[87] The policy behind the scheme, as opposed to its local impact, should therefore be taken for granted. Thus, following a recommendation of the Franks Committee, statutory rules of procedure normally provide that the inspector shall disallow questions directed to the merits of government policy.[88]

But the line between general policy and its local application may not be easy to draw, and it is often the underlying policy which objectors wish to attack. In practice inspectors tend to be indulgent, allowing objectors to criticise policy and reporting such objections to the minister. Where this is done the inquiry is likely to be fairer to all concerned, since it is unrealistic to suppose that objectors have any effective voice to criticise policy in Parliament. The latitude allowed to them may vary according to the subject matter, and they may more reasonably claim to attack the policy underlying a development plan (for example) than that underlying the need for a power station or an airport.

[82] Above, p. 738.
[83] Below, p. 983.
[84] Above, p. 506.
[85] *Lovelock* v. *Minister of Transport* (1980) 40 P & CR 336 (objection disputing need for motorway held out of order).
[86] Franks Report, Cmnd. 218 (1957), para. 288.
[87] *Bushell* v. *Secretary of State for the Environment* [1981] AC 75 at 94 (Lord Diplock). See also *Lovelock* v. *Vespra Township* (1981) 123 DLR (3d) 530 (right to cross-examine on policy statement upheld by Supreme Court of Canada).
[88] e.g. SI 1967 No. 720, r. 6(2) (compulsory purchase by ministers).

This issue came to a head before the House of Lords in a case where objectors wished to dispute the need for a motorway. In advance of the inquiry into the schemes for two sections of the motorway the minister announced that the government's policy to build the motorways would not be open to debate at the inquiry, but that objectors could contest the lines proposed. The inspector in fact allowed the objectors to call evidence questioning the need for the motorway as a whole, but he refused to allow cross-examination of departmental witnesses about the methods used for predicting traffic flow for roads generally, which the objectors maintained were faulty. Upholding this refusal as fair in the circumstances, the House of Lords held that traffic prediction technique was a part of general policy and beyond the true scope of a local inquiry.[89] In admitting evidence about need the inspector had made a concession beyond what was required by law, and it was for him to say where the concession should stop. Lord Diplock observed that it would be a rash inspector who felt able to make recommendations on such a matter merely on evidence from one particular inquiry and that it would be an unwise minister who acted on it. Lord Lane also pointed out that it would be no help to the minister to receive differing recommendations about need from a series of local inquiries dealing with separate sections of the route.

The problem of distinguishing between general policy and its local application will appear again in connection with extrinsic evidence, discussed below.

There are strong practical reasons for not allowing local inquiries to be carried too far beyond their proper range. It is not unusual for a major inquiry to take a hundred days or more. The inquiry into the Greater London development plan in 1970–72 sat for 237 days to deal with over 28,000 objections and led to a 1,200-page report. The inquiry of 1977 into the nuclear reprocessing plant at Windscale sat for 100 days and the report extended to 689 pages. The Sizewell B nuclear power station inquiry of 1985–87 held 340 sittings and produced a 3,000-page report. In the weighing of conflicting public and private interests some account must be taken of expenditure of time and money.

Scope of inquiries: statutory restriction

The scope of some inquiries is restricted. The normal enactment requires the minister to hold an inquiry and to consider the inspector's report. But some Acts say that the inquiry shall be merely an inquiry into the objection. Thus the formula in the Police Act 1996 provides for an inquiry into police amalgamation schemes to be held 'with respect to the objection'.[90] Its intention is to prevent discussion of the merits of the scheme as opposed to the merits of the objection, and to nullify the Scottish decision requiring both sides of the case to be expounded.

[89] *Bushell* v. *Secretary of State for the Environment* (above).

[90] This change was recommended by the Royal Commission on the Police, 1962, Cmnd. 1728, para. 289.

An inquiry 'into the objection' merely is fundamentally inadequate, for as the Franks Committee observed, 'an objection cannot reasonably be considered as a thing in itself, in isolation from what is objected to'.[91] The restriction is a crude and imperfect attempt to make the distinction between general policy and its local application explained above. In fact it is questionable whether an inquiry 'into the objection' is really restricted in any significant way, since it is easy to frame an objection so as to put in issue the whole policy behind the scheme.

A more effective restriction is the power which some statutes give to the minister to disregard objections of certain kinds. For example, under the Acquisition of Land Act 1981[92] the minister may call upon the objector to a compulsory purchase order to state his grounds of objection, and he may disregard the objection if he is satisfied that it can be dealt with in the assessment of compensation. In the case of certain road schemes under the Highways Act 1980[93] the minister may dispense with an inquiry if he is satisfied that it is unnecessary, though he cannot invoke this power against some classes of objectors, such as public authorities. Objections to compulsory purchase orders which in substance amount to objections to approved road schemes of certain kinds may be disregarded under the same Act, which also allows the minister to call for particulars of objections advocating alternative routes or new roads and to disregard such objections not notified in advance of the inquiry.[94] The Town and Country Planning Act 1990[95] allows the minister to disregard objections to compulsory purchase orders which amount in substance to objections to development plans.

A special case where the scope of the inquiry may be drastically limited is that of the 'examination in public' of structure plans submitted to the Secretary of State by local planning authorities. He is required to consider all objections duly made, but the 'examination in public' (the word 'inquiry' is avoided) is restricted to 'such matters affecting his consideration of the plan as he considers ought to be so examined'; and one decision holds that an objector is not entitled to so full a hearing as he could claim at an inquiry.[96] The Council on Tribunals may concern itself with this peculiar procedure; but otherwise the Tribunals and Inquiries Act 1992 does not apply.[97] The Secretary of State need only give 'such statement as he considers appropriate' of the reasons for his decision; but it has been held that the reasons must be adequate and intelligible, no less than in other cases.[98] He makes

[91] Cmnd. 218 (1957), para. 271. This paragraph erroneously assumes that the standard form of inquiry is into objections only.

[92] s. 13 and 1st sched., para. 4.

[93] 1st sched., paras. 7, 14.

[94] 1st sched., Pt. III.

[95] s. 245(1).

[96] *Bradley (Edwin H.) & Sons Ltd.* v. *Secretary of State for the Environment* (1982) 47 P & CR 374.

[97] Town and Country Planning Act 1990, s. 35(8).

[98] *Bradley (Edwin H.)* v. *Secretary of State for the Environment* (above); *Barnham* v. *Secretary of State for the Environment* (1985) 52 P & CR 10.

procedural regulations after consultation with the Lord Chancellor but not necessarily with the Council on Tribunals.[99]

Extrinsic evidence: the problem

Acute difficulty can arise where the minister bases his decision on facts which he obtains otherwise than through the inquiry. This is another case where the mixture of semi-legal procedure and political decision readily causes misunderstanding. If the objector finds that the minister has taken account of facts which there was no opportunity of contesting at the inquiry, he may feel that the inquiry is a waste of time and money. But, as has been emphasised already, it is inherent in most inquiry procedures that in the end the minister takes a decision of policy, and that the inquiry provides him with only part of the material for his decision. *Ex hypothesi* he may take account of other material. But of what sort of other material?

In its special report to the Lord Chancellor on the Essex chalkpit case[1]—where the minister had rejected the inspector's recommendation in reliance upon expert evidence from the Ministry of Agriculture which was not put before the inspector and which the objectors had no opportunity to controvert—the Council on Tribunals criticised the rejection by the minister of his inspector's recommendation in cases where (i) the rejection was based on ministerial policy which could and should have been made clear at the inquiry or (ii) the minister took advice after the inquiry from persons who neither heard the evidence nor saw the site, but yet controverted the inspector's findings as to the facts of the local situation. These final words contain the heart of the matter. The minister's policy may be formed on the basis of all kinds of fact, reports and advice which have nothing to do with the local situation which is the subject of the inquiry, and which therefore need not necessarily be known to the objectors or investigated at the inquiry. But the facts of the local situation are in a different category, and there is bound to be complaint if due respect is not paid to the inspector's findings. In the chalkpit case the government's explanations were not clear on this vital question: was the advice given by the Ministry of Agriculture general advice, to the effect that a certain mode of chalk-working was incapable of creating excessive dust; or was it really advice about the local situation, to the effect that chalk-working in that particular pit would be innocuous? It was the possibility that the advice was of the latter character that justified the complaint.

[99] SI 1999 No. 3280, not reciting consultation with the Council.

[1] Above, p. 739 (the *Buxton* case).

Extrinsic evidence: the solution

The Council on Tribunals recommended that there should be a rule for future cases providing that the minister, if differing from the inspector's recommendation on a finding or a fact or on account of fresh evidence (including expert opinion) or a fresh issue (not being a matter of government policy), should first notify the parties and allow them to comment in writing; and that they should be entitled to have the inquiry reopened if fresh evidence or a fresh issue emerged. This proposed rule was accepted and has since been followed in practice. It is also embodied in the statutory rules of procedure which have been made for various classes of inquiries including planning appeals.[2] Failure to observe it has led to the quashing or remitting of a number of decisions.[3]

In some situations it may be difficult to tell what is a finding of fact and what is a matter of opinion. The rule was held not to apply where the minister rejected his inspector's finding that a house in a particular place would be unobjectionable, since the minister was held not to be differing from the inspector on the facts but forming a different opinion of them on the 'planning merits' and enforcing a general policy of not permitting building outside the village boundaries.[4]

It is fully established that the principles of natural justice do not permit the minister, any more than the inspector, to receive evidence as to the local situation from one of the parties concerned in the inquiry, without disclosing it to the others and allowing them to comment. To take evidence from one party behind the backs of the others vitiates the whole inquiry and renders the minister's order liable to be quashed.[5] To take evidence or advice from other sources raises cognate but

[2] See next section. For planning appeals see SI 2000 No. 1624, r. 17(5). A technical defect is that the rule does not apply where the inspector makes no recommendation: see *Westminster Bank Ltd.* v. *Beverley Borough Council* [1971] AC 508. A further defect is that it 'only bites where the Secretary of State is disposed to disagree with the Inspector' (Council on Tribunals, *Annual Report*, 1987/88, para. 2.82). Parties opposed to the inspector's recommendation may be prejudiced by being unable to controvert fresh evidence supporting the recommendation. See also *Hamilton* v. *Roxburgh County Council* 1971 SC 2. The Parliamentary Commissioner for Administration is willing to investigate complaints of breach of the rule, despite the obvious legal remedy: see his *Annual Report for 1969* (HC 138, 1969–70) at 169 (Case C.54/L).

[3] *French Kier Developments Ltd.* v. *Secretary of State for the Environment* [1977] 1 All ER 296; *Penwith DC* v. *Secretary of State for the Environment* (1977) 34 P & CR 269 (erroneously citing the Tribunals and Inquiries Act instead of the inquiry rules); *Pyrford Properties Ltd.* v. *Secretary of State for the Environment* (1977) 36 P & CR 28; *Pollock* v. *Secretary of State for the Environment* (1979) 40 P & CR 94.

[4] *Luke (Lord)* v. *Minister of Housing and Local Government* [1968] 1 QB 172; *Vale Estates Ltd.* v. *Secretary of State for the Environment* (1970) 69 LGR 543; *Murphy & Sons Ltd.* v. *Secretary of State for the Environment* [1973] 1 WLR 560; *Brown* v. *Secretary of State for the Environment* (1980) 40 P & CR 285. See similarly *Darlassis* v. *Minister of Education* (1954) 52 LGR 304 (minister at liberty to consult another minister on matter of policy) and *Summers* v. *Minister of Health* [1947] 1 All ER 184; *Lithgow* v. *Secretary of State for Scotland* 1973 SLT 81. Contrast *Burwoods (Caterers) Ltd.* v. *Secretary of State for the Environment* (1972) Est. Gaz. Dig. 1007 (local information used: decision quashed).

[5] As in the cases cited above, p. 513.

different questions which the courts have not yet fully explored. It is clear that the inspector must not himself obtain local evidence without disclosing it to the parties,[6] and in principle the minister should be subject to the same restriction. In one case Lord Denning LJ said:[7]

> The minister on his part must also act judicially. He must only consider the report and the material properly before him. He must not act on extrinsic information which the house-owner has had no opportunity of contradicting. Thus far have the courts gone . . .

But this 'extrinsic information' should be limited to information about the local situation in the particular case. It can hardly extend to information relating only to general policy, which the minister should always be able to obtain and use with complete freedom.[8]

Procedural rules

The Tribunals and Inquiries Act 1992[9] empowers the Lord Chancellor to make rules of procedure for statutory inquiries, or classes of inquiries, held by or on behalf of ministers. The rules may provide for preliminary matters; they must be made by statutory instrument; and the Council on Tribunals must be consulted.

Various types of inquiry[10] have been furnished with rules made under this power, including three large classes: compulsory purchase inquiries held under the Acquisition of Land Act 1981 (formerly 1946);[11] planning appeals, applications and enforcement;[12] and inquiries into schemes for trunk roads and motorways.[13] Rules have also been made for inquiries connected with the underground storage of gas,[14] electricity supply[15] and pipe-lines.[16] But after 1967 the business of making inquiry rules in new areas was allowed to come to a halt. It was only outbreaks of disorder at trunk road and motorway inquiries that caused rules to be made for them belatedly in 1976,[17] followed by a review promising numerous administra-

[6] As in *Hibernian Property Co. Ltd.* v. *Secretary of State for the Environment* (1973) 27 P & CR 197 and *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 WLR 1255 (above, p. 513).

[7] *Steele* v. *Minister of Housing and Local Government* (1956) 6 P & CR 386 at 392.

[8] See *Bushell* v. *Secretary of State for the Environment* [1981] AC 75, discussed above, p. 977.

[9] s. 9. Similar provisions have been in force since 1959.

[10] The rules normally apply also to hearings (see above, p. 966).

[11] SI 1994 No. 3264 (compulsory purchase by ministers), SI 1990 No. 512 (compulsory purchase by public authorities). But it is anomalous that there are no rules for other cases.

[12] SI 2000 Nos. 1624, 1625.

[13] SI 1994 No. 3263.

[14] SI 1966 No. 1375.

[15] SI 1967 No. 450; SI 1990 No. 528.

[16] SI 1995 No. 1239.

[17] SI 1994 No. 3263.

tive improvements in 1978.[18] Rules for drought order inquiries were made in 1984.[19] Rules for power station inquiries were made in 1987 in anticipation of a major inquiry into the construction of a nuclear power station.[20] In the remaining types of inquiries not yet covered by rules, it is the practice to follow the Lord Chancellor's rules by analogy so far as possible, since many of them are capable of general application. Positive procedural rules are of great help to all concerned with inquiries.

Consultation with the Council on Tribunals is obligatory only when rules are made by the Lord Chancellor.[21] Other ministers are sometimes empowered to make rules for inquiries, but in practice they consult the Council on Tribunals, and their rules may be made in similar form.

Among the more important provisions of the Lord Chancellor's rules are those dealing with:

1. the timetable for the various steps and formalities;[22]
2. the written statement of its case by the initiating or opposing authority,[23] usually to be supplied at least forty-two days before the inquiry;
3. the persons entitled to appear at the inquiry;
4. the right of representation;
5. evidence of government departments concerned with the proposal; the right to call evidence and cross-examine departmental representatives and witnesses (though not to ask questions directed to the merits of government policy);
6. procedure for site inspections;
7. evidence obtained after the inquiry;[24]
8. notification of the decision, with reasons;[25]
9. the right to obtain a copy of the inspector's report;[26]
10. the holding of pre-inquiry meetings (at which the timetable for the inquiry will be set).[27]

The persons entitled to appear as of right under the rules are those who have

[18] Cmnd. 7133 (White Paper).
[19] SI 1984 No. 999.
[20] SI 1990 No. 528.
[21] Tribunals and Inquiries Act 1992, s. 9(1).
[22] The practice of the Lord Chancellor (e.g. in the Planning (Inquiries Procedure) Rules (SI 2000 No. 1624)) has been to calculate the times allowed from the date of the Secretary of State's notification to the parties that an inquiry would be held, rather than backwards from the date of the inquiry. Generally the inquiry has to be held within twenty-two weeks of the date of notification (r. 10(1)); twenty-eight days' notice of the date of the inquiry must be given to all entitled to appear (r. 10(3)). In *Ostreicher v. Secretary of State for the Environment* [1978] 1 WLR 810 a complaint that the objector could not attend on the specified date for religious reasons was disallowed.
[23] Above, p. 972.
[24] Above, p. 981.
[25] Above, p. 974.
[26] Above, p. 972.
[27] SI 2000 Nos. 1624 and 1625, r. 5 and r. 7 respectively.

some statutory standing in the matter. In compulsory purchase cases this means any owner, lessee or occupier of the land who is entitled to have notice of the compulsory purchase order and has made formal objections, and also the acquiring authority.[28] In planning appeals it means the appellant, the local planning authority, certain other local authorities in some cases, certain other persons with legal rights in the land affected, persons who have made formal objection in cases where advertisement of the application is required, and any person on whom the Secretary of State has required notice of it to be served.[29] The rules then provide that any other person may appear at the inspector's discretion, and in practice appearances by neighbours, amenity societies and others are freely allowed.[30] The question whether there is really any legal power to exclude them has been mentioned above.[31] At any rate, they do not under the statutory rules enjoy the full rights of a party. They are not entitled to be sent the statement of the initiating or opposing authority's case; and they are not entitled to the benefit of the rule, discussed above, about disclosure of evidence from sources other than the inquiry. The Council on Tribunals was unsuccessful in asking for an assurance that the benefit of the latter rule should in practice be extended to them.[32] Their only protection is that they will usually have similar interests to one of the statutory parties, who will be officially encouraged to keep them informed.[33]

This difficulty illustrates the paradox which underlies many inquiries where an issue which in law lies between particular parties is in practice thrown open to the public at large. The principal legal advantage that has so far been won by third party objectors is that an objector who under the rules has been given leave to appear at the inquiry thereby acquires the character of a 'person aggrieved' for the purpose of challenging the legality of the decision under statutory procedure.[34] This improvement in his position is held to flow from the existence of the rules, though they do not in fact alter the previous practice in this respect. He may also benefit from the progressive relaxation of the rules about the standing of third party objectors, of which examples have been given earlier.[35]

An objector's right of representation is unrestricted, so that he may appear by a lawyer or by any other person, as well as by himself.

[28] SI 1990 No. 512.
[29] SI 2000 No. 1625, r. 6.
[30] The Code of Practice for Major Inquiries (Circular 10/88 (Department of the Environment)) provides for more equal treatment of those with direct interests in the land and others such as neighbours and amenity societies. All those interested in participating may register with the Inspector and are given an opportunity to put their case to him.
[31] Above, p. 977.
[32] *Annual Report*, 1962, para. 37. The Council on Tribunals' further attempt also failed: *Annual Report*, 1987–88, para. 2.82.
[33] Same report, para. 39.
[34] See above, p. 739.
[35] Above, pp. 695 and 699.

Public or private hearings

The rules contain no requirement that the proceedings should be held in public. Although public hearings have always been the rule, the inspector was able (as in a court of law) to exclude the public and even other parties where the evidence to be given was confidential, for example a secret commercial process. In such cases there is an irreconcilable conflict between the objectors' rights to know the case against them and to cross-examine witnesses and, on the other hand, the need for secrecy in genuine cases. Since 1972 the policy has been that inspectors should not hear evidence in private at planning inquiries;[36] and in 1982 this rule was made statutory, subject only to exceptions where the national interest required secrecy in order to protect national security or to safeguard measures taken for the security of premises or property.[37]

Where the rules are silent there is no presumption that the inquiry will take place in public and Article 10 of the ECHR (freedom of expression) is not engaged.[38] Whether to hold an inquiry at all and whether it should sit in public were 'pre-eminently . . . political decision[s]'.[39]

Procedure, evidence, costs

The inspector is master of the procedure at an inquiry, always provided that the principles of natural justice and the statutory rules, if any, are properly observed.[40] He may adjourn it if this is reasonable,[41] and he may exclude anyone who disrupts the proceedings.[42] The legal rules of evidence do not apply, so that hearsay may be admitted, if relevant, without vitiating the proceedings, whether or not the

[36] 836 HC Deb., written answers, col. 199 (4 May 1972).

[37] Town and Country Planning Act 1990, s. 321, replacing Planning Inquiries (Attendance of Public) Act 1982.

[38] *R. (Persey)* v. *Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin.), [2003] QB 794 (Minister's decision that 'Lessons Learnt' Inquiry (non-statutory) into outbreak of Foot and Mouth Disease should sit in private upheld). Contrast *R. (Wagstaff)* v. *Secretary of State for Health* [2001] 1 WLR 292 (Minister's decision that inquiry under National Health Act 1977, s. 2 into Shipman case (GP who murdered his patients) should sit in private, held irrational).

[39] Simon Brown LJ in *Persey*, para. 66.

[40] See *Miller (T. A.) Ltd.* v. *Minister of Housing and Local Government* [1968] 1 WLR 992; *Winchester CC* v. *Secretary of State for the Environment* (1979) 39 P & CR 1 (inspector rightly refused to hear expert witness).

[41] *Ostreicher* v. *Secretary of State for the Environment* [1978] 1 WLR 810; *Greycoat Commercial Estates Ltd.* v. *Radmore*, The Times, 14 July 1981 (3 months adjournment upheld).

[42] *Lovelock* v. *Secretary of State for Transport* (1979) 39 P & CR 468 (disrupters removed by police; disrupter excluded from the inquiry cannot complain of breach of natural justice). The inspector in planning appeals is given power to exclude disrupters from the pre-inquiry meeting as well as from the inquiry proper (SI 2000 Nos. 1624 and 955, r. 5(9) and r. 7(3) respectively). Previously inspectors lacked an explicit power to exclude from the pre-inquiry meeting (Council on Tribunals, *Annual Report*, 1987–88, para. 2.80).

evidence is taken on oath.[43] Cross-examination is allowed by procedural rules[44] and evidently also by the rules of natural justice,[45] if it is within the proper scope of the inquiry. The House of Lords has decided that witnesses enjoy absolute privilege against actions for defamation.[46]

Powers to take evidence on oath[47] or affirmation, and also to require persons to attend and produce documents, are conferred on the inspector in many classes of inquiries, including planning and compulsory purchase inquiries.[48]

Legal representation is always allowed in practice, as well as under procedural rules, and is probably a matter of natural justice. Legal advice and assistance, but not legal aid, are available in connection with statutory inquiries on the same basis as in the case of tribunals.[49]

Ministers have power in numerous cases, again including planning and compulsory purchase, to make orders for the recovery of costs incurred in connection with inquiries either by the department or by local authorities or by other parties.[50] Following a special report by the Council on Tribunals,[51] this power has been exercised more freely. Costs are usually awarded against any party who behaves unreasonably and vexatiously, including a public authority. Costs are usually awarded to successful objectors in compulsory purchase and similar cases; and inspectors usually make recommendations as to costs in their reports.[52]

After a long interval legislation has extended the power to award costs to hearings in addition to inquiries and also to planning appeals decided on written representations.[53] Inspectors have also been empowered to award costs on the same basis as the Secretary of State.[54] That basis is now very wide, since it may extend to 'the entire administrative cost of the inquiry' including staff costs and overheads.[55] Since these costs can only be computed by the department, and in any case the department acts as judge in its own cause when costs are awarded in its favour, the arrangements seem far from satisfactory in principle.

[43] *Marriott* v. *Minister of Health* (1935) 154 LT 47; *Miller (T. A.) Ltd.* v. *MHLC* (above).

[44] Above, p. 983.

[45] Above, p. 512.

[46] *Trapp* v. *Mackie* [1979] 1 WLR 377 (Secretary of State's inquiry into reasons for dismissal of headmaster), holding that it is not necessary for the inspector to have the power of decision. See [1982] *PL* at 432 (N. V. Lowe and H. F. Rawlings).

[47] This power exists in any case: Evidence Act 1851, s. 16; above, p. 931.

[48] e.g. Acquisition of Land Act 1981, s. 5(2); Town and Country Planning Act 1990, s. 320; both applying (as is usual) the powers of Local Government Act 1972, s. 250 (as it now is).

[49] Above, p. 933 and below p. 996 (Tribunals of Inquiry).

[50] As n. 51 above.

[51] Cmnd. 2471 (1964).

[52] Ministry of Housing and Local Government Circular 73/65.

[53] Town and Country Planning Act 1990, s. 322 and 6th sched., para. 6.

[54] Act of 1990, 6th sched., para. 6(5).

[55] Housing and Planning Act 1986, s. 42. This applies even where the inquiry does not take place.

Discretionary inquiries

The Tribunals and Inquiries Act 1992 defines a 'statutory inquiry' as an inquiry or hearing held under a statutory duty.[56] The jurisdiction of the Council on Tribunals and the other provisions of the Act therefore apply where an Act provides that the minister *shall* hold an inquiry, but do not apply where the provision is merely that the minister *may* hold an inquiry. There are many discretionary inquiries of the latter class, and it is no less important that they should be brought within the Act. Examples of discretionary inquiries are those held under the Local Government Act 1972, where departments have a general power to hold inquiries in connection with their functions under the Act,[57] inquiries into objections to compulsory purchase orders for defence purposes,[58] and inquiries held under the Education Act 1996,[59] the National Health Service Act 1977[60] and the Highways Act 1980.[61]

The Tribunals and Inquiries Act 1966 dealt with this problem by giving power to the Lord Chancellor to make orders designating particular classes of inquiries as subject to the relevant parts of the Tribunals and Inquiries Act 1958 relating to supervision by the Council on Tribunals and the making of procedural rules.[62] The duty to give reasons for decisions could also be made applicable, but this required express direction in the order.[63] The current order, made in 1975, has extended the list to more than eighty classes where reasons must be given, and has added thirty-five additional classes where reasons need not be given.[64] In this latter group are, amongst others, certain accident inquiries,[65] certain cases where inquiries may be held into any matter arising under an Act,[66] and also decisions on 'Secretary of State's questions' in social security matters.[67]

Informal procedures

Since any inquiry into anything may always be held informally, ministers sometimes prefer to avoid statutory procedures altogether and to hold non-statutory inquiries. The first inquiry into the development of Stansted Airport (1965–6),

[56] Above, p. 970.
[57] s. 250.
[58] See Council on Tribunals, *Annual Report*, 1961, para. 79.
[59] s. 503.
[60] s. 84.
[61] s. 302.
[62] See now Tribunals and Inquiries Act 1992, s. 16(2), making the designated inquiries subject to the Act generally, except as regards reasons for decisions.
[63] Tribunals and Inquiries Act 1992, s. 10(4).
[64] SI 1975 No. 1379, as amended most recently by SI 1992 No. 2171.
[65] Below, p. 993.
[66] e.g. Police Act 1996, s. 49.
[67] Under Social Security Administration Act 1992, s. 17. For these questions see above, p. 912.

which might well have been held under the planning legislation (as was the second inquiry of 1981–82), was in fact held as a mere administrative inquiry after which the government proposed to authorise the development by special order. In such cases objectors have no procedural rights (apart from the principles of natural justice), their complaints cannot be taken up by the Council on Tribunals, and the safeguards intended by the Act of 1966 cannot operate. The Council on Tribunals has publicly criticised this practice.[68]

An informal inquiry procedure, which proved so useful that it was made statutory in 1986, was that by which appellants in planning appeals were invited by the department to agree to have their appeals decided on written representations only, without an inquiry or hearing.[69] The attraction of this voluntary alternative was that it saved time and expense and was frequently satisfactory—so much so that the great majority of all planning appeals came to be decided by inspectors after an exchange of written representations and a site visit.[70] The inspector's report and the Secretary of State's decision (if any) are now made available and there is the usual right to a reasoned decision on request. But this procedure makes no provision for the views of third party objectors such as neighbours and amenity societies.

Major inquiries[71]

Big projects for such things as major airports and power stations often raise difficult questions about alternative sites and other problems of more than local character which cannot well be handled at an ordinary local inquiry.[72] Sometimes they are of gigantic proportions, such as the inquiries concerned with the Greater London Development Plan (1970), which sat on 240 days, and the Sizewell B nuclear power station (1983–85), which sat on 340 days. In the hope of improving the procedure for exceptionally complicated inquiries special provision was made by the Town and Country Planning Act 1968, now replaced by the Town and Country Planning Act 1990,[73] under which the minister might refer applications and appeals, and also the government's own proposals, to a 'planning inquiry commission' consisting of from three to five persons. The commission must then proceed in two stages: first, rather like a royal commission, it must conduct a general investigation; secondly, it must hear objectors at a local inquiry before one

[68] *Annual Report*, 1967, p. 27; 1968, p. 14.

[69] Council on Tribunals, *Annual Report*, 1964, para. 76; 1966, para. 89.

[70] In 2001–02 80 per cent of planning appeals were decided within sixteen weeks (*Planning Inspectorate's Annual Report* 2001–02, p. 66).

[71] For discussion of government proposals for reform see (2002) *JPL* 137 (Popham and Purdue).

[72] See above, p. 977.

[73] s. 101 and sched. 8, pt. 1.

or more of its members. It is only the second stage which is subject to the Tribunals and Inquiries Act 1992 and to the usual safeguards.

No planning inquiry commission has yet been constituted. Attention has turned rather to informal pre-inquiry procedures designed to secure the fullest possible exchange of information, and also public participation, before the formal and adversarial proceedings begin. The government, prompted by the delays and frustration occasioned by the inquiry into Heathrow Terminal Five, issued in May 1999 a further consultation paper, 'Streamlining the processing of major projects through the planning system'. The major suggestion is that with schemes of national significance Parliament should be invited to approve by resolution the proposals in principle. This would preclude discussion at the inquiry of such matters as are settled by Parliament's approval.[74] After consultation with the parties the Secretary of State should agree a timetable for the inquiry with the inspector. Sanctions such as fines, awards of costs and curtailment of representation or cross-examination have been proposed to ensure compliance with the timetable. The Council's response to these proposals has been lukewarm.[75]

Decisions by inspectors

The large number of planning appeals, now in the order of 16,000 a year,[76] inevitably led to severe delays. In order to reduce the time-lag the Secretary of State was empowered in 1968 to prescribe classes of appeals to be decided by the inspector himself without reference to the Department, subject to the Secretary of State's option to require any particular case to be referred.[77] The prescribed classes have now been extended to cover the great majority of planning appeals.[78] The Tribunals and Inquiries Act 1992 applies in all respects,[79] and rules of procedure of the usual kind have been made.[80] Furthermore, there is provision for the parties to waive their right to an oral hearing, so that in these cases also the procedure for determining appeals on written representations only has acquired a statutory basis and is subject to the general law governing inquiries.[81]

This procedure has in general worked well, despite the abnormal expedient of putting final decisions on matters of policy into the hands of officials not responsible to Parliament. However, it has not solved the problem of delay. Severe delays were experienced in the late 1980s. These have been significantly reduced since the

[74] Such a procedure already exists under the Transport and Works Act 1992.
[75] *Annual Report*, 1998–99, 49–50.
[76] *Planning Inspectorate Statistical Report* 2001–02.
[77] Town and Country Planning Act 1990, sched. 6.
[78] SI 1997 No. 420.
[79] 6th sched. (as above), para. 8(1).
[80] SI 2000 No. 1625.
[81] 6th sched. (as above), para. 2(3).

planning inspectorate was established as an executive agency, and now generally meet the targets set by Ministers.[82]

The Secretary of State has experimented with 'informal hearings' which he may offer in selected 'inspector's decision' cases where the appellant and the local planning authority agree. The timetable is accelerated[83] and the hearing takes the form of a discussion led by the inspector, sitting with the parties and their advisers round the same table. Evidence is circulated in advance and is not read out at the hearing, and cross-examination is by informal questioning. The inspector gives his decision in writing soon after the hearing and the formal decision letter follows later. These are statutory hearings and the normal rules of procedure apply with minor adjustments, and with the aid of a code of practice. They have proved to be a popular and efficient alternative to a formal local inquiry.

Inspectors generally

All the evidence before the Franks Committee of 1955–57 was to the effect that the inspectors were competent, patient and open to very little criticism as to the manner in which they controlled the proceedings. Their reputation was strengthened still further by the practice of publishing their reports.

As explained above, all the inspectors have now been organised into an executive agency, the Planning Inspectorate.[84] Although the agency continues to operate within the government planning policy, agency status enhances the perceived independence of the inspectors; and the quality of adjudication by inspectors is not threatened by this development.[85]

In the past the status of departmental inspectors has been controversial, especially when the Department initiated the proposal under enquiry. But the establishment of the Planning Inspectorate has weakened links with the Department and the use of such inspectors has ceased to be controversial. There is a danger, if the inspector is too independent of the Department that is the engine of planning policy, that objectors will be misled as to the nature of the inquiry and believe that the decision will be based entirely on evidence led at the inquiry.

[82] In 2001–02, 80 per cent of planning appeals (i) by written applications were decided in sixteen weeks (against a target of sixteen weeks); (ii) by hearing were decided in twenty-two weeks (against a target of twenty-two weeks); and (iii) by inquiries were decided in twenty-nine weeks (against a target of thirty weeks). For these and other details see the Annual Reports and Statistical Report of the Planning Inspectorate.

[83] In 1991/92 the median overall time was twenty-eight weeks.

[84] For executive agencies see p. 47.

[85] *Annual Report*, 1991–92, paras. 1.64–1.69.

The Council on Tribunals

Various complaints reach the Council on Tribunals from people dissatisfied with inquiries. These complaints are taken up with government departments when they seem to have merit, and a number of improvements in practice have resulted.

In handling such complaints the Council on Tribunals performs an 'ombudsman' function like that of the Parliamentary Commissioner for Administration.[86] The Parliamentary Commissioner is also himself an ex officio member of the Council.[87] It was apparently the intention of this arrangement that their respective functions should be determined by informal agreement, since the Commissioner has discretion to decide whether to take up any case. But, as pointed out earlier, the Commissioner's policy is to investigate all eligible complaints, even though they may also fall within the sphere of the Council, so that there are now two alternative avenues in cases connected with inquiries where the two jurisdictions overlap.[88] Thus the Parliamentary Commissioner has investigated complaints about delays in planning appeals, evidence heard in camera at an inquiry, costs and similar matters. This overlap, though untidy, is advantageous to complainants, since the Parliamentary Commissioner's powers of investigation and of obtaining satisfaction are much greater than those of the Council,[89] which is ill-equipped for the handling of individual complaints.

OTHER INQUIRY PROCEDURES

Experiments in the United States

An attempt to 'judicialise' departmental procedure, much in the manner the House of Lords refused to approve in the *Arlidge* case,[90] has led the law of the United States through some interesting gyrations. In a famous case of 1936, which concerned the Secretary of Agriculture's power to fix prices for sales of livestock after a public hearing, the Supreme Court invalidated a price-fixing order merely on the ground that the Secretary himself had not personally heard or read any of the evidence or considered the arguments submitted, but had decided the matter solely on the advice of his officials in consultations at which the objectors were not present.[91] A heroic decision! The opinion given by Chief Justice Hughes rejected

[86] Above, p. 84.
[87] Tribunals and Inquiries Act 1992, s. 2(3).
[88] Above, p. 103.
[89] Above, p. 925.
[90] Above, p. 484.
[91] *Morgan* v. *United States*, 298 US 468 (1936). See Schwartz and Wade, *Legal Control of Government*, 250; Schwartz, *Administrative Law*, 3rd edn., 420.

the very essence of administrative practice by refusing to allow that 'one official may examine evidence, and another official who has not considered the evidence may make the findings and order'. He insisted that the duty of decision was 'akin to that of a judge. The one who decides must hear'.

This doctrine, as was inevitable if it was not to bring government business to a standstill, has been subjected to severe qualification. The facts of administrative life make it impossible for the minister to peruse all the evidence. And the actual task of collecting the evidence and holding the inquiry must be delegated to officials. But the Supreme Court of the United States continued to require that the decision should be the personal decision of the minister in the sense that he sees the record and exercises his personal judgment upon it. The case may be predigested for him in his department, but he is the one who is required to decide. He must therefore 'hear' in the sense of applying his mind to both sides of the case. He may not simply ratify a decision taken by his subordinates, as he may in England.[92]

The federal Administrative Procedure Act

With the Administrative Procedure Act 1946 Congress addressed the difficulties which attend upon some of the problems discussed in this book.[93] It did, indeed, adopt the ideal 'the one who decides must hear' for the inquiries to which it applied, meaning obligatory statutory inquiries held by agencies of the federal government and decided 'on the record'. But instead of attempting to control the final decision of the minister or agency, and postponing the substantial decision until the last possible moment, it allowed a substantial decision to be taken by the official who holds the hearing. The object was to meet the complaint that hearing officers may be—or at any rate appear to be—too much the puppets of their agencies. Hearing officers were formed into something like a special corps, and were removable only for good cause established before the Civil Service Commission; and their salaries and conditions of service were controlled by the Commission rather than by their own agencies. Having given them a status of greater independence, the Act then provided that, unless they submit the whole record to the agency, they should decide the case, and not merely make a recommendation to the agency.

Thus the ideal has become: 'The one who hears must decide.' Reasons must be given for the decision, and also for any further decision by the agency, so that the

[92] Above, p. 319. In *Steele* v. *Minister of Housing and Local Government* (1956) 6 P & CR 386 at 392 Denning LJ said, dealing with a Housing Act inquiry, that in a judicial matter such as that it was 'infinitely better' that the man who heard the evidence and arguments should decide; but he added that Parliament had prescribed otherwise: 'one man hears, another decides'.

[93] See Schwartz and Wade, *Legal Control of Government*, 108; Schwartz (as above), 432.

agency's appellate function is much less free from constraint than it would be if it were taking an initial decision on an unpublished report from its hearing officer.

Would this 'judicialised' procedure improve the system of statutory inquiries in Britain? The Franks Committee in their report of 1957 did not think so: it was fallacious, they said, to regard the inspector as 'a kind of judge provisionally deciding the matter, subject to an appeal to the minister'.[94] This is undoubtedly correct in the cases for which statutory inquiries are primarily designed: the cases where the decision is likely to be dominated by ministerial policy. It is a mistake to suppose that the person in the best position to decide on the site of an atomic power station or of a new town is the inspector who held the inquiry. The inquiry can determine the local aspects, but it cannot determine the national aspects.

But in cases where policy is stereotyped or easy to ascertain, the position may be otherwise. These are the cases for which the American procedure is designed; and it reflects the American feeling that policy ought to be crystallised in rules and formulae rather than left at large.[95] This class of cases is not so extensive in Britain, but something like it applies to the classes of planning appeals which are decided by the inspector subject only to intervention by the minister in special cases.[96]

Accident Inquiries

Railway accidents, shipwrecks, air crashes, factory accidents, and so forth often have to be inquired into, and in general the familiar form of the public inquiry is followed.[97] But under the various statutes providing for such inquiries the practice varies a good deal. It is obviously of great importance that it should be satisfactory, since the reputation and livelihood of drivers, pilots and others—not to mention the safety of their passengers—will often depend upon the findings. The Franks Committee did not investigate them, confining itself to the more controversial inquiries affecting land.

Tribunals of Inquiry

A special form of inquiry, which from time to time becomes a focus of public attention, is the inquiry which Parliament may at any time authorise under the Tribunals of Inquiry (Evidence) Act 1921.[98] This has no particular connection with administrative powers or with administrative law; for though it has often been used to investigate allegations of administrative misdeeds by ministers of the

[94] Cmnd. 218 (1957), para. 274.
[95] This is discussed in (1965) 81 *LQR* 357.
[96] Above, p. 989.
[97] On accident inquiries see Wraith and Lamb, *Public Inquiries as an Instrument of Government*, 146.
[98] For a general account see Keeton, *Trial by Tribunal*.

Crown, civil servants, local authorities or the police, it is not confined to such matters.[99] An inquiry of this kind is a procedure of last resort, to be used when nothing else will serve to allay public disquiet, usually based on sensational allegations, rumours or disasters. There have been some twenty such occasions since the Act was passed, including cases of improper gifts to ministers,[1] disclosure of budget secrets by ministers,[2] a leak of information about bank rate,[3] accusations of brutality against the police,[4] the supervision of an insurance company by ministers and civil servants,[5] disorders in Northern Ireland (twice)[6] and the Aberfan landslide disaster,[7] involving the National Coal Board. Inquiries with similar purposes—for instance, the inquiry into the investigation of the racially motivated murder of Stephen Lawrence[8]—may be held under other legislation.

These inquiries are fundamentally extra-legal, being commissioned by the government which can always set up an inquiry into anything. But the Act of 1921 clothes Tribunals of Inquiry with the powers of the High Court to summon witnesses, send for documents, administer oaths and so forth, reinforced by the sanction of citing cases of disobedience or contempt before the High Court, which can then punish offenders as for contempt of court. The tribunal must sit in public unless in its opinion this is inexpedient in the public interest; and it may allow or refuse legal representation to anyone involved. There are no other rules of procedure. Although the tribunal has a wide latitude to determine its own procedure, the courts will intervene when there is 'very good reason'.[9] In order to bring the

[99] In *Haughey* v. *Moriarty*, 103/98 (28 July 1998) the Irish Supreme Court, considering the very similar Irish legislation, held that a tribunal of inquiry was properly established into the tax affairs of a former Taoiseach; tribunals were not limited to inquiries that might aid legislation. But the court stressed that tribunals of inquiry should not be used for local or minor matters. See [1999] *PL* 175 (L. Blom-Cooper).

[1] Cmd. 7616 (1948).

[2] Cmd. 5184 (1936).

[3] Cmnd. 350 (1957).

[4] Cmd. 3147 (1928); Cmnd. 718 (1959).

[5] HC 133, February 1972.

[6] Cmd. 566 (NI), April 1972; HC 220, April 1972; Prime Minister's statement, 305 HC Deb 502 (29 January 1998).

[7] HC 553, July 1967.

[8] Held under s. 9 of the Police Act 1996. See Cm. 4262 (1999) for the report.

[9] *R.* v. *Lord Saville of Newdigate ex p. B*, The Times, 15 April 1999 (CA) (quashing tribunal's decision to disclose identity of witnesses since the tribunal misunderstood assurances given (by first tribunal of inquiry into same matter) that anonymity was guaranteed because of threats to witnesses' lives and security). This was the second inquiry held under the 1921 Act into the events of 'Bloody Sunday' (30 January 1972). The tribunal's subsequent decision not to grant anonymity notwithstanding the assurances was also quashed for failure to have sufficient regard to the witnesses' fundamental rights, especially the right to life (*R.* v. *The Same* [2000] 1 WLR 1855 (CA)). See [1999] *PL* 663 (B. Hadfield) and [2000] *PL* 1 (Blom-Cooper). There has also been litigation on where the soldiers should give evidence: *R. (A)* v. *Lord Saville of Newdigate* [2002] 1 WLR 1249 (CA) (tribunal of inquiry directed that soldiers' evidence should not be taken in Londonderry). While 'good reason' to intervene seems to have been readily found in the Bloody Sunday cases, it proved more difficult to find in *Mount Murray Country Club Ltd* v. *Macleod* [2003] UKPC 53; [2003] STC 1525; The Times, 15 July

Act into play both Houses of Parliament must resolve that a tribunal shall investigate some matter described as being 'of urgent public importance'. The tribunal is then appointed by the Crown or Secretary of State in a document reciting that the Act is to apply. The parliamentary resolutions serve to differentiate tribunals of inquiry from ordinary administrative inquiries or investigations, such as royal commissions and departmental committees, which have no statutory authority or special powers.

Experience of tribunals of inquiry has revealed the dangers to which a procedure of this kind is naturally prone. The inquiry is inquisitorial in character, and usually takes place in a blaze of publicity. Very damaging allegations may be made against persons who may have little opportunity of defending themselves and against whom no legal charge is preferred. The tribunal is usually presided over by an eminent judge, who can be relied upon to mitigate these dangers so far as possible. But an inquisitorial public inquiry is not always easily controllable, and its evils would be grave if its use were not infrequent.

A royal commission (chaired by Salmon LJ) reviewed the whole procedure in 1966 and made fifty recommendations.[10] It rejected various alternatives which had been suggested and it emphasised that some powerful and unrestricted means of inquiry must be available for use in emergencies. But it also emphasised that they were justifiable only on exceptional occasions when there was something like a nation-wide crisis of confidence.

In order to minimise the risk of injustice to individuals the Commission identified six 'cardinal principles' that all tribunals established under the 1921 Act should observe. In summary these are: (1) that the tribunal should be satisfied that each witness called was really involved; (2) that every witness should be informed of any allegations, and the substance of the evidence, against him; (3) that he should have an adequate opportunity of preparing his case and of being assisted by legal advisers (normally to be paid for out of public funds); (4) that he should have the opportunity of being examined by his own solicitor or counsel; (5) that all material witnesses a witness wishes to be called should, if reasonably practical, be called; and (6) every witness should have the opportunity of testing any evidence which might affect him by cross-examination conducted by his own solicitor or counsel.

The Salmon Commission considered that amendment of the 1921 Act would be required to implement some of these principles, e.g. the right to legal representation. Legislation would also be required to implement the further recommendation that immunity should be conferred on members of the tribunal, counsel, solicitors and witnesses. This last would ensure that witnesses did not remain silent out of

2003. The Privy Council said that judicial review should not restrict the work of the inquiry unless it was 'being unreasonable'. See [2003] *PL* 578 (Blom-Cooper). For a further example, see *Peters* v. *Davison* [1999] 2 NZLR 164 (CA), intervention justified on ground of error of law on face of record.

[10] Cmnd. 3121 (1966).

fear of self-incrimination. However, the government has declined to act,[11] but some recommendations have in substance been implemented administratively: the Attorney-General frequently gives a general undertaking that no evidence given by a witness to the inquiry will be used in evidence in criminal proceedings against him or her;[12] and the government frequently bears the cost of legal assistance.[13]

The Scott Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq[14] did not follow the Salmon principles. Only counsel for the inquiry cross-examined witnesses. Witnesses were not always informed of the allegations against them since nothing might be alleged against them; the tribunal was simply trying to find out what happened. It gave witnesses notice of the matters about which they would be asked questions. Witnesses were not represented by counsel before the inquiry but they were given an opportunity to correct errors in their evidence. In adopting these procedures Sir Richard Scott was guided not only by fairness to the individuals concerned but also by considerations of cost and efficiency. The inquisitorial nature of his inquiry was, he felt, at odds with the adversarial values immanent in the Salmon principles;[15] and he made detailed recommendations about inquiry procedures stressing that the nature of the inquiry should determine the procedures adopted subject to an overriding duty of fairness.[16]

The conduct of the Scott Inquiry has been severely criticised by Lord Howe of Aberavon because of its denial of legal representation before the inquiry and because in these circumstances the inquisitorial nature of the proceedings impaired the impartiality of the tribunal.[17] He considers that the Salmon principles should be strictly applied. However, the Council on Tribunals, when asked by the Lord Chancellor to consider Sir Richard's views, came to the conclusion that it was 'wholly impractical' to devise a set of model rules that would serve for every inquiry.[18] All that could be done was to set out the key objectives which were effectiveness, fairness, speed and economy and the practical considerations that would determine the procedure actually adopted. The government has accepted the advice of the Council as a response to Sir Richard's recommendations.[19]

[11] In White Paper, Cmnd. 5313 (1973) the government declined to legislate as recommended by the Commission in a supplementary report (Cmnd. 4078 (1969)) to ensure that the tribunal's contempt powers were not used to stifle discussion but accepting the bulk of the other recommendations requiring legislation. No legislation has followed.

[12] For the terms of such an undertaking see *Lawrence Inquiry Report*, Appendix 1, para. 14. The evidence may be used if the witness is charged with giving false evidence.

[13] (1995) 111 *LQR* 596, 604 (Sir Richard Scott).

[14] HC 115 (1995–96). This inquiry was not held under the 1921 Act. All aspects of the inquiry are discussed by several authors in [1996] *PL* 359–527. Lord Phillips' Inquiry into Bovine Spongiform Encephalopathy was also not conducted under statutory authority and was simply a 'report to Ministers' although announced in Parliament (see www.bseinquiry.gov.uk).

[15] In (1995) 111 *LQR* 596 Sir Richard describes and defends the conduct of his inquiry.

[16] Para. B2.29 of the *Report*.

[17] [1996] *PL* 445.

[18] *Annual Report*, 1995–96, 6–8 and Appendix A.

[19] *Annual Report*, 1996–97, 46.

The Salmon principles, it seems, will no longer be followed slavishly (if at all).[20]

In the past the Attorney-General has often undertaken the task of presenting evidence to an inquiry even when this involved making charges against his ministerial colleagues and conducting hostile cross-examinations of them.[21] This ability of the Attorney-General to detach himself from his political and personal ties when he acts as a guardian of the law is not easily understood by the public and the Salmon Commission recommended that the practice should cease.[22] Although the government did not accept this recommendation, the current practice is that counsel to the inquiry are not law officers.

Investigations by the Serious Fraud Office and Department of Trade Inspectors

Parliament has on several occasions, out of concern for the integrity and honesty of commercial life, granted to officials extensive powers of investigation backed by the coercion of the criminal law. The most prominent examples of such powers are those of inspectors appointed by the Secretary of State for Trade and Industry under Part XIV of the Companies Act 1985 'to investigate the affairs of a company' and those of the Director of the Serious Fraud Office to 'investigate . . . serious or complex fraud'.[23]

The Director of the Serious Fraud Office, for instance, can, while carrying out an investigation, require 'any person', whether under investigation or not, whom he has reason to believe has relevant information about a matter under investigation, to answer any questions or otherwise furnish relevant information.[24] He may also require such a person to produce any documents which the director believes relate to the matter under investigation.[25]

[20] Even before the Scott Report the Salmon principles were more honoured in the breach. See Appendix to the *Croom-Johnson Report into the Operations of the Crown Agents*, HC 364 (1982); *Crampton* v. *Secretary of State for Health* (unrep., 9 July 1993)) (inquiry may be satisfactorily conducted without observing 'the letter' of the six cardinal principles (Sir Thomas Bingham MR)).

[21] The classic case was the conduct by Sir Hartley Shawcross, A-G, of the 'prosecution' before the tribunal of inquiry into 'bribery of ministers of the Crown or other public servants in connection with the grant of licences, etc.', Cmd. 7616 (1948).

[22] Cmnd. 3121 (1966), para. 96.

[23] Criminal Justice Act 1987, s. 1. There are other occasions on which such powers are granted. For instance, provisional liquidators of companies who have obtained orders under s. 236(3) of the Insolvency Act 1986 have similar powers (see *Bishopsgate Investment Management Ltd.* v. *Maxwell and another* [1993] Ch. 1), as have inspectors appointed under the Financial Services Act 1986, s. 107.

[24] Criminal Justice Act 1987, s. 2(2). It is a criminal offence not to comply with such an order from the director of the SFO (s. 2(13)—failing to comply without reasonable excuse—and s. 2(14)—knowingly or recklessly making a false statement). The obstruction of Department of Trade inspectors, for example, by not answering the inspectors' questions or refusing to produce documents, is treated as contempt of court (Companies Act 1985, s. 436).

[25] s. 2(3). Furthermore, this power is buttressed by provisions that allow a search warrant to be issued (by a justice of the peace) to search for such documents (s. 2(4), (5), (6)).

There are some safeguards for the person under investigation. A statement made in response to the exercise of the Director's powers is not admissible as evidence against him;[26] and legal professional privilege prevails over the requirement to disclose information or produce documents to the Director.[27] But the position of the person under investigation is unenviable: not only has the privilege against self-incrimination and the right to silence been significantly abrogated but the Serious Fraud Office is not required while investigating to disclose documents and information in their possession,[28] and the investigation by the Serious Fraud Office can continue even after the person under investigation has been charged.[29] It is not surprising that the powers of the Director have been criticised.[30] But an investigation under the Companies Act 1985 was held by the European Court of Human Rights not to breach Article 6(1) of the European Convention.[31] The inspectors' functions were investigative, not adjudicative, and the procedures adopted did not exceed the national authorities' margin of appreciation.

[26] Criminal Justice Act 1987, s. 2(8). There are special circumstances in which the statement is admissible: where the maker is prosecuted for knowingly or recklessly making a false statement (s. 2(8)(a)), or where the maker in giving evidence on prosecution for some other offence makes another statement inconsistent with his earlier statement (s. 2(8)(b)). A statement made to Department of Trade inspectors is no longer admissible against its maker in any subsequent proceedings (Companies Act 1985, s. 434(5), (5A) (as amended by the Youth Justice and Criminal Evidence Act 1999, s. 59, sched. 3, paras. 4, 5)). The admissibility of such evidence was held a breach of Art. 6(1) in *Saunders* v. *UK* (1997) 23 EHRR 313.

[27] s. 2(9).

[28] *R.* v. *Director of the Serious Fraud Office ex p. Maxwell*, The Times, 9 October 1992. Neither do Department of Trade inspectors need to disclose such matters (*Re Pergamon Press* [1971] Ch. 388).

[29] *R.* v. *Director of the Serious Fraud Office ex p. Smith* [1993] AC 1.

[30] See D. Pannick, 'The SFO May be Going Too Far', The Times, 22 June 1993. Cf. G. Staple, 'Serious and Complex Fraud: A New Perspective' (1993) 56 *MLR* 127.

[31] *Fayed* v. *United Kingdom*, No. 28/1993/423/502 (1994) 18 EHRR 393. For discussion of Art. 6(1) see above, p. 445.

APPENDIX 1

Lord Diplock's Formal Statement on Judicial Review

There are many references in this book to Lord Diplock's exposition of the principles of judicial review in *Council of Civil Service Unions* v. *Minister for the Civil Service*.[1] This statement was described by high authority as 'classical but certainly not exhaustive';[2] and Lord Hoffmann has said in a lecture: 'the principles of judicial review . . . cannot be captured even by Lord Diplock in three or four bullet points with single word headings elucidated by a single sentence of explanation'.[3] Subject to these caveats, the following extract from Lord Diplock's speech is appended in order that his propositions may be read in their context.

Lord Diplock said:

Judicial review, now regulated by RSC, Ord. 53, provides the means by which judicial control of administrative action is exercised. 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 a decision.

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other 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 grounds 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 of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation that qualifies a decision for inclusion in class (b) a 'legitimate expectation' rather than a 'reasonable expectation', in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily

[1] [1985] AC 374 at 408.

[2] *R.* v. *Secretary of State for the Environment ex p. Nottinghamshire CC* [1986] AC 240 at 249 (Lord Scarman).

[3] (1997) 32 Ir. Jur. 49 at 53.

have such consequences. The recent decision of this House in *In re Findlay* [1985] AC 318 presents an example of the latter kind of expectation. 'Reasonable' furthermore bears different meanings according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter.)

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, which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e. that part of the common law that is given by lawyers the label of 'the prerogative'. Where this is the source of decision-making power, the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank.

It was the prerogative that was relied on as the source of the power of the Minister for the Civil Service in reaching her decision of 22 December 1983 that membership of national trade unions should in future be barred to all members of the home civil service employed at GCHQ.

My Lords, I intended no discourtesy to counsel when I say that, intellectual interest apart, in answering the question of law raised in this appeal, I have derived little practical assistance from learned and esoteric analyses of the precise legal nature, boundaries and historical origin of 'the prerogative', or what powers exercisable by executive officers acting on behalf of central government that are not shared by private citizens qualify for inclusion under this particular label. It does not, for instance, seem to me to matter whether today the right of the executive government that happens to be in power to dismiss without notice any member of the home civil service upon which perforce it must rely for the administration of its policies, and the correlative disability of the executive government that is in power to agree with a civil servant that his service should be on terms that did not make him subject to instant dismissal, should be ascribed to 'the prerogative' or merely to a consequence of the survival, for entirely different reasons, of a rule of constitutional law whose origin is to be found in the theory that those by whom the administration of the realm is carried on do so as personal servants of the monarch who can dismiss them at will, because the King can do no wrong.[4]

Nevertheless, whatever label may be attached to them there have unquestionably survived into the present day a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority but nevertheless have consequences on the private rights or legitimate expectations of other persons which would render the decision subject to judicial review if the power of the decision-maker to make them were statutory in origin. From matters so relatively minor as the grant of pardons to condemned criminals, of honours to the good and great, of

[4] *Note by the senior author*: In a conversation with Lord Diplock at the time when judgment in this case was pending I expressed (I am afraid impertinently) the fear that it would contain much nonsense about the royal prerogative. 'It will,' he replied, 'but not from me.' I have always attributed this paragraph to that conversation.

corporate personality to deserving bodies of persons, and of bounty from monies made available to the executive government by Parliament, they extend to matters so vital to the survival and welfare of the nation as the conduct of relations with foreign states and—what lies at the heart of the present case—the defence of the realm against potential enemies. Adopting the phraseology used in the European Convention on Human Rights 1953[5] (Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)) to which the United Kingdom is a party it has now become usual in statutes to refer to the latter as 'national security'.

My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further groups. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is *par excellence* a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 KB 223). It applies to 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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards* v. *Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

[5] The date of the Convention was 1950.

APPENDIX 2

Issues that arose or came to light while this book was in the press

1. *The ouster clause in the Asylum and Immigration (Treatment of Claimants etc.) Bill 2004*

This clause, which has been mentioned elsewhere (Preface, p. 722) sought to insert a new section 108A into the Nationality, Immigration and Asylum Act 2002. (The text is given in [2004] PL 232 and [2004] Judicial Review 97.) Sub-clause 1 provided that 'No court shall have any supervisory or other jurisdiction (whether statutory or inherent) in relation to the Tribunal [the Asylum and Immigration Tribunal]'. Sub-clause 2, omitting some details, provided that no court could 'entertain proceedings for questioning . . . any determination, decision or other action of the Tribunal (including a decision about jurisdiction . . .)'. Sub-clause 3 specified the grounds on which a court was precluded from 'entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity'. These included all the classic grounds of judicial review—'lack of jurisdiction, irregularity, error of law, breach of natural justice or any other matter'. The only significant saving was 'bad faith' by a member of the Tribunal. But 'bad faith' was defined very narrowly as 'dishonesty, corruption or bias' (sub-clause 4) in contrast with the broad and less pejorative meaning usually given to 'bad faith' in administrative law (see p. 416 'Bad faith not dishonesty').

This measure with its wanton disregard for the right of access to the courts attracted criticism from many influential quarters. Much of that criticism is collected in 'The Ouster Debate' in [2004] Judicial Review 95 ff, but note in addition the tellingly critical Report of the Joint Committee on Human Rights on the Bill (HL 35/HC 304; 10th February 2004). Moreover, the House of Commons Constitutional Affairs Committee in its Second Report (HC 211-I; 2 March 2004 (relevant parts printed in [2004] Judicial Review 1000) was also critical. Notwithstanding this criticism from within Parliament itself the measure was passed without significant amendment by the House of Commons. There was also weighty criticism from the Lord Chief Justice, Lord Woolf, giving the Squire Centenary Lecture in Cambridge (see (2004) 63 CLJ 317 and <http://www.law.cam.ac.uk/docs/view.php?doc = 1415>) as well as 'forcible' but private representations made by Lord Irvine of Lairg (see the Lord Chancellor's statement in the Lords (Hansard, 15 March 2004, col 51)).

In the end the weight of criticism prevailed and the Lord Chancellor (Lord Falconer) withdrew the clause at an early stage of the Bill's progress through the House of Lords (Hansard, ibid.). The replacement clause (now clause 26 (replacing section 81 of the Nationality Immigration and Asylum Act 2002 and inserting sections 103A–E into that Act)) has not yet (22 June 2004) secured Parliamentary approval. The new provisions create a complicated web—which can only be sketched here—of rights of appeal generally to the High Court (or equivalent in other jurisdictions) on the grounds of 'error of law' by the Tribunal. The relief granted in a successful appeal is reconsideration by the Tribunal. A noteworthy aspect of the system now proposed is the short time limits: the appeal must be made within 10 working days (28 days if the appellant is outside the UK). Moreover, only one appeal may be made (proposed section 103A). The typical appellant will have but one opportunity to appeal and will need to formulate the error of law allegedly made by the Tribunal in a short period of time. The government's desire to frustrate dilatory appeals may be thought to justify these restrictions.

At the time that the controversy was at its height there were bold statements by several eminent jurists suggesting that the judges should challenge legislative supremacy by denying effectiveness to the unamended ouster clause. See, for instance, Lord Lester QC ([2004] Judicial Review 95) arguing that since the common law accords supremacy to Parliament, it might decline to recognise that supremacy where Parliament abuses its powers. But the silence of the serving judiciary on the question of whether they had power to 'disapply' or 'strike down' the ouster clause should be noted. Such a step would have thrust the judiciary into a political maelstrom and its consequences would have been determined by politics not law. The supremacy of parliament, for good or ill, is an ancient and fundamental principle of the constitution. Notwithstanding its many errors, Parliament speaks with the special legitimacy of an elected representative legislature. (See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: OUP, 1999) for the leading account.) Surely it is not for the judges alone, without reference to any elected part of the constitutional order, to bring its supremacy to an end. As Lord Millett said in *Ghaidan* v. *Godin-Mendoza* (discussed below): 'the doctrine of Parliamentary supremacy is [not] sacrosanct, but . . . any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning' (para. 57).

As pointed out in the Preface this incident strengthens the case for a written constitution for the United Kingdom. But the fact that, in the end, the weight of principled criticism prevailed and the offensive provision was not enacted should not be overlooked. Apparently unbridled power was restrained.

2. Oudekraal Estates (Pty) Limited *v.* The City of Cape Town and others *(Case No. 41/2003, judgment 28 May 2004)*

The theory of the second actor (above p. 303) was adopted by the Supreme Court of Appeal in South Africa in the above case as a way of explaining how an invalid administrative act might nonetheless have legal effect. The appellant's predecessor in title had secured approval from the Administrator of the Cape Province in terms of the Townships Ordinance of 1934 (Cape) for the development of certain land on the slopes of Table Mountain as a township. However, this decision apparently ignored the existence on the land of several 'kramats', the ancient graves of spiritual leaders of the Muslim community and places of pilgrimage. The Supreme Court of Appeal found that this was a relevant consideration that was not taken into account. Consequently the approval by the Administrator of the township 'was was unlawful and invalid at the outset' (para 26). However, the Supreme Court of Appeal went on to hold that this did not mean that the Cape Metropolitan Council was entitled to ignore the apparent approval and refuse to approve the engineering services plan which was necessary to allow appropriate services to be provided to the township. In reliance upon the second actor theory, the court concluded that the first act, the Administrator's approval, existed in fact if not in law and that the second actor—the Cape Metropolitan Council—could not ignore that. The court (Howie P and Nugent JA; Cameron, Brand and Southwood JJA concurring) said: 'the proper enquiry in each case—at least at first—is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court' (para. 1). So the conclusion was reached that the validity of the act subsequent to the grant of permission did not depend upon the legal validity of that first act but only upon its factual existence.

As explained above (ibid.), a weakness of the theory is that it provides little guidance to the actual determination of the legal powers of the second actor. A particular value of the *Oudekraal* judgment is that it directs attention to 'the value of certainty in a modern bureaucratic state, a value that the legislature should be taken to have in mind as a desirable objective when it enacts enabling legislation' (para 37). The context indicates that certainty is to be a guide in construing statutes in order to determine the powers of a second actor.

3. R. (Mullen) *v.* Home Secretary *[2004] UKHL 18; [2004] 2 WLR 1140 (HL)*

Here the House of Lords expressed different opinions on the meaning of section 133 of the Criminal Justice Act 1988, discussed above, pp. 812/813. The case concerned a person whose conviction on serious charges (conspiracy to cause

explosions) was quashed on the ground that his deportation (from Zimbabwe to the United Kingdom) was an abuse of process. The applicant sought compensation under section 133 for the period he had been incarcerated. That section only granted the right to compensation where 'a miscarriage of justice' had been shown. The House of Lords was divided on whether a miscarriage of justice required that the applicant should be clearly innocent of the crime charged. Or whether a guilty (or at least not clearly innocent) person was the victim of a miscarriage of justice simply because their trial had been unfair. In the event, however, their Lordships were agreed that the applicant's trial had been fair (although an abuse of process that the prosecution was brought). The applicant failed to obtain compensation.

4. Ghaidan *v.* Godin-Mendoza *[2004] UKHL 30*

Here the House of Lords confirmed the decision of the Court of Appeal that the words 'wife or husband' included a homosexual partner for the purposes of succession to a statutory tenancy (above p. 176). This conclusion was reached through the application of section 3(1) of the Human Rights Act 1988 that requires 'so far as it is possible to do so' legislation to be 'read and given effect to' in a way that is compatible with Convention rights. All the speeches, save Baroness Hale's, consider in depth the correct approach to the interpretative obligation under section 3(1).

The judges were agreed that there did not need to be any ambiguity in the text to engage the obligation (para. 29 and 67). (After all where there was ambiguity the common law already required the adoption of an interpretation consistent with human rights.) It followed that even if there were no doubt as to the meaning of the text according to ordinary principles of construction, a different meaning might have to be given to the text in the application of section 3(1).

And to this extent, said Lord Nicholls of Birkenhead, the court had power to

> modify the meaning, and hence the effect, of primary and secondary legislation. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must . . . 'go with the grain of the legislation' (para 32–33).

Lord Steyn declined to 'formulate precise rules' about the proper limits for the use of section 3(1) but stressed that the making of a declaration of incompatibility under section 4 should be a remedy of last resort (para. 50).

Lord Millett (dissenting) stressed that the court's task was to interpret not to legislate. He said that this meant that:

> the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read

down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must 'strive to find *a possible* interpretation compatible with Convention rights, (emphasis added). *R v A* [2002] 1 AC 45, 67, para 44 *per* Lord Steyn. But it is not entitled to give it an impossible one, however much it would wish to do so.

One such impossible interpretation, in his Lordship's view, would be one where the legislation contained provisions which expressly, or by necessary implication, contradicted the meaning which the enactment would have to be given to make it compatible (para. 75). And on his analysis of the text the right to the statutory tenancy had an implicit limitation to the claimant being of the opposite sex to the deceased tenant.

Lord Rogers of Earlsferry found the limits on the interpretative obligation not in 'the fundamental features of the legislative scheme' but in the 'essential principles and scope of the legislation' and delivered the following dictum that captures the essence of the interpretative task.

> When Housman addressed the meeting of the Classical Association in Cambridge in 1921, he reminded them that the key to the sound emendation of a corrupt text does not lie in altering the text by changing one letter rather than by supplying half a dozen words. The key is that the emendation must start from a careful consideration of the writer's thought. Similarly, the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendment (para. 122).

The differences in formulation of the limitation on the section 3(1) obligation is probably not significant. But either formulation expresses the judiciary's fidelity at a profound level to our constitutional order in which even fundamental human rights are subject to the will of Parliament. The section 3(1) obligation will probably never be defined with the clarity that would be desirable. As the differences of view between the judges show, difficulties remain and a measure of discretion will always attend interpretation. But judicial fidelity to constitutional foundations is particularly important where the judges in the proper exercise of their role under section 3(1) are changing the meaning and effect of a statute.

5. *The Civil Procedure (Modification of Supreme Court Act 1981) Order 2004 (SI 2004 No. 1033)*

As noted above (p. 653), the changes in nomenclature introduced by the Civil Procedure Rules, Part 54 were open to doubt since no change had been made to the nomenclature used in the Supreme Court Act 1981; and the statutory names should surely prevail over those used in the CPR. The above Order has now, through the use of 'Henry VII powers' (see p. 864), amended the 1981 Act so that mandamus, prohibition and certiorari are now renamed as mandatory, prohibiting and quashing orders respectively. However, the 1981 Act still lays down that the 'leave' of the court is required to make an 'application for judicial review'. So the CPR's use of 'permission' and 'claim for judicial review' for these procedures remains open to doubt.

The above Order also makes an important change to the remedies available in an application for judicial review. Section 31(4) is amended so that in appropriate circumstances 'restitution or the recovery of a sum due' may be awarded in an application for judicial review 'if . . . the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application'. See the discussion at p. 654. Previously damages were the only monetary award available in judicial review proceedings.

6. *Effective Inquiries*

The Department of Constitutional Affairs, following a lead by the Public Affairs Select Committee, has issued a consultation paper with the above title. The paper is available at: <http://www.dca.gov.uk/consult/inquiries/index.htm#part1>. The focus of any changes to inquiry procedures will be to make them faster and more cost effective. The great cost of the second 'bloody Sunday' Inquiry has doubtless concentrated government minds on this issue. An annex to the consultation paper contains the first publication of Sir Roy Beldam's 'Review of Inquiries and Overlapping Proceedings'.

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