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INTRODUCTION

GOVERNMENT, LAW AND JUSTICE

The administrative state

'Until August 1914,' it has been said, 'a sensible law-abiding Englishman could pass through life and hardly notice the existence of the state, beyond the post office and the policeman.'[1] This worthy person could not, however, claim to be a very observant citizen. For by 1914 there were already abundant signs of the profound change in the conception of government which was to mark the twentieth century. The state schoolteacher, the national insurance officer, the labour exchange, the sanitary and factory inspectors, with their necessary companion the tax collector, were among the outward and visible signs of this change. The modern administrative state was already taking shape, reflecting the feeling that it was the duty of government to provide remedies for social and economic evils of many kinds. This feeling was the natural consequence of the great constitutional reforms of the nineteenth century. The enfranchised population could now make its wants known, and through the ballot box it had acquired the power to make the political system respond.

The advent of the welfare state might be dated from the National Insurance Act 1911, though the Education Act 1902, the Old Age Pensions Act 1908 and the Housing and Town Planning Act 1909 also have claims to consideration. But long before that period Parliament had imposed controls and regulations by such statutes as the Factories Acts, the Public Health Acts, and the railway legislation.[2] By 1854 there were already sixteen central government inspectorates.[3] The period 1865–1900 had been called 'the period of collectivism'[4] because of the outburst of regulatory legislation and the tendency to entrust more and more power to the state.[5] The author of that remark would have been hard put to it to find words for

[1] A. J. P. Taylor, *English History, 1914–1945*, 1.

[2] For the growth of the central government's powers and machinery in the nineteenth century see Holdsworth, *History of English Law*, xiv. 90–204.

[3] Parris, *Constitutional Bureaucracy*, 200.

[4] Dicey, *Law and Opinion in England in the Nineteenth Century*, 64.

[5] In 1888 Maitland wrote (*Constitutional History of England*, 1955 reprint, 501): 'We are becoming a much governed nation, governed by all manners of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.'

the period since the Second World War, which is as different from his own as his own was different from that of the Stuart kings. As his generation came to recognise the need for the administrative state, they had also to devise more efficient machinery. The Northcote–Trevelyan Report (1854) on the civil service was one milestone; another was the opening of the civil service to competitive examination in 1870. Meanwhile the modern type of ministerial department was replacing the older commissions and boards. The doctrine of ministerial responsibility was crystallising, with its correlative principles of civil service anonymity and detachment from politics. Thus were laid the foundations of the vast and powerful bureaucracy which is the principal instrument of administration today. Scarcely less striking has been the expansion of the sphere of local government, extending to education, town and country planning, and a great many other services and controls. The devolution of power has now been carried to new levels with the grant of substantial law-making powers to Scotland and Wales.

If the state is to care for its citizens from the cradle to the grave, to protect their environment, to educate them at all stages, to provide them with employment, training, houses, medical services, pensions, and, in the last resort, food, clothing, and shelter, it needs a huge administrative apparatus. Relatively little can be done merely by passing Acts of Parliament and leaving it to the courts to enforce them. There are far too many problems of detail, and far too many matters which cannot be decided in advance. No one may erect a building without planning permission, but no system of general rules can prescribe for every case. There must be discretionary power. If discretionary power is to be tolerable, it must be kept under two kinds of control: political control through Parliament, and legal control through the courts. Equally there must be control over the boundaries of legal power, as to which there is normally no discretion. If a water authority may levy sewerage rates only upon properties connected to public sewers, there must be means of preventing it from rating unsewered properties unlawfully.[6] The legal aspects of all such matters are the concern of administrative law.

Administrative law

A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject, as viewed by most lawyers. The governmental power in question is not that of Parliament: Parliament as the legislature is sovereign and, subject to one exception,[7] is beyond legal control. The powers of all other public authorities are subordinated to the law, just as much in the case of the Crown and ministers as in the case of local authorities and other public bodies. All such subordinate powers

[6] See *Daymond* v. *Plymouth City Council* [1976] AC 609; below, p. 861.

[7] European Community law; below, p. 198.

have two inherent characteristics. First, they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power. Secondly, and consequentially, it is always possible for any power to be abused. Even where Parliament enacts that a minister may make such order as he thinks fit for a certain purpose, the court may still invalidate the order if it infringes one of the many judge-made rules. And the court will invalidate it, *a fortiori*, if it infringes the limits which Parliament itself has ordained.

The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. 'Abuse', it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law which they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it. It is a common occurrence that a minister's order is set aside by the court as unlawful, that a compulsory purchase order has to be quashed or that the decision of a planning authority is declared to be irregular and void. The courts are constantly occupied with cases of this kind which are nothing more than the practical application of the rule of law, meaning that the government must have legal warrant for what it does and that if it acts unlawfully the citizen has an effective legal remedy. On this elementary foundation has been erected an intricate and sophisticated structure of rules, which are basically judge-made rules of common law.

As well as power there is duty. It is also the concern of administrative law to see that public authorities can be compelled to perform their duties if they make default. The Inland Revenue may have a duty to repay tax, a licensing authority may have a duty to grant a licence, the Home Secretary may have a duty to admit an immigrant. The law provides compulsory remedies for such situations, thus dealing with the negative as well as the positive side of maladministration.

Function distinguished from structure

As a second approximation to a definition, administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities. This is only one part of the mass of law to which public authorities are subject. All the detailed law about their composition and structure, though clearly related to administrative law, lies beyond the scope of the subject as here presented. So it is not necessary to investigate how local councillors are elected or what are the qualifications for service on various tribunals. Nor is it necessary to enumerate all the powers which governmental authorities possess, which by itself would require a book. A great deal must be taken for granted in order to clear the field.

What has to be isolated is the law about the *manner* in which public authorities

must exercise their functions, distinguishing function from structure and looking always for general principles. If it appears that some unwritten law requires that a man should be given a fair hearing before his house can be pulled down, before his trading licence can be revoked, and before he can be dismissed from a public office, a general principle of administrative law can be observed. If likewise a variety of ministers and local authorities are required by unwritten law to exercise their various statutory powers reasonably and only upon relevant grounds, there too is a general principle. Although this book supplies some particulars about the structure of public authorities and about some of their more notable powers, this is done primarily for the sake of background information. The essence of administrative law lies in judge-made doctrines which apply right across the board and which therefore set legal standards of conduct for public authorities generally.

There are, however, some areas in which more attention must be paid to structure. This is particularly the case with special tribunals and statutory inquiries, and to some extent also with delegated legislation. It is not by coincidence that these are the last three chapters of the book. They stand apart for the reason that the problems which need discussion relate as much to the organisation of the machinery for dispensing justice, and in the case of delegated legislation to the machinery of government, as to the role of the courts of law. In these final chapters, accordingly, there is a shift of emphasis towards what might be called constitutional design.

This book's conception of administrative law has been said to typify a 'red light' theory of the subject, aimed mostly at curbing governmental power, as contrasted with 'green light theory' whose advocates favour 'realist and functionalist jurisprudence' designed to make administration easier and better.[8]

> What one person sees as control of arbitrary power may, however, be experienced by another as a brake on progress. While red light theory looks to the model of the balanced constitution, green light theory finds the 'model of government' more congenial. Where red light theorists favour judicial control of executive power, green light theorists are inclined to pin their hopes on the political process.[9]

The path of progress by green light, it is said, is through improved ministerial responsibility, more effective consultation, decentralisation of power, a reduced role for the judiciary (therefore rejecting human rights legislation), freedom of information and other reforms to be sought by political means.[10] But these objectives, whether or not desirable, are of a different order from those of this book, and there is no easy 'red or green' contrast between them. This book is concerned with the present realities of legislative, executive and judicial power and aims to analyse them in a way helpful to lawyers. There is an 'amber' element in that some subjects,

[8] Harlow and Rawlings, *Law and Administration*, 2nd edn., 67.
[9] Harlow and Rawlings (as above).
[10] See (1979) 42 *MLR* 1, [1985] *PL* 564, [2000] *MLR* 159 (J. A. G. Griffith).

such as devolution of power and freedom of information, are common ground. But the purposes of the legal and the political approaches are so different that they cannot usefully be presented as a neat contrast of alternatives. 'Chalk or cheese' would be a better metaphor than 'red or green'.

Alliance of law and administration

It is a mistake to suppose that a developed system of administrative law is necessarily antagonistic to efficient government. Intensive administration will be more tolerable to the citizen, and the government's path will be smoother, where the law can enforce high standards of legality, reasonableness and fairness. Nor should it be supposed that the continuous intervention by the courts, which is now so conspicuous, means that the standard of administration is low. This was well observed by Sir John Donaldson MR:[11]

> Notwithstanding that the courts have for centuries exercised a limited supervisory jurisdiction by means of the prerogative writs, the wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.
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> With very few exceptions, all public authorities conscientiously seek to discharge their duties strictly in accordance with public law and in general they succeed. But it is must be recognised that complete success by all authorities at all times is a quite unattainable goal. Errors will occur despite the best of endeavours. The courts, for their part, must and do respect the fact that it is not for them to intervene in the administrative field, unless there is a reason to inquire whether a particular authority has been successful in its endeavours. The courts must and do recognise that, where errors have, or are alleged to have, occurred, it by no means follows that the authority is to be criticised. In proceedings for judicial review, the applicant no doubt has an axe to grind. This should not be true of the authority.

Provided that the judges observe the proper boundaries of their office, administrative law and administrative power should be friends and not enemies. The contribution that the law can and should make is creative rather than destructive.

The connecting thread which runs throughout is the quest for administrative justice. At every point the question is, how can the profession of the law contribute to the improvement of the technique of government? It is because all the various topics offer scope for this missionary spirit that they form a harmonious whole. Subject as it is to the vast empires of executive power that have been created, the public must be able to rely on the law to ensure that all this power may be used in a way conformable to its ideas of fair dealing and good administration. As liberty is subtracted, justice must be added. The more power the government wields, the

[11] *R. v. Lancashire CC ex p. Huddleston* [1986] 2 All ER 941 at 945.

more sensitive is public opinion to any kind of abuse or unfairness. While the greater part of this book is concerned with the standards required by the courts, the last two chapters (on tribunals and inquiries) are concerned also with standards required by Act of Parliament and by good administration. Taken together, the work of judiciary and legislature amounts to an extensive system of protection. It has its weaknesses, but it also has great strengths.

Public law and political theory

It would be natural to suppose that there must be intimate connections between constitutional and administrative law and political theory. The nature of democracy, governmental power, the position of the Crown—these and many such subjects have foundations which are first and foremost political and only secondarily legal. Yet legal exposition and analysis normally inhabits a world of its own, paying due respect indeed to history but little or none to theories of government. Despite some brave attempts which have been made from the legal side,[12] most students of public law feel no need to explore the theory which forms its background; or, if they do, they find little illumination.

Yet it is possible to claim that 'the nature and content of constitutional and administrative law can only be properly understood against the background of political theory which a society actually espouses, or against such a background which a particular commentator believes that a society ought to espouse'.[13] This is of course true in the sense that every lawyer will carry his own ideas of the political and social environment in which he works, and the better he understands it, the better will be his service to the community. But that need not involve political theory in the abstract. Legal antipathy to political theory is likely to be motivated by instinctive belief in the virtue of objectivity in law, the belief that law should be kept as distinct as possible from politics, and that there is positive merit in keeping a gulf between them. A judge or an advocate may be a conservative, a socialist or a Marxist, but he will be a good judge or advocate only if his understanding of the law is unaffected by his political theory; and the same may be true of a textbook writer.

The most obvious opportunities for theory lie on the plane of constitutional law. Does the law provide a coherent conception of the state? Is it, or should it be, based on liberalism, corporatism, pluralism, or other such principles? What are its implications as to the nature of law and justice? More pragmatically, should there be a

[12] Notably the books by P. P. Craig, *Public Law and Democracy in the United Kingdom and in the United States of America*; T. R. S. Allan, *Law, Liberty, and Justice*; M. Loughlin, *Public Law and Political Theory*; and articles by Sir John Laws, [1995] *PL* 72, [1996] *PL* 622 and Sir Stephen Sedley, (1994) 110 *LQR* 270, [1995] *PL* 386. See also Harlow and Rawlings, *Law and Administration*, 2nd edn., ch. 1, for discussion and references.

[13] Craig (as above), p. 1.

separation of powers, and if so how far? Is a sovereign parliament a good institution? Is it right for Parliament to be dominated by the government? Ought there to be a second chamber? The leading works on constitutional law, however, pay virtually no attention to such questions, nor can it be said that their authors' understanding of the law is noticeably impaired. The gulf between the legal rules and principles which they expound, on the one hand, and political ideology on the other, is clear and fundamental, and the existence of that gulf is taken for granted.

On the plane of administrative law the openings for political theory are fewer. They do include one large subject, the organisation of government, the civil service, devolution, local government, the police, regulation of industry, and so forth. But where the emphasis falls, as it does in this book, upon the central body of legal rules which regulate the use of governmental power, the focus is narrower. Those rules are based upon elementary concepts of legality, reasonableness and fairness which are self-evident in their own right and are even further detached from politics than are the principles of constitutional law. Although their natural home is in a liberal democracy, there is no necessary reason why they should not be observed under any regime, even if illiberal or undemocratic. The central part of administrative law, as presented in this book, has a neutrality which is lacking in constitutional law.

Constitutional law and administrative law are subjects which interlock closely and overlap extensively. The rule of law, for instance, is a basic concept which runs through them both and which offers scope for political theory as well as for the discussion of its practical features which will be found below. But other such universals are not easily found in the field of administrative law, and the lack of them limits the assistance which political theory can provide.

CHARACTERISTICS OF THE LAW

The Anglo-American system

The British system of administrative law, which is followed throughout the English-speaking world, has some salient characteristics, which mark it off sharply from the administrative law of other European countries. Although in the United States of America it has naturally followed its own line of evolution, it is recognisably the same system.[14] This is true also of Scotland, although it must never be forgotten that Scots law may differ materially from English. It may be said of Scots

[14] The British and American systems are compared in Schwartz and Wade, *Legal Control of Government*.

administrative law that its foundations are the same as in England, but that there are important differences in detail.[15] This book does not deal with Scots law in general, but it points in several places to Scots law as an example of enlightenment in matters where English law has shown itself defective;[16] and useful Scots decisions can often be cited.

The outstanding characteristic of the Anglo-American system is that the ordinary courts, and not special administrative courts, decide cases involving the validity of governmental action. The ordinary law of the land, as modified by Acts of Parliament, applies to ministers, local authorities, and other agencies of government, and the ordinary courts dispense it. This is part of the traditional concept of the rule of law, as explained in the next chapter. This has both advantages and disadvantages. The advantages are that the citizen can turn to courts of high standing in the public esteem, whose independence is beyond question; that highly efficient remedies are available; that there are none of the demarcation problems of division of jurisdictions; and that the government is seen to be subject to the ordinary law of the land. Its disadvantages are that many judges are not expert in administrative law: that neglect of the subject in the past has seriously weakened it at times; and that its principles have sometimes been submerged in the mass of miscellaneous law which the ordinary courts administer. These disadvantages have recently become less menacing as the judiciary have become both more specialised and more determined to find remedies for any kind of governmental abuse.

Evolutionary reform

Under the arrangement of court business which obtained until 1977, applications for prerogative remedies would usually come before a Queen's Bench Divisional Court, actions for damages and declarations before a single Queen's Bench judge, and actions for injunctions would be heard in the Chancery Division. The practice reflected the division between the old courts of common law and chancery, which had been obsolete for a century; and it might have been devised for producing the maximum divergence of judicial opinion and the minimum consistency of principle. In 1977, however, procedural reforms were introduced which concentrated cases concerned with administrative law in the Queen's Bench Division, so that that court in effect became an administrative division of the High Court.[17] These reforms were pioneered by legislation in Ontario and New Zealand, and adopted in this country as the result of a report of the Law Commission made in

[15] For the Scots system see Mitchell, *Constitutional Law*, 2nd edn., pt. 3; Scottish Law Commission's Memorandum No. 14 (1971, A. W. Bradley); *The Laws of Scotland* (Stair Memorial Encyclopaedia), i (A. W. Bradley).

[16] As in the case of default powers (below, p. 740) and of 'Crown privilege' (below, p. 842).

[17] See below, p. 650. Since 1980, however, these cases normally come before a single judge under SI 1980 No. 2000, so that the expert character of the court may be diminished.

1976.[18] New Zealand had already established an administrative division of the High Court in 1968.[19]

Much wider proposals had been contemplated by the Law Commission in 1969, when they recommended that a royal commission or comparable body should conduct an inquiry into the whole system of administrative law in Britain, covering not only the scope of judicial control and remedies, but also the organisation and personnel of the courts dealing with proceedings against the administration.[20] This would have called in question the whole basis of the Anglo-American system and consideration would have to have been given to the possibility of replacing it with a hierarchy of special administrative courts of the Continental type.[21] It was just at this time, however, that the English courts were showing strong signs of throwing off the defeatism of the previous period, when it had certainly seemed that radical reforms might be necessary. The Lord Chancellor declined to authorise the proposed inquiry, and instead asked the Law Commission to undertake a review of the system of remedies only.[22] For that was a more evident need; and as a result of the Commission's above-mentioned report of 1976 the procedure for obtaining the various remedies was reformed—though with results which in some ways were less felicitous than had been hoped.[23]

The Continental system

In France, Italy, Germany and a number of other countries there is a separate system of administrative courts which deal with administrative cases exclusively. As a natural consequence, administrative law develops on its own independent lines, and is not enmeshed with ordinary private law as it is in the Anglo-American system. In France droit administratif is a highly specialised science, administered by the judicial wing of the Conseil d'État, which is staffed by judges of great professional expertise, and by a network of local tribunals of first instance.[24] Courts of this kind, whose work is confined to administrative law, may have a clearer view of the developments needed to keep pace with the powers of the state than have courts which are maids of all work. Certainly the Conseil d'État has shown itself more aware of the demands of justice in respect of financial

[18] Cmd. 6407 (1976).

[19] Judicature Amendment Act 1968. For a commentary see (1972) 22 *UTLJ* 258 (Sir R. Wild, CJNZ).

[20] Law Com. No. 20, Cmnd. 4059 (1969).

[21] As advocated by Professor W. A. Robson to the Committee on Ministers' Powers (see Cmnd. 4060 (1932), 110 and Robson, *Justice and Administrative Law*, 3rd edn., ch. 6); and in [1965] *PL* 95, [1967] *CLJ* 46 (J. D. B. Mitchell).

[22] 306 HL Deb. col. 190 (4 Dec. 1969).

[23] See below, p. 650.

[24] See Brown and Bell, *French Administrative Law*, 5th edn.

compensation,[25] in contrast to the English reluctance—as Lord Wilberforce has observed.[26] But the French system is not without its disadvantages. Its remedies are narrow in scope and not always effective, and the division of jurisdictions between civil and administrative courts is the subject of technical rules which can cause much difficulty.

Although the structure of the courts is so different, many of the cases that come before the Conseil d'État are easily recognisable as the counterparts of familiar English situations. Review of administrative findings of fact and determinations of law, abuse of discretion, ultra vires—all of these and many other English rubrics can be illustrated from the administrative law of France. There is also the similarity that both English and French systems are contained in case-law rather than in any statutory code. French authorities are by no means out of place when precedents are being sought for guidance on some novel issue.

European Union law

The European Communities, now the European Union, of which Britain became a member in 1973, have their own legal system, which has been vigorously developed by the European Court of Justice in Luxembourg in accordance with a series of treaties (Rome (1957)[27] to Amsterdam (1998)) and the legislation made under them by the Community authorities. It is a condition of membership, fulfilled in Britain by the European Communities Act 1972,[28] that Community law takes precedence over national law, and many rules of Community law have direct effect in the member states, so that they must be applied and enforced by national courts. A brief general account of this system will be found below.[29] Community law contains its own administrative law, under which the Court of Justice can annul unlawful acts of the community authorities and award compensation against them. The Court's constitution and powers are modelled on those of the French Conseil d'État. The subordination of all the law of the member states to community law as declared by the Court makes the Court an extremely powerful tribunal.

The impact on British administrative law, which came slowly at first, has now made itself felt dramatically. Community law has revolutionised one of the fundamentals of constitutional law, as explained later, by demanding that an Act of our supposedly sovereign Parliament must be 'disapplied' by a British court if

[25] As noted below, p. 341.

[26] In *Hoffmann–La Roche & Co.* v. *Secretary of State for Trade and Industry* [1975] AC 295 at 358, contrasting 'more developed legal systems'.

[27] Now supplemented by the Treaty of Maastricht (1993) and the European Communities (Amendment) Act 1993.

[28] s. 2. See below, p. 198.

[29] See p. 192.

held to be in conflict with community law;[30] and ministerial regulations have been invalidated by judgments given in Luxembourg.[31] Wide categories of government liability, enforceable in British courts, have been created similarly, as will later be explained.[32] The incoming tide, as Lord Denning once described it,[33] may percolate into any creek or backwater of our law, which will then be submerged by its superior power. As community law imposes itself more and more, administrative law will become an amalgam of British and European rules. Although not many instances can as yet be cited in this book, there is bound to be an abundance of them in future. An increasing degree of convergence between British and European administrative law is also probable.

European human rights

Another European system which our law is now absorbing is that of the European Convention on Human Rights and Fundamental Freedoms, to which Britain acceded as one of the founder members in 1950 but to which it gave domestic legal force only in 2000. During the intervening half-century the government accepted the obligations of the Convention as interpreted by the European Court of Human Rights in Strasbourg but refused to make them enforceable in British courts. That anomaly was ended by the Human Rights Act 1998 which came into force in 2000. As explained later,[34] that Act provides that the decisions and practice of the European Court are to be followed by British courts in enforcing the human rights set out in the Convention and incorporated in the Act. Here therefore is another non-indigenous source of law, which is both fundamental and far-reaching.

Historical development

Administrative law in England has a long history, but the subject in its modern form did not begin to emerge until the second half of the seventeenth century. A number of its basic rules can be dated back to that period, and some, such as the principles of natural justice, are still older. In earlier times the justices of the peace, who were used as all-purpose administrative authorities, were superintended by the judges of assize, who on their circuits conveyed instructions from the Crown, dealt with defaults and malpractices, and reported back to London on the affairs of the country. Under the Tudor monarchy this system was tightened up under the authority of the Privy Council and of the provincial Councils in the North and in

[30] Below, p. 198.
[31] As in the *Bourgoin* case, below, p. 778.
[32] Below, p. 778.
[33] *Bulmer (H. P.) Ltd.* v. *J. Bollinger SA* [1974] Ch. 401 at 418.
[34] Below, p. 169.

Wales.[35] This was a long step towards the centralisation of power in a state of the modern type. The Privy Council's superintendence was exercised through the Star Chamber, which could punish those who disobeyed the justices of the peace, and reprove or replace the justices themselves. But the powers of the state were not often challenged at the administrative level. A freeman of a borough might resist unlawful explusion by obtaining a writ of mandamus[36] and writs of certiorari might lie against the Commissioners of Sewers if they usurped authority.[37] But it was on the constitutional rather than on the administrative plane, and notably on the battlefields of the civil war, that the issues between the Crown and its subjects were fought out.

After the abolition of the Star Chamber in 1642, and the destruction of most of the Privy Council's executive power by the Revolution of 1688, a new situation arose. The old machinery of central political control had been broken, and nothing was put in its place. Instead, the Court of King's Bench stepped into the breach and there began the era of the control of administration through the courts of law. The King's Bench made its writs of mandamus, certiorari, and prohibition, as well as its ordinary remedy of damages, available to anyone who wished to dispute the legality of administrative acts of the justices and of such other authorities as there were. The political dangers of doing so had ceased to exist, and the field was clear for the development of administrative law. The chapter on local government mentions the part played by the justices in the eighteenth century, and how in the course of the nineteenth century most of their administrative functions were transferred to elected local authorities. All through this time the courts were steadily extending the doctrine of ultra vires and the principles of judicial review. These rules were applied without distinction to all the new statutory authorities, such as county councils, boards of works, school boards and commissioners, just as they had been to the justices of the peace. As the administrative state began to emerge later in the nineteenth century, exactly the same rules were applied to central government departments. This is the same body of law which is still being developed today. The history of many of the detailed doctrines, such as the rules for review of jurisdictional questions, the principles of natural justice, and the scope of certiorari, will be seen in the treatment of them later in this book.

Administrative law, as it now exists, has therefore a continuous history from the later part of the seventeenth century. The eighteenth century was the period *par excellence* of the rule of law,[38] and it provided highly congenial conditions in which the foundations of judicial control could be consolidated. It is remarkable how little fundamental alteration has proved necessary in the law laid down two

[35] Holdsworth, *History of English Law*, iv. 71.
[36] As in *Bagg's Case* (1616) 11 Co. Rep. 93; below, p. 478.
[37] As in *Hetley* v. *Boyer* (1614) Cro. Jac. 336; *Smith's Case* (1670) 1 Vent. 66; below, p. 351.
[38] See below, p. 110.

centuries ago in a different age. The spread of the tree still increases and it throws out new branches, but its roots remain where they have been for centuries.

Twentieth-century failings

Up to about the end of the nineteenth century administrative law kept pace with the expanding powers of the state. But in the twentieth century it began to fall behind. The courts showed signs of losing confidence in their constitutional function and they hesitated to develop new rules in step with the mass of new regulatory legislation. In 1914 the House of Lords missed an important opportunity to apply the principles of natural justice to statutory inquiries,[39] a new form of administrative procedure which ought to have been made to conform to the ordinary man's sense of fairness, for example by allowing him to know the reasons for the minister's decision and to see the inspector's report on which the decision was based. Not until 1958 were these mistakes corrected, and even then the remedy was provided by legislation and administrative concession rather than by the courts themselves. Meanwhile the executive took full advantage of the weak judicial policy, and inevitably there were loud complaints about bureaucracy. Eminent lawyers, including a Lord Chief Justice, published books under such titles as *The New Despotism*[40] and *Bureaucracy Triumphant*.[41] At the same time, Parliament was losing its control over ministers, so making it all the more obvious that the law was failing in its task of enforcing standards of fairness in the exercise of governmental powers.

The report of the Committee on Ministers' Powers of 1932[42] was intended to appease the complaints about bureaucracy. It covered ministerial powers of delegated legislation and of judicial or quasi-judicial decision.[43] The Committee made some sound criticisms of the system of public inquiries which had come into use. But their recommendations for making it fairer and more impartial were not entirely realistic and they proved unacceptable to the strongly entrenched administration.[44] The report led to certain improvements in delegated legislation, but in other respects it was little more than an academic exercise. It did not discuss the scope of judicial control, and although it called for the vigilant observance of the principles of natural justice, it did not consider how widely they should be applied.

[39] *Local Government Board* v. *Arlidge* [1915] AC 120; below, p. 484.

[40] By Lord Hewart CJ (1929).

[41] By Sir Carleton Allen (1931).

[42] Cmd. 4060 (1932).

[43] See below, p. 40.

[44] 'Few reports have assembled so much wisdom whilst proving so completely useless . . . its recommendations are forgotten, even by lawyers and administrators, and in no important respect did the report influence, much less delay, the onrush of administrative power, and the supersession of the ordinary forms of law which is taking place to-day.' Professor G. W. Keeton in *The Nineteenth Century and After* (1949), 230.

Discontent with administrative procedures therefore continued to accumulate. The practical reforms that were needed were not made until 1958, when the Report of the Committee on Administrative Tribunals and Enquiries (the Franks Committee)[45] led to the Tribunals and Inquiries Act 1958 and to a programme of procedural improvements, all to be supervised by a new body, the Council on Tribunals. The story of these reforms is told in later chapters.[46] They were of great importance in administrative law, but they were in no way due to the work of the courts.

The relapse and the revival

During and after the Second World War a deep gloom settled upon administrative law, which reduced it to the lowest ebb at which it had stood for centuries. The courts and the legal profession seemed to have forgotten the achievements of their predecessors and they showed little stomach for continuing their centuries-old work of imposing law upon government. It was understandable that executive power was paramount in wartime, but it was hard to understand why, in the flood of new powers and jurisdictions that came with the welfare state, administrative law should not have been vigorously revived, just when the need for it was greatest.

Instead, the subject relapsed into an impotent condition, marked by neglect of principles and literal verbal interpretation of the blank-cheque powers which Parliament showered upon ministers. The leading cases made a dreary catalogue of abdication and error. Eminent judges said that the common law must be given a death certificate, having lost the power to control the executive;[47] that certiorari was not available against an administrative act;[48] that there was no such thing in Britain as droit administratif;[49] and that there was no developed system of administrative law.[50] The following are some of the aberrations of what might be called 'the great depression'.

The court's power to quash for error on the face of the record was denied.[51]

The principles of natural justice were held not to apply to the cancellation of a licence depriving a man of his livelihood.[52]

Statutory phrases like 'if the minister is satisfied' were held to confer unfettered and uncontrollable discretion.[53]

[45] Cmnd. 218 (1957). The Act of 1958 has been replaced by the Tribunals and Inquiries Acts 1971 and 1992.

[46] Below, pp. 905, 961.

[47] Lord Devlin in 8 *Current Legal Problems* (1956), 14.

[48] Lord MacDermott, *Protection from Power under English Law* (1957), 88.

[49] Below, p. 25.

[50] Lord Reid in *Ridge* v. *Baldwin* [1964] AC 40 at 72, quoted below, p. 491.

[51] Below, p. 270.

[52] Below, p. 487.

[53] Below, p. 419.

Statutory restrictions on legal remedies were literally interpreted, contrary to long-settled principles.[54]

The Crown was allowed unrestricted 'Crown privilege' so as to suppress evidence needed by litigants.[55]

It was not even as if these were matters of first impression where the court had to consider questions of legal policy. Plentiful materials, in some cases going back for centuries, were available in the law, but they were ignored.

In the 1960s the judicial mood completely changed. It began to be understood how much ground had been lost and what damage had been done to the only defences against abuse of power which still remained. Already in the 1950s the courts had reinstated judicial review for error on the face of the record;[56] and there had been the statutory and administrative reforms of tribunal and inquiry procedures,[57] which helped to give a lead. Soon the courts began to send out a stream of decisions which reinvigorated administrative law and re-established continuity with the past. The principles of natural justice were given their proper application, providing a broad foundation for a kind of code of administrative due process.[58] The notion of unfettered administrative discretion was totally rejected.[59] Restrictions on remedies were brushed aside where there was excess of jurisdiction, in accordance with 200 years of precedent;[60] and the law was widened so as to make an excess of jurisdiction out of almost every error.[61] The citadel of Crown privilege was overturned and unjustifiable claims were disallowed.[62] In all these matters the rules for the protection of the citizen had been repudiated by the courts. All were now reactivated. Lord Reid's remark of 1963 that 'we do not have a developed system of administrative law' was countered in 1971 by Lord Denning's, that 'it may truly now be said that we have a developed system of administrative law'.[63] Both Lord Reid and Lord Denning had made conspicuous contributions to its development, but they had done so more by steering the law back on to its old course than by making new deviations.

In retrospect it can be seen that the turning-point of the judicial attitude came in 1963 with the decision of the House of Lords which revived the principles of natural justice.[64] From then on a new mood pervaded the courts. It was given still further impetus by a group of striking decisions in 1968–9, one of which, Lord Diplock said,[65]

[54] Below, p. 735.
[55] Below, p. 842.
[56] Below, p. 268.
[57] Below, p. 921.
[58] Below, p. 442.
[59] Below, p. 354.
[60] Below, p. 718.
[61] Below, p. 264.
[62] Below, p. 845.
[63] *Breen* v. *Amalgamated Engineering Union* [1971] 2 QB 175 at 189.
[64] *Ridge* v. *Baldwin* (above).
[65] In the *Racal* case (below, p. 265), referring to the *Anisminic* case (below, p. 264).

made possible the rapid development in England of a rational and comprehensive system of administrative law on the foundation of the concept of ultra vires.

Since then the judges have shown no reluctance to reformulate principles and consolidate their gains. They have pressed on with what Lord Diplock in a case of 1981 described as[66]

that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime.

So conspicuous has that progress been that he said in the same case that judicial statements on matters of public law if made before 1950 were likely to be a misleading guide to what the law is today.

A developed system?

Had the materials not been neglected, a developed system could have been recognised long beforehand. In 1888 Maitland had percipiently remarked:[67]

If you take up a modern volume of the reports of the Queen's Bench Division, you will find that about half the cases reported have to do with rules of administrative law; I mean such matters as local rating, the powers of local boards, the granting of licences for various trades and professions, the Public Health Acts, the Education Acts, and so forth.

And he added a caution against neglecting these matters, since otherwise a false and antiquated notion of the constitution would be formed. But his advice was not taken. No systematic treatises were published.[68] The decisions on housing, education, rating, and so on were looked upon merely as technicalities arising on some isolated statute, and not as sources of general rules. Tennyson's description of the law as a 'wilderness of single instances'[69] exactly fitted the profession's attitude. So far from undertaking systematic study, generations of lawyers were being brought up to believe, as Dicey had supposedly maintained, that administrative law was repugnant to the British constitution.[70] This belief was misconceived, as explained

[66] In the *Inland Revenue Commissioner's Case* (below, p. 691). See likewise Lord Diplock's remarks in *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 279 and in *Mahon* v. *Air New Zealand* [1984] AC 808 at 816.

[67] *Constitutional History of England* (1955 reprint), 505.

[68] Port, *Administrative Law*, appeared in 1929. But there was no full-scale treatment of judicial review until Professor de Smith's pioneering work, *Judicial Review of Administrative Action*, was first published in 1959. The treatment in *Halsbury's Laws of England* was fragmentary and inadequate until a title on Administrative Law, by Professor de Smith and others, appeared in the 4th edn., 1973.

[69] Aylmer's Field, line 441.

[70] In 1915 Dicey published a short article on the *Rice* and *Arlidge* cases (below, pp. 483–4) entitled 'The Development of Administrative Law in England', 31 *LQR* 495. But this did not remove the misconceptions which he had caused.

below,[71] but it blighted the study of the law in what should have been a formative period. Even Lord Hewart, despite his protests in *The New Despotism* and elsewhere against bureaucracy and its devices for evading judicial control, referred disparagingly to 'what is called, in Continental jargon, "administrative law"'.[72]

Whether a developed system or not, administrative law is a highly insecure science so long as it is subject to such extreme vacillations in judicial policy as have taken place since the Second World War. One of the arguments for a written constitution and a new Bill of Rights is that they should give the judiciary more confidence in their constitutional position and more determination to resist misuse of governmental power, even in the face of the most sweeping legislation. At the present time the courts are vigorously asserting their powers, now augmented by the Human Rights Act 1998, and there seems to be no danger of another relapse. But the not so distant past is a solemn warning.

[71] Below, pp. 24–25.
[72] *Not Without Prejudice*, 96.

2

CONSTITUTIONAL FOUNDATIONS OF THE POWERS OF THE COURTS

THE RULE OF LAW

Legality and discretionary power

The British constitution is founded on the rule of law,[1] and administrative law is the area where this principle is to be seen in its most active operation. The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorised by law—and in nearly every case this will mean authorised directly or indirectly by Act of Parliament. Every act of governmental power, i.e. every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can then safely disregard.

That is the principle of legality. But the rule of law demands something more, since otherwise it would be satisfied by giving the government unrestricted discretionary powers, so that everything that they did was within the law. *Quod principi placuit legis habet vigorem* (the sovereign's will has the force of law) is a perfectly legal principle, but it expresses rule by arbitrary power rather than rule according to ascertainable law. The secondary meaning of the rule of law, therefore, is that government should be conducted within a framework of recognised rules and principles which restrict discretionary power. Coke spoke in picturesque language of 'the golden and straight metwand' of law, as opposed to 'the uncertain and crooked cord of discretion'.[2] Many of the rules of administrative law are rules for restricting the wide powers which Acts of Parliament confer very freely on ministers and other authorities. Thus the Home Secretary has a nominally unlimited power to revoke any television licence and a local planning author-

[1] The classic exposition is that of Dicey, *The Law of the Constitution*, ch. 4.
[2] 4 Inst. 41.

ity may make planning permission subject to such conditions as it thinks fit, but the courts will not allow these powers to be used in ways which Parliament is not thought to have intended.[3] An essential part of the rule of law, accordingly, is a system of rules for preventing the abuse of discretionary power. Intensive government of the modern kind cannot be carried on without a great deal of discretionary power; and since the terms of Acts of Parliament are in practice dictated by the government of the day, this power is often conferred in excessively sweeping language. The rule of law requires that the courts should prevent its abuse, and for this purpose they have performed many notable exploits, reading between the lines of the statutes and developing general doctrines for keeping executive power within proper guidelines, both as to substance and as to procedure.[4]

The principle of legality is a clear-cut concept, but the restrictions to be put upon discretionary power are a matter of degree. Faced with the fact that Parliament freely confers discretionary powers with little regard to the dangers of abuse, the courts must attempt to strike a balance between the needs of fair and efficient administration and the need to protect the citizen against oppressive government. Here they must rely on their own judgement, sensing what is required by the interplay of forces in the constitution. The fact that this involves questions of degree has sometimes led critics to disparage the rule of law, treating it as a merely political phenomenon which reflects one particular philosophy of government.[5] But this is true only in the sense that every system of law must have its own standards for judging questions of abuse of discretionary power. As will be seen from Chapter 12, the rules of law which our own system has devised for this purpose are objective and non-political, based on the judicial instinct for justice, and capable of being applied impartially to any kind of legislation irrespective of its political content. Without these rules all kinds of abuses would be possible and the rule of law would be replaced by the rule of arbitrary power. Their existence is therefore essential to the rule of law, and they themselves are principles of law, not politics.

Judicial independence

A third meaning of the rule of law, though it is a corollary of the first meaning, is that disputes as to the legality of acts of government are to be decided by judges who are independent of the executive. It is in this sense, and in this sense only, that 'the British constitution, though largely unwritten, is firmly based upon the

[3] See below, pp. 362 and 404 respectively.

[4] See especially Chapters 11, 14.

[5] The best-known criticism is that of Sir I. Jennings, *The Law and the Constitution*, 5th edn., 42–62, attacking Dicey's exposition (above). An effective reply was made by Sir W. Holdsworth in (1939) 55 *LQR* at 586 and in his *History of English Law*, xiv. 202.

separation of powers'.[6] In the unwritten constitution it is venerated as a principle of policy rather than of law, though it is now reinforced by the developing law of human rights. The written constitutions of independent Commonwealth countries, on the other hand, have their foundations in legislation from which legal rights can flow. The separation of judicial from executive power 'is implicit in the very structure of a constitution on the Westminster model', so that, for example, the judiciary and not the government must control the length of prisoners' detention as a matter of law.[7]

In Britain, as in the principal countries of the Commonwealth and in the United States of America, disputes between citizen and government are adjudicated by the ordinary courts of law. Although many disputes must be taken before special tribunals ('administrative tribunals'), these tribunals are themselves subject to control by the ordinary courts[8] and so the rule of law is preserved. In countries such as France, Italy and Germany, on the other hand, there are separate administrative courts organised in a separate hierarchy—though it does not follow that they are less independent of the government. The right to carry a dispute with the government before the ordinary courts, manned by judges of the highest independence, is an important element in the Anglo-American concept of the rule of law.

Fairness

A fourth meaning is that the law should be even-handed between government and citizen. Clearly it cannot be the same for both, since every government must necessarily have many special powers. What the rule of law requires is that the government should not enjoy unnecessary privileges or exemptions from ordinary law. It was a 'lacuna in the rule of law'[9] that until 1947 the Crown was in law exempt from the ordinary law of employer's liability for wrongs done by its employees, since there was no necessity for this immunity and in practice the Crown did not claim it.[10] The Post Office still enjoys legal immunities which violate the rule of law.[11] The Crown also is exempt from obeying Acts of Parliament unless

[6] *Duport Steel* v. *Sirs* [1990] 1 WLR 142 at 157 (Lord Diplock). For discussion of the proper role of the judiciary see Lord Hoffmann's lecture *Separation of Powers* [2002] *JR* 137. Cf. [2003] *JR* 12 (M. Chamberlain).

[7] *Director of Public Prosecutions of Jamaica* v. *Mollison* [2003] 2 WLR 1160. See also *Hinds* v. *The Queen* [1977] AC 195, *Pinder* v. *The Queen* [2003] 1 AC 620. A striking example is *Liyanage* v. *The Queen* [1967] 1 AC 259, where the Privy Council invalidated retrospective criminal legislation enacted in Ceylon for the purpose of convicting particular prisoners of acts of rebellion. This was held to be an unlawful usurpation of judicial power, being a 'legislative judgment' violating the separation of powers.

[8] Below, p. 921.

[9] Report of the Committee on Ministers' Powers, Cmd. 4060 (1932), 112.

[10] See below, p. 819.

[11] Below, p. 144.

they contain some positive indication to the contrary effect.[12] It was 'a black day for the rule of law' when the High Court held that the law was unenforceable against ministers and civil servants.[13] In principle all public authorities should be subject to all normal legal duties and liabilities which are not inconsistent with their governmental functions.

In addition to its central principles the rule of law has a large periphery of controversial aspects. In so far as dictatorial government confers arbitrary power on some autocrat or legislature it can be claimed that there can be no real rule of law without representative democracy.[14] Wide claims have also been made for other areas of political theory, even to the point of asserting that the rule of law demands beneficial social and economic services and conditions.[15] Personal independence, also, is claimed to be included, as expressed in 'the principle of minimal interference'.[16] A contrast has been made between 'formal' and 'substantive' versions of the rule of law, the former being sometimes not much more than the principle of legality and the latter insisting on wider range and positive content.[17] But this ought not to be seen as a dilemma, since the rule of law necessarily has both formal and substantive features. As a legal principle its value is greatest if it is not stretched beyond the core of basic doctrine centred upon legality, regularity and fairness, always with emphasis on the rejection of arbitrary power. It is in this sense that it is most often referred to by judges, as in Lord Griffiths's statement that

> the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law[18]

and in Lord Steyn's statement that

> Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.[19]

[12] Below, p. 836.

[13] For this temporary lapse see below, p. 834.

[14] For comment see Craig, *Public Law and Democracy*, ch 2; Allan, *Law, Liberty and Justice*, ch. 2; Harden and Lewis, *The Noble Lie: The British Constitution and the Rule of Law*; Jowell in Jowell and Oliver, *The Changing Constitution*, 5th edn., 90; Allan in (1988) 8 *OJLS* 266 and (1999) 115 *LQR* 221.

[15] As in the resolution of the International Commission of Jurists, Delhi, 1959, cited in Allan (as above), 20.

[16] See [1996] *PL* 630 (Sir John Laws).

[17] For a survey of opinions and a balanced analysis see [1997] *PL* 467 (P. Craig).

[18] *R.* v. *Horseferry Road Magistrates' Court ex p. Bennett* [1994] 1 AC 42 at 62.

[19] *R.* v. *Home Secretary ex p. Pierson* [1998] AC 539 at 591. For this case, which involved a retrospective penalty, see below, p. 377. See also *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 161, 173 (Lord Irvine LC and Lord Steyn); *R.* v. *Home Secretary ex p. Stafford* [1998] 1 WLR 503 at 518 (Lord Bingham CJ).

Most lawyers would agree that it is these central elements of the rule of law, lying outside the areas of controversy, which are the most genuine and valuable.

The rule of law has other important meanings outside the sphere of public administration, for example in the principle that no one should be punished except for some legally defined crime and that rights should not be infringed by retrospective legislation. If access to justice is unduly slow and expensive, the rule of law is diminished. It is made a rallying-cry when any inroad is threatened upon the ideals which underlie the legal system. Quixotic though it is to hope that 'it may be a government of laws and not of men',[20] the rule of law remains none the less a vital necessity to fair and proper government. The enormous growth in the powers of the state makes it all the more necessary to preserve it. In one sense, the whole of this book is devoted to explaining how that is being done.

Fallacious comparisons

Although the concept of the rule of law might be called the mainspring of administrative law, Dicey's famous formulation of it in *The Law of the Constitution*[21] cast a prolonged blight over administrative law in Britain. At the root of this paradox was a verbal misunderstanding. Dicey maintained that 'administrative law' was utterly foreign to our constitution, that it was incompatible with the rule of law, with the common law, and with constitutional liberty as we understand it. But Dicey's 'administrative law' was a translation of the French droit administratif, and it was this, rather than any British conception, that Dicey denounced. He regarded it as a prime virtue of the rule of law that all cases came before the ordinary courts, and that the same general rules applied to an action against a government official as applied to an action against a private individual. Under the French system, with its special administrative courts, actions against officials or the state are in many cases subject to a separate system of judicature. What Dicey meant by 'administrative law' was a special system of courts for administrative cases. Even in Dicey's generation this was an unusual sense of the expression. But once that sense is appreciated, the paradox disappears.

Dicey's denunciation of the French system was based on his mistaken conclusion that the administrative courts of France, culminating in the Conseil d'État, must exist for the purpose of giving to officials 'a whole body of special rights, privileges, or prerogatives as against private citizens',[22] so as to make them a law unto themselves. It has long been realised that this picture was wrong, but it has become a traditional caricature. Even today English judges can speak as if droit

[20] Constitution of Massachusetts (1780), pt. I, art. 30.
[21] Ch. 4, first published in 1885.
[22] *The Law of the Constitution*, 10th edn., 336.

administratif was a system for putting the executive above the law. Thus Lord Denning MR has said:[23]

> Our English law does not allow a public officer to shelter behind a droit administratif.

But in fact French administrative law has a system of compensation for the acts of public officers which is in some respects more generous than that of English law.

The reality is that the French Conseil d'État is widely admired[24] and has served as a model for other countries, as well as for the Court of Justice of the European Communities. At the time when our own administrative law was in a state of relapse there were those who advocated importing the French system in Britain. Undoubtedly the French administrative courts have succeeded in imposing a genuinely judicial control upon the executive and in raising the standard of administration. They are impartial and objective courts of law in the fullest sense. Though their judges are government employees, they are no less critical of the administration than is the British judiciary. The popularity of the Conseil d'État is such that at one time it was in danger of being overwhelmed by the number of cases brought before it; but in 1953 the work was devolved and distributed through a system of local tribunals of first instance. The Conseil itself, forming a wing of an administrative college of great power and prestige, can develop its own principles of law and keep them in step with the prevailing philosophy of the respective rights of government and governed. An English judge, trained basically in private law and administering a more legalistic control, may feel less free to break new ground where new problems of public law call for new solutions.

An interesting aspect of the French system is that the administration has succeeded in developing, from within itself, its own machinery of self-discipline, administrative in its origins but yet fully imbued with legal technique. In Britain, on the other hand, the civil service works in an atmosphere far removed from legal influence, and legal control lies with entirely different organs, which by nature are unaccustomed to administrative work.[25] This exaggerates the cleavage between the legal and administrative worlds, and impedes the great objective—the improvement of administration by transfusion of the legal standards of justice. Both countries can claim advantages for their methods. In Britain the standing of the courts is high, and few would wish to see them abandon their historic function of protecting the subject against unlawful acts of government. But no one should suppose that administrative courts necessarily weaken the rule of law.

[23] *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 QB 223 at 226. For similar remarks by Salmon LJ see the same case at 275 and *Re Grosvenor Hotel, London* (No. 2) [1965] Ch. 1210 at 1261 ('There is no droit administratif in this country').

[24] See Brown and Bell, *French Administrative Law*, 5th edn., for a good general account in English.

[25] See below, p. 53.

THE SOVEREIGNTY OF PARLIAMENT

Legislative sovereignty

The sovereignty of Parliament is a peculiar feature of the British constitution which exerts a constant and powerful influence.[26] In particular, it is an ever-present threat to the position of the courts; and it naturally inclines the judges towards caution in their attitude to the executive, since Parliament is effectively under the executive's control. It is also responsible for the prominence in administrative law of the doctrine of ultra vires, as will shortly appear.

The sovereign legal power in the United Kingdom lies in the Queen in Parliament, acting by Act of Parliament. An Act of Parliament requires the assent of the Queen, the House of Lords, and the House of Commons, and the assent of each House is given upon a simple majority of the votes of members present. This is the one and only form of sovereign legislation, and there is no limit to its legal efficacy. It is true that Acts may be passed without the assent of the House of Lords under the procedures provided by the Parliament Acts 1911 and 1949; but these confer delegated, not sovereign, powers, for legislation passed under them owes its validity to their superior authority, and this is the hallmark of delegated legislation.[27] Sovereign legislation owes its validity to no superior authority: the courts accept it in its own right. Furthermore, no Act passed under the Parliament Acts can prolong the life of Parliament beyond five years,[28] whereas the power of a sovereign Act is boundless.

Under the traditional rules, any previous Act of Parliament can always be repealed by a later Act, either expressly or, in case of conflict, impliedly. Acts of the most fundamental kind, such as the Habeas Corpus Act 1679, the Bill of Rights 1688, the Act of Settlement 1700, the Statute of Westminster 1931 and (though subject to argument) the European Communities Act 1972 are just as easy to repeal, legally speaking, as is the Antarctic Treaty Act 1967. No special majorities or procedure are needed. The ordinary, everyday form of Act of Parliament is sovereign, and can effect any legal consequences whatsoever.

But this legal paramountcy can be exercised only by an Act of the sovereign Parliament, assented to by Queen, Lords and Commons. The two Houses of Parliament by themselves dispose of no such power, either jointly or severally. A resolution of either House, or of both Houses, has no legislative or legal effect whatever unless an Act of Parliament so provides.[29] There are many cases where some administrative order or regulation is required by statute to be approved by

[26] Here also Dicey's is the classic exposition: *The Law of the Constitution*, ch. 1. For valuable discussion see de Smith and Brazier, *Constitutional and Administrative Law*, 8th edn., ch. 4.

[27] See Hood Phillips, *Constitutional and Administrative Law*, 8th edn., 80; [1954] *CLJ* at 265, [1955] *CLJ* at 193; Wade, *Constitutional Fundamentals*, 27.

[28] Parliament Act 1911, s. 2(1).

[29] *Stockdale* v. *Hansard* (1839) 9 Ad. & E 1.

resolutions of the Houses.[30] But this procedure in no way protects the order or regulation from being condemned by the court, under the doctrine of ultra vires, if it is not strictly in accordance with the Act.[31] Whether the challenge is made before[32] or after[33] the Houses have given their approval is immaterial.

The devolution of legislative power to Scotland, Wales, and Northern Ireland, though of great importance constitutionally, has not altered the essentials of Parliamentary sovereignty. Acts of the Scottish Parliament receive the royal assent, but their authority derives entirely from the Scotland Act 1998 of the United Kingdom Parliament, which expressly preserves that Parliament's power to make laws for Scotland.[34] The Scottish Parliament's legislative power is moreover confined by a long list of 'reserved matters' which are outside its competence and which the central government can modify by Order in Council.[35] The Scottish Parliament's legislation, though primary legislation in the sense that it possesses initiative, is a special form of delegated legislation, essentially similar to that discussed in Chapter 23. The framework of the Northern Ireland Act 1998 is broadly the same. The Government of Wales Act 1998 confers only powers of secondary legislation on the Welsh Assembly to the extent that central government transfers existing ministerial powers to it subject to affirmative resolutions in both Houses of Parliament. A more detailed account of the devolution legislation is reserved for Chapter 4.

Lack of constitutional protection

One consequence of parliamentary sovereignty is that this country has no constitutional guarantees. We have nothing like the Constitution of the United States, which can be changed only by special procedures. In other countries there is normally a written constitution, embodied in a formal document, and protected, as a kind of fundamental law, against amendment by simple majorities in the legislature. In Britain, however, we have never made a fresh start with a new constitution, although in the seventeenth century the courts bowed to several revolutionary changes of sovereign. Not only do we have no constitutional guarantees: we cannot, according to classical doctrine, create them.[36] Since an

[30] Below, p. 379.

[31] See below, pp. 379, 874.

[32] As in *R. v. Electricity Commissioners ex p. London Electricity Joint Committee Co. (1920) Ltd.* [1924] 1 KB 171; *R. v. HM Treasury ex p. Smedley* [1985] QB 657.

[33] As in *Hoffmann–La Roche & Co. v. Secretary of State for Trade and Industry* [1975] AC 295 at 354, 365, 372; *Laker Airways Ltd. v. Dept. of Trade* [1977] QB 643; and see *R. v. Secretary of State for the Environment ex p. Nottinghamshire CC* [1986] AC 240, explained below, p. 377.

[34] s. 28.

[35] s. 30.

[36] In 1977 the House of Lords was advised by a Select Committee including Lord Wilberforce, Lord Diplock and Lord Scarman that this was impossible under the constitution: HL 176, May 1978. But even within the traditional rules entrenchment could be achieved, as it is in countries with written constitutions, by putting the judges under oath to uphold the constitution (or Bill of Rights) as supreme law: see Wade, *Constitutional Fundamentals*, 30–50.

ordinary Act of Parliament can repeal any law whatever, it is impossible for Parliament to render any statute unrepealable, or repealable only in some special way. If two Acts of Parliament conflict, the later Act must prevail and the earlier Act must be repealed by implication to the extent of the conflict—but subject to one important qualification which has been propounded in the Divisional Court in an influential judgment.[37] Parliament cannot bind its successors. Parliament cannot, therefore, modify or destroy its own continuing sovereignty, for the courts will always obey its latest commands. This situation could, indeed, be changed by a revolution of some kind, 'revolution' here meaning a legal discontinuity, a fundamental change which defies the existing rules of law but is accepted by the courts—as when James II was succeeded by William and Mary in 1688.

Just such a revolution has resulted from Britain's accession to the European Communities. The European Communities Act 1972 laid down that Community law should prevail over British law, including 'any enactment passed or to be passed'.[38] By those last four words Parliament attempted to bind its successors and to subordinate all future legislation to Community law. And the attempt has succeeded. When the Merchant Shipping Act 1988, by imposing restrictions on Spanish fishing vessels, proved to be contrary to Community law, the House of Lords found no difficulty in holding that the Act must give way. Lord Bridge explained that it had been obvious from the beginning that Community membership demanded just such a limitation of Parliament's sovereignty, that Parliament's acceptance of that limitation had been 'entirely voluntary' and that 'there is nothing in any way novel in according supremacy to rules of Community law'.[39] But for a court thus to 'disapply' an Act of Parliament, and to grant an injunction forbidding a minister from obeying it, was a revolutionary change.[40] The hallowed rule that Parliament cannot bind its successors had to yield to political necessity, and constitutional law had to adjust itself to realities just as it did in 1688. Since the

[37] By Laws LJ in *Thoburn* v. *Sunderland CC* (below) where he held that fundamental constitutional statutes (in this case the European Communities Act 1972) were repealable only by express words and not by mere implication.

[38] s. 2(4).

[39] *R.* v. *Secretary of State for Transport ex p. Factortame Ltd.* (No. 2) [1990] 1 AC 603. Only one speech (that of Lord Bridge) dealt with sovereignty. Labour legislation was similarly disapplied in *R.* v. *Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 AC 1, for which see below, p. 199.

[40] That the change was truly revolutionary is disputed by Sir John Laws in [1995] *PL* 72 at 89, on the ground that sovereignty is preserved by Parliament's undoubted ability to repeal the Act of 1972 and take Britain out of the EU; and by T. R. S. Allan in (1997) *LQR* 443, on the ground that the change was within the existing law of statutory interpretation, properly understood. The difficulty with the former objection is that Parliament has for the time being effectively bound its successors, thus restricting their power. That is certainly revolutionary for the time being; what might happen later is another matter. The difficulty with the latter objection is that the supposed law had not previously been evident. For a balanced and helpful discussion see (1991) 11 YBEL 22 (P. Craig), and for support of Allan's position see Murray Hunt, *Using Human Rights Law in English Courts*, 79.

House made no mention of the hallowed rule it must be doubtful whether it is still in existence;[41] whether the door has now been opened to entrenched clauses generally; or whether entrenchment is possible only in the case of international obligations or other overriding political causes.

There is now much dissatisfaction with undiluted parliamentary power, since the control of legislation has effectively passed into the hands of the executive. Parliament's independent control has been progressively weakened by the party system and it is called upon to pass many more Acts in each session than it can scrutinise properly. Dicey extolled judge-made law as a better protection for the liberty of the citizen than constitutional guarantees. But it is now better understood that a written constitution which is respected, as it is for example in the United States, provides valuable safeguards which in Britain have been lacking. Several distinguished judges have indeed suggested that constitutional fundamentals such as the rule of law, judicial independence and judicial review may be beyond the power of Parliament to abolish.[42] Effective safeguards for many basic rights were obtained when Britain became a founding member of the European Convention on Human Rights and Fundamental Freedoms of 1950 and when she acceded to the European Communities in 1973.[43] And now the substance of the European Convention has been incorporated into our law by the Human Rights Act 1998. Care has been taken, however, to respect the sovereignty of Parliament, so that the new human rights are given no special constitutional status and Parliament, is not legally restrained from amending or repealing them.[44] So there is as yet no occasion to test the possibility, opened up by the acceptance of EU law, that other international obligations, buttressed by treaties or conventions, might be entrenched under Parliament's new-found power to bind its successors.

Parliamentary sovereignty, as it now exists, profoundly affects the position of the judges. They are not the appointed guardians of constitutional rights, with power to declare statutes unconstitutional, like the Supreme Court of the United States. Subject only to the overriding law of the European Union, they can only obey the latest expression of the will of Parliament. Nor is their own jurisdiction sacrosanct. If they fly too high, Parliament may clip their wings. They entirely lack the impregnable constitutional status of their American counterparts. Nevertheless they have built up for themselves a position which is a good deal stronger than constitutional theory by itself might suggest. Feeling their way, case by case, they define their

[41] The rule is emphatically restated by Laws LJ in *Thoburn* v. *Sunderland City Council* [2003] 1 QB 151, though without comment on its conflict with the speech of Lord Bridge (above) which is also restated.

[42] For such suggestions made by Lord Woolf MR, Laws and Sedley LJJ and by Lord Cooke of Thorndon, and for the riposte of Lord Irvine QC (as he then was) ('judicial supremacism' prompted by 'extra-judicial romanticism') see [1996] *PL* 59 at 75 and below, p. 40.

[43] For the effect of these international obligations in administrative law see below, ch. 6.

[44] See below, p. 170.

powers for themselves. In doing so they draw upon strong traditions of long standing and upon their own prestige, and with these resources they can do much. Some of their bold decisions discussed in this book, particularly those of recent years, show that they need not be deterred by the weakness of their constitutional status. Even under the British system of undiluted sovereignty, the last word on any question of law rests with the courts. When in the *Anisminic* case the House of Lords interpreted an Act of Parliament to mean the exact opposite of what it appeared to say, Parliament, so far from retaliating, made important concessions to the legal point of view.[45] So long as the courts move in step with public opinion, their constitutional subservience need not prevent them from developing administrative law imaginatively.

Ministerial responsibility

One aspect of the supremacy of Parliament is that ministers are responsible to it, both individually and collectively, through the Cabinet. Parliament is the body before which ministers are called to account, and without the confidence of which they cannot continue. But here again the theory is far from the reality. The party system means in practice that, in anything but the last resort, the government controls Parliament. This is especially evident in the process of legislation. Bills are drafted by government departments and are often driven through Parliament by the party whips and with inadequate time for many of their clauses to be properly considered. Many matters of importance in administrative law, such as restrictions on legal remedies and the proliferation of statutory tribunals, are enacted without comment in either House and without attention to their legal consequences. Ministerial responsibility fails in practice to control legislation effectively, most statutes being enacted in almost exactly the form on which the government decided in advance.

The traditional methods of calling ministers to account for errors in administration are parliamentary questions, debates on the adjournment, and occasional debates such as those on Supply days in the House of Commons. But by these relatively cumbersome processes Parliament cannot possibly control the ordinary run of daily governmental acts except by taking up occasional cases which have political appeal. Administrative justice demands some regular, efficient and non-political machinery for investigating individual complaints against governmental action of all kinds, including the action of subordinate officials. Ministerial responsibility is an erratic and defective instrument for this purpose. Every so often a Member of Parliament achieves spectacular success with a constituent's grievance by a parliamentary question or a motion on the adjournment. But this is the

[45] *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147. For this case and its sequel and for judicial disobedience to 'ouster clauses' see below, p. 718.

safety-valve, not the control mechanism, of the administrative system. Parliament works in a highly charged atmosphere, in which the doctrine of ministerial responsibility may make it politically suicidal for a minister to admit a mistake. This is exactly what is not required.

The deficiencies of ministerial responsibility as a system of protection against administrative wrongdoing led an eminent judge to say bitterly, as long ago as 1910,[46]

> If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.

Dicey expressed similar views in 1915, criticising judicial reliance on 'so-called ministerial responsibility'.[47] And in 1981 Lord Diplock said:[48]

> It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.

In fact the courts often acknowledge the importance of ministerial responsibility to Parliament, without in any way regarding it as a substitute for judicial review.

A constitutional improvement was introduced in 1967 in the person of the Parliamentary Commissioner for Administration. His method of investigating complaints against administration has all the advantages which the parliamentary process lacks: it is impartial, non-political and it can penetrate behind the screen which ministerial responsibility otherwise interposes between Parliament and government departments. As related later, the Parliamentary Commissioner Bill was opposed on the ground that it was inconsistent with ministerial responsibility, but the truth was that it remedied some of its defects and made it work better.[49]

The high degree of detachment and anonymity in which the civil service works is largely a consequence of the principle of ministerial responsibility. Where civil servants carry out the minister's orders, or act in accordance with his policy, it is for him and not for them to take any blame. He also takes responsibility for ordinary administrative mistakes or miscarriages. But he has no duty to endorse unauthorised action of which he disapproves, though he has general responsibility

[46] *Dyson* v. *A.-G.* [1911] 1 KB 410 at 424 (Farwell LJ). The 'departmental aggression' was an unjustified demand for information by the Commissioners of Inland Revenue.

[47] (1915) 31 *LQR* 148 at 152.

[48] *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617.

[49] Below, p. 85.

for the conduct of his department and for the taking of any necessary disciplinary action.[50]

GOVERNMENT SUBJECT TO LAW

Ordinary law and prerogative remedies

It is now necessary to explain in general terms some of the elements of judicial control, the details of which occupy so much of this book. The rules which govern disputes involving the government and public authorities come before the ordinary courts, and the courts so far as possible apply 'ordinary law', treating public authorities as if they were private individuals with normal legal duties and liabilities, except so far as modified by statute. Thus a local authority or a public corporation is legally liable for the negligence of its employees in exactly the same way as any other employer. Ministers as such, though acting as ministers of the Crown, have none of the Crown's prerogatives or immunities in law, and are in principle in the same position as private individuals.[51] The great majority of proceedings by and against public authorities, therefore, can be adjudicated without making any distinction between private and official capacities.

Nevertheless there are many administrative wrongs that the ordinary law cannot reach. Public authorities may often act unlawfully without rendering themselves liable in trespass, nuisance, and so forth. If an application for a licence is wrongly refused, or if a licence is wrongly revoked, or if a claim to national insurance benefit is wrongly rejected, there will usually be no remedy in private law.[52] It is true that almost any kind of wrong can be brought before the court by an action for a declaration, in which the court can declare the claimant's rights. But this remedy has only recently come to the fore. Long before it did so, the courts had developed the nucleus of a system of public law out of the special 'prerogative' remedies of certiorari, prohibition and mandamus, together also with habeas corpus.[53] These remedies are still of the greatest importance for the purpose of compelling ministers, tribunals and other governmental bodies to act lawfully and to perform their duties. They cover the area where the remedies of private law are weak or ineffective. This in no way alters the fact that legality is enforced through the ordinary courts, applying principles of ordinary law.

These prerogative remedies are so called because they were originally used by the

[50] This paragraph is based on the Home Secretary's statement in Parliament in the debate on the *Crichel Down* case, below, p. 920: 530 HC Deb. col. 1286 (20 July 1954).

[51] Below, p. 46.

[52] Below, p. 785.

[53] Below, p. 592.

Crown and by the royal courts for the purpose of preventing inferior tribunals and other bodies from meddling in matters that did not concern them. They were designed to enforce order in the complex network of jurisdictions, both central and local, which was a feature of the legal system. Certiorari would issue from the Court of King's Bench to quash a decision, for example of justices of the peace, which was outside their jurisdiction or patently contrary to law. Prohibition would prevent them from proceeding in any matter outside their jurisdiction. Mandamus would command them to carry out their legal duties, if they were in default. Habeas corpus would release any person wrongfully detained. But it was private individuals who usually called the attention of the court to these wrongs, and in time the prerogative remedies ceased to be a royal monopoly and became available to any subject. Nevertheless the Crown remained the nominal plaintiff and the remedies retained their character of remedies devised for upholding public order rather than private right. This character, as will be seen later, makes them especially valuable for correcting administrative illegalities which do not directly injure any particular person, for example a failure by a cinema licensing authority to prevent the exhibition of indecent films.[54]

The High Court is the source of all these remedies. Formerly the prerogative remedies were sought through the Crown Court Office of that court but now they come under the Administrative Court, which itself is part of the High Court Queen's Bench Division, and is basically an administrative arrangement merely which does not infringe the principle that public law is enforced by the ordinary courts.

Review, legality and discretion

The system of judicial review is radically different from the system of appeals.[55] When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'[56]

Rights of appeal are always statutory.[57] Judicial review, on the other hand, is the exercise of the court's inherent power to determine whether action is lawful or not

[54] Below, p. 401.

[55] Sometimes the courts use 'review' in the opposite sense to make the same contrast, describing judicial review as 'supervision' and the appellate function as 'review'. See *R. v. Nat Bell Liquors* [1922] 2 AC 128 at 156; *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 at 195.

[56] The difference is shown by the rule that the existence of a right of appeal does not normally prejudice the right to review: below, p. 703.

[57] Below, p. 949.

and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law. This is nonetheless true because nearly all cases in administrative law arise under some Act of Parliament. Where the court quashes an order made by a minister under some Act, it typically uses its common law power to declare that the Act did not entitle the minister to do what he did,[58] and that he was in some way exceeding or abusing his powers.

Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not. If the Home Secretary revokes a television licence unlawfully, the court may simply declare that the revocation is null and void.[59] Should the case be one involving breach of duty rather than excess of power, the question will be whether the public authority should be ordered to make good a default. Refusal to issue a television licence to someone entitled to have one would be remedied by an order of the court requiring the issue of the licence. If administrative action is in excess of power (ultra vires), the court has only to quash it or declare it unlawful (these are in effect the same thing) and then no one need pay any attention to it. The minister or tribunal or other authority has in law done nothing, and must make a fresh decision.

Judicial control, therefore, primarily means review, and is based on a fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. But there are many situations in which the courts interpret Acts of Parliament as authorising only action which is reasonable or which has some particular purpose, so that its merits determine its legality. Sometimes the Act itself will expressly limit the power in this way, but even if it does not it is common for the court to infer that some limitation is intended. The judges have been deeply drawn into this area, so that their own opinion of the reasonableness or motives of some government action may be the factor which determines whether or not it is to be condemned on judicial review. The further the courts are drawn into passing judgment on the merits of the actions of public authorities, the more they are exposed to the charge that they are exceeding their constitutional function. But today this accusation deters them much less than formerly, particularly now that Parliament has in the Human Rights Act 1998 licensed more intrusive review by the courts.[60]

Unless the courts are prepared to act boldly in this direction, they can give but feeble protection against administrative wrongdoing. The whole problem is

[58] A number of Acts substitute a statutory power for the common law power (below, p. 727); but this does not alter the principle.

[59] See below, p. 302.

[60] See below, p. 209.

centred on the question of discretionary power, which lies at the heart of administrative law. When Parliament grants power to public authorities, it inevitably also gives them discretion. Each authority has to decide for itself whether to act or not to act, and how it wishes to act. If this discretion is not conferred, the authority has not a power but a duty. Judicial review is therefore not confined to cases of plain excess of power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure. In law the consequences are exactly the same: an improper motive, or a false step in procedure, makes an administrative act just as illegal as does a flagrant excess of authority. If merely because an Act says that a minister may 'make such order as he thinks fit', or may do something 'if he is satisfied' as to some fact, the court were to allow him to act as he liked, a wide door would be opened to abuse of power and the rule of law would cease to operate.

It is a cardinal axiom, accordingly, that every power has legal limits. If the court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward his case, the act may be condemned as unlawful. Although lawyers appearing for government departments have often argued that some Act confers unfettered discretion on a minister, they are guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns. The same truth can be expressed by saying that all power is capable of abuse, and that the power to prevent abuse is the acid test of effective judicial review.

THE DOCTRINE OF ULTRA VIRES

The central principle

The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law.[61] 'The juristic basis of judicial review is the doctrine of ultra vires.'[62] To a large extent the courts have developed the subject by extending and refining this principle, which has many ramifications and which in some of its aspects attains a high degree of artificiality.

Where the empowering Act lays down limits expressly, their application is merely an exercise in construing the statutory language and applying it to the facts. Thus if

[61] Approved in terms in *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 171 (Lord Steyn). Cf. (2002) 7 EHRLR 723 at 725 (Lord Steyn), but without consideration of the constitutional questions.

[62] As above at 164 (Lord Browne-Wilkinson), affirming his view in *R.* v. *Hull University Visitor ex p. Page* [1993] AC 682 at 701.

land may be taken by compulsory purchase provided that it is not part of a park, the court must determine in case of dispute whether the land is part of a park and decide accordingly.[63] If the Act says 'provided that in the opinion of the minister it is not a park', the question is not so simple. Reading the language literally, the court would be confined to ascertaining that the minister in fact held the opinion required. But then the minister might make an order for the acquisition of land in Hyde Park, certifying his opinion that it was not part of a park. It is essential to invalidate any malpractice of this kind, and therefore the court will hold the order to be ultra vires if the minister acted in bad faith or unreasonably or on no proper evidence.[64] Results such as these are attained by the art of statutory construction. It is presumed that Parliament did not intend to authorise abuses, and that certain safeguards against abuse must be implied in the Act. These are matters of general principle, embodied in the rules of law which govern the interpretation of statutes. Parliament is not expected to incorporate them expressly in every Act that is passed. They may be taken for granted as part of the implied conditions to which every Act is subject and which the courts extract by reading between the lines. Any violation of them, therefore, renders the offending action ultra vires.

As with substance, so with procedure. One of the law's notable achievements has been the development of the principles of natural justice, one of which is the right to be given a fair hearing before being penalised in any way. These principles are similarly based upon implied statutory conditions: it is assumed that Parliament, when conferring power, intends that power to be used fairly and with due consideration of rights and interests adversely affected. In effect, Parliament legislates against a background of judge-made rules of interpretation. The judges have constructed a kind of code of good administrative practice, taking Parliament's authority for granted. Even where sophisticated reasoning makes them appear to be frustrating Parliament's intentions they still claim, paradoxically, to be respecting them.[65]

An act which is for any reason in excess of power (ultra vires) is often described as being 'outside jurisdiction'. 'Jurisdiction', in this context, means simply 'power', though sometimes it bears the slightly narrower sense of 'power to decide', e.g. as applied to statutory tribunals. It is a word to which the courts have given different meanings in different contexts, and with which they have created a certain amount of confusion. But this cannot be explained intelligibly except in the particular contexts where difficulties have been made. Nor should the difficulties be exaggerated. For general purposes 'jurisdiction' may be translated as 'power' with no risk of inaccuracy.

Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. If it is not within the powers given by the

[63] For this case see below, p. 255.

[64] See below, pp. 417, 351, 272.

[65] The *Anisminic* case (below, p. 718) is an outstanding example.

Act, it has no legal leg to stand on. The situation is then as if nothing had happened, and the unlawful act or decision may be replaced by a lawful one. If a compulsory purchase order is quashed as being ultra vires, there is nothing to prevent another order being made in respect of the same land, provided that it is done lawfully. Thus a public authority or tribunal is often given *locus poenitentiae* and is able to correct an error by starting afresh—something which it might otherwise be unable to do.

Necessary artificialities

The technique by which the courts have extended the judicial control of powers is that of stretching the doctrine of ultra vires. As already observed, they can make the doctrine mean almost anything they wish by finding implied limitations in Acts of Parliament, as they do when they hold that the exercise of a statutory power to revoke a licence is void unless done in accordance with the principles of natural justice. For this purpose they have only one weapon, the doctrine of ultra vires.[66] This is because they have no constitutional right to interfere with action which is within the powers granted (intra vires): if it is within jurisdiction, and therefore authorised by Parliament, the court has no right to treat it as unlawful.

It is for constitutional reasons of this kind that the doctrine of ultra vires has become so artificial in some of its applications. Having no written constitution on which he can fall back, the judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power. The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of ultra vires.

Into this bed of Procrustes, accordingly, must be fitted not only the more obvious cases of inconsistency with statute, such as failure to follow expressly prescribed procedure, irregular delegation, and breach of jurisdictional conditions: but also the more sophisticated types of malpractice, such as unreasonableness, irrelevant considerations, improper motives, breach of natural justice and, more recently, mere error of law. If an Act empowers a minister to act as he thinks fit in some matter, the court will read into the Act conditions requiring him to act within the bounds of reasonableness, to take account of relevant but not of irrelevant considerations, to conform to the implicit policy of the Act, and to give a fair hearing to anyone prejudicially affected. These are examples of the many grounds on which the court will invalidate improper action. Somehow they must be forced

[66] Formerly there was an exception in the case of error on the face of the record, explained below.

into the mould of the ultra vires doctrine, for unless that can be done the court will be powerless.

'Jurisdiction'

It is at this point that artificiality becomes a problem. From time to time the judicial mind rebels against the misuse of language which is seemingly involved in saying that, for example, a minister who acts on wrong considerations or without giving someone a fair hearing is acting outside his jurisdiction. It is tempting to call this, in words which will be quoted later,[67] 'a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not'. Sometimes, therefore, judges have said that errors such as improper motives or breach of natural justice do not involve excess of jurisdiction.[68] But then they forgot that, if this were correct, they would have no title to condemn them. Every administrative act is either intra vires or ultra vires; and the court can condemn it only if it is ultra vires. Even now there are sometimes signs of judicial unfamiliarity with the 'basic English' of administrative law. Relatively seldom do the courts feel it necessary to expound the analysis of ultra vires in its more subtle applications. But the House of Lords has done so in several important modern decisions, which put the matter beyond doubt. In *Ridge* v. *Baldwin*,[69] a leading case on natural justice, the House held that the dismissal of a chief constable, being vitiated by failure to give him a fair hearing, was void, and from that it follows inexorably that it was outside jurisdiction, i.e. ultra vires.[70] In the *Anisminic* case,[71] one of the high-water marks of judicial control, the House similarly held that a tribunal's decision was a nullity if it misunderstood the law and so took account of wrong factors. The connection between these various elements was clearly expressed in the same case by Lord Pearce:[72]

[67] Below, p. 262.

[68] As in *R.* v. *Secretary of State for the Environment ex p. Ostler* [1977] QB 122 (below, p. 718); but in *The Discipline of Law*, 108, Lord Denning MR recanted these 'unguarded statements'. Another example is *R.* v. *Home Secretary ex p. Cheblak* [1991] 1 WLR 890 at 894 (decision flawed by procedural error etc. said to be 'within the powers of the person taking it').

[69] [1964] AC 40; below, p. 489. A statement by the Privy Council that this was not the decision of the majority is erroneous: below, p. 495.

[70] Expressly confirmed by the Privy Council (Lord Diplock) in *A.-G.* v. *Ryan* [1980] AC 718 at 730.

[71] *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147; below, p. 718; see similarly *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 278.

[72] At 195. Lord Reid at 171 in substance says the same thing, but he gives an unusually narrow meaning to 'jurisdiction', thus holding that a decision can be a nullity without being in excess of jurisdiction. In the normal sense of these words, this is a contradiction in terms: see below, p. 262.

Lack of jurisdiction may arise in many ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.

In 1992, and again in 1998, the House of Lords strongly confirmed this analysis, holding that any error of law rendered a tribunal's decision ultra vires.[73] History testifies, in fact, that the courts have long been using it consistently,[74] for example when awarding damages for trespass when a public authority demolished a building under an order which was void for violation of natural justice.[75] If the order is void, it cannot be within jurisdiction; for if it is within jurisdiction, it must be valid.

Sceptical comments on this long-established doctrine have been made by critics who justly observe that the restraints implied into Acts of Parliament have in reality been created by the judges on their own initiative and owe little or nothing to any perceptible Parliamentary intention. Eminent judges, writing extrajudicially, have described the doctrine as a 'fairy-tale'[76] and a 'fig-leaf'[77] serving to provide a facade of constitutional decency, with lip-service to the sovereign Parliament, while being out of touch with reality. The reality, it is argued, is that the judges are fulfilling the duties of their constitutional position, acting in their own right independently of Parliament, adjusting the balance of forces in the constitution, and asserting their title to promote fairness and justice in government under the rule of law.[78] Pragmatically this is plainly a persuasive view. It accords also with a judicial suggestion that the courts would be entitled to reject legislation

[73] *R.* v. *Hull University Visitor ex p. Page* [1993] AC 682; *Boddington* v. *British Transport Police* [1999] 2 AC 143.

[74] See e.g. *Short* v. *Poole Cpn.* [1926] Ch. 66, a much cited case, where Warrington LJ observes (at 90) that no public body can have statutory authority to act in bad faith or on irrelevant grounds, and any such act is unauthorised and ultra vires. Similarly in *R.* v. *North ex p. Oakey* [1927] 1 KB 491 at 503, 505 Scrutton and Atkin LJJ held that a breach of natural justice is an excess of jurisdiction. The reports are full of similar statements.

[75] *Cooper* v. *Wandsworth Board of Works* (1863) 14 CBNS 180; below, p. 480.

[76] See [1995] *PL* 65 (Lord Woolf MR). For Lord Irvine's support of the classical doctrine see [1999] *EHRLR* 350 at 368.

[77] See Sir John Laws in Supperstone and Goudie (eds), *Judicial Review*, 1st edn., at 67, 2nd edn., 4.15; [1995] *PL* at 79. For a reply to these criticisms and comment on the technical problems of abandoning the traditional doctrine see (1996) 55 *CLJ* 122 (Forsyth). For Sir John Laws's response see *Judicial Review* (as above), 2nd edn., 4.13. For further valuable discussion see [1999] *CLJ* 129 (M. Elliott); Forsyth (ed.), *Judicial Review and the Constitution* (2000) with contributions by Elliott (269, 341), Forsyth (393), Craig (373) and Jowell (327); and Elliott, *The Constitutional Foundations of Judicial Review* (2001). See also [1999] *PL* 428 and 448; (2002) 61 *CLJ* 87 (Allan); [2003] *PL* 286 (Forsyth and Elliott).

[78] For a balanced discussion see (1998) 57 *CLJ* 63 (Craig).

undermining the rule of law, if for example Parliament were to attempt to abolish judicial review.[79] Yet in their decisions the judges are firm upholders of the classical doctrine of ultra vires, based upon assumed Parliamentary approval, since they regard this as the sheet-anchor of their constitutional authority.[80] While they remain of that mind, rival doctrines, however plausible, must remain in the realm of theory. The powers of the judges, moreover, have been greatly increased by the development of administrative law, and are now increased again by the Human Rights Act 1998. If they are seen to be staking claims to constitutional autonomy (criticised by Lord Irvine as 'judicial supremacism' prompted by 'extrajudicial romanticism'[81]) they may be all the more exposed to attack as being unelected, unaccountable, devoid of democratic legitimacy, and no longer 'the weakest and least dangerous department of government'.[82]

There is, nevertheless, 'an inescapable tension between, on one hand, the traditional doctrine of ultra vires and its foundation in legislative supremacy and, on the other, the contemporary recognition of a range of common law rights conceived as basic components of a liberal, democratic legal order'.[83]

An historical exception: error on the face of the record

Before the doctrine of ultra vires had been stretched to cover all the categories of abuse of power that must now be brought within it, the Court of King's Bench had established its power to quash the decisions of inferior tribunals and administrative agencies for error on the face of the record. The rise, decline, revival, and now the eclipse of this jurisdiction form a separate strand in the history of the subject, and this story will be told later. All that need be noted here is that it was exceptional because it was not a branch of the doctrine of ultra vires.

Legislative, administrative, judicial and quasi-judicial functions

Administrative law needs consistent working definitions of the three primary constitutional functions, legislative, administrative and judicial; and also of the hybrid 'quasi-judicial' function which has a part of its own to play. But the reader must be warned that the courts themselves are addicted to distinctions which are more superficial and more confusing than those discussed here, and which by no means

[79] See [1995] *PL* at 68 (Lord Woolf MR). Lord Woolf has approved Sedley J's reference to 'a mutuality of respect between two constitutional sovereignties': [1998] 1 WLR at 670.

[80] See above, p. 29.

[81] In a lecture published in [1996] *PL* 59 (see at 77).

[82] The words of Alexander Hamilton (The Federalist, No. 78) and the title of Lord Steyn's article in [1997] *PL* 84.

[83] T. R. S. Allan in Forsyth and Hare (eds.), *The Golden Metwand*, 15 at 35.

always help to clarity. Nor is it very profitable to take concepts out of their particular contexts and analyse them in the abstract. A few pointers only will therefore be given here.

The one distinction which would seem to be workable is that between judicial and administrative functions. A judicial decision is made according to rules. An administrative decision is made according to administrative policy. A judge attempts to find what is the correct solution according to legal rules and principles. An administrator attempts to find what is the most expedient and desirable solution in the public interest. It is true, of course, that many decisions of the courts can be said to be made on grounds of legal policy and that the courts sometimes have to choose between alternative solutions with little else than the public interest to guide them. There will always be grey areas. Nevertheless the mental exercises of judge and administrator are fundamentally different. The judge's approach is objective, guided by his idea of the law. The administrator's approach is empirical, guided by expediency. Under this analysis, based on the nature of the functions, many so-called administrative tribunals, such as social security and employment tribunals, have judicial rather than administrative functions, since their sole task is to find facts and apply law objectively. Yet in the case of a local valuation court, whose task is similar, the House of Lords has held exactly the opposite.[84]

A quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial. A typical example is a minister deciding whether or not to confirm a compulsory purchase order or to allow a planning appeal after a public inquiry. The decision itself is administrative, dictated by policy and expediency. But the procedure is subject to the principles of natural justice, which require the minister to act fairly towards the objectors and not (for example) to take fresh evidence without disclosing it to them.[85] A quasi-judicial decision is therefore an administrative decision which is subject to some measure of judicial procedure. Since nowadays the great majority of administrative decisions which affect the rights or legal position of individuals are subject to the principles of natural justice in any case, the term quasi-judicial is now little used. It will however recur in Chapter 15, with comment on erratic judicial opinions.

[84] *A.-G. v. British Broadcasting Corporation* [1981] AC 303, for which see below, p. 933. The House discussed numerous 'non-tests' (as Lord Edmund-Davies aptly called them) for determining what is a 'court' for purposes of contempt of court, and the majority held that the function of a local valuation court is administrative and not judicial. See also *General Medical Council* v. *BBC*, The Times, 11 June 1998 (GMC disciplinary committee not 'court'); contrast *Peach Grey & Co.* v. *Sommers* [1995] 2 All ER 513 (industrial tribunal held to be 'court'). Tests used for interpreting the constitutions of other countries, as in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* [1931] AC 275 and *Ranaweera* v. *Ramachandran* [1970] AC 962, have quite different purposes and are of little help for the basic analysis needed in administrative law.

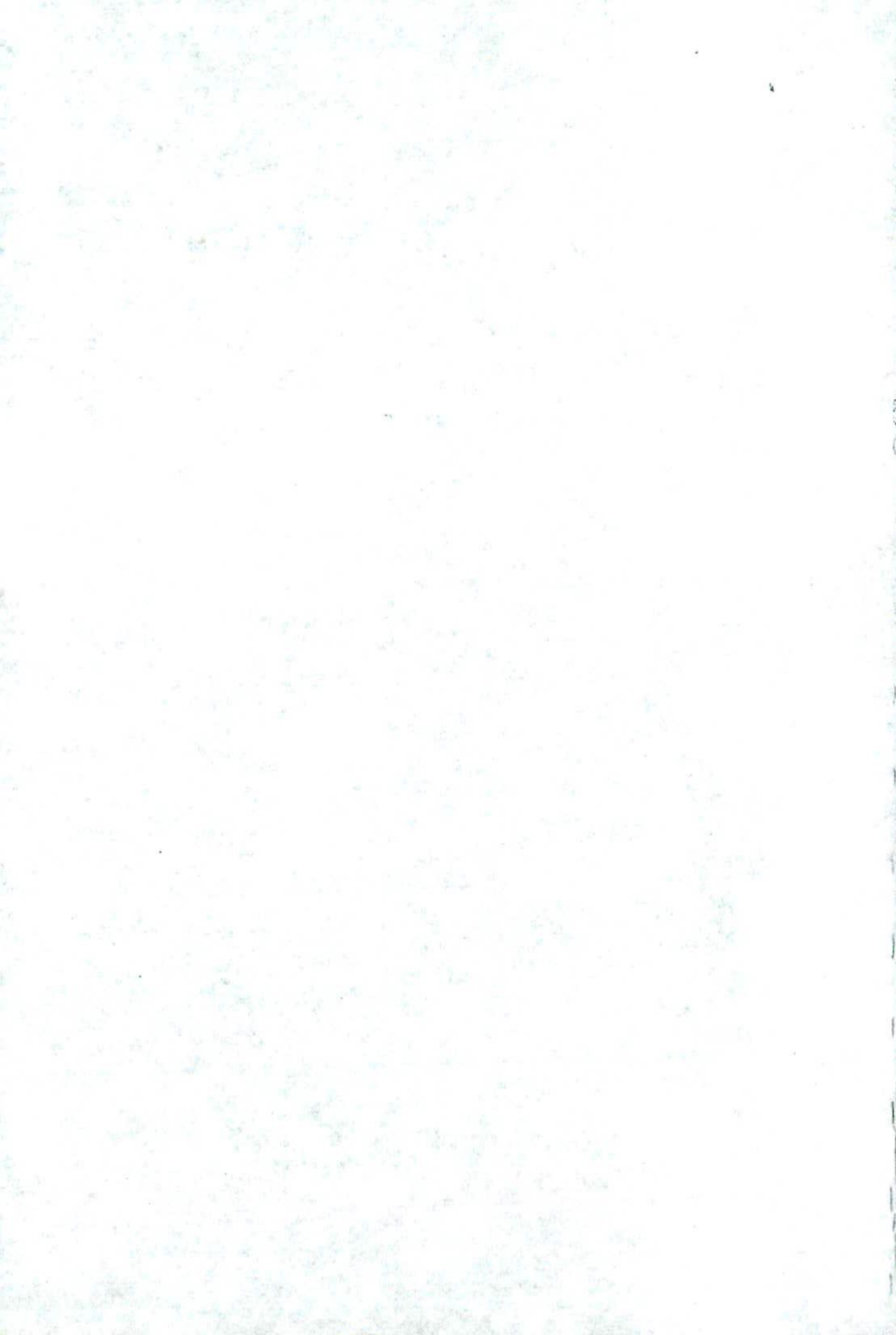
[85] As explained by Lord Hoffmann in *R. (Alconbury Developments Ltd.)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1402.

In 1932 the Committee on Ministers' Powers formulated contrasting definitions of judicial and quasi-judicial decisions.[86] The important difference was that a judicial decision 'disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found', whereas in an administrative decision this is replaced by 'administrative action, the character of which is determined by the minister's free choice'.

To distinguish cleanly between legislative and administrative functions, on the other hand, is, as the Committee said, 'difficult in theory and impossible in practice'. They are easy enough to distinguish at the extremities of the spectrum: an Act of Parliament is legislative and a deportation order is administrative. But in between is a wide area where either label could be used according to taste, for example where ministers make orders or regulations affecting large numbers of people. This is further explained at the outset of Chapter 22.

[86] Cmd. 4060 (1932), 73.

PART II
AUTHORITIES AND FUNCTIONS



3

THE CENTRAL GOVERNMENT

This chapter aims to supply miscellaneous information about public authorities of various kinds and their legal status. An exhaustive account of the structure and functions of government belongs to constitutional rather that to administrative law. But some of the more prominent features of the system are here sketched, so as to illustrate the machinery by which executive power is conferred and exercised, and so as to fill in the administrative background to situations which will be analysed in later chapters. Taking first the central government, we may start at the apex of the pyramid with the Crown and ministers. The legal nature of the Crown itself is explained in a later chapter.[1]

THE CROWN AND MINISTERS

Allocation of powers

'The Crown' means the Queen, whether in her official or her personal capacity. The Crown's legal powers, whether prerogative or statutory, must be exercised by the sovereign personally as a matter of law, e.g. by Order in Council or letters patent or royal warrant. In practice these powers are controlled by ministers, since convention requires that the Crown should act as its ministers advise. The one case where the Crown may have to act of its own volition is in the appointment of a Prime Minister, the initial act of impetus which sets the machinery of cabinet government in motion; but even that is normally governed by convention.

The Crown itself, however, has relatively few important legal powers, except in the capacity of employer.[2] In almost all other areas administrative powers are statutory, and it has long been the practice for Parliament to confer them upon the proper minister in his own name.[3] The Act will say 'The minister may make regulations' or 'the minister may appoint' or 'the minister may approve'. The minister will of course be acting as a minister of the Crown and on behalf of the

[1] See below, p. 814. See generally Sunkin and Payne (eds.), *The Nature of the Crown*.

[2] See below, p. 61.

[3] Maitland, *Constitutional History*, 417, traced this practice from about the time of the Reform Bill of 1832.

Crown. But his powers and duties under the Act will in law be his alone. This is of great legal and constitutional importance, since the minister as such has none of the Crown's prerogatives and immunities.[4] His unlawful actions may be invalidated, or he may be compelled to perform his duties, by remedies which do not lie against the Crown; and judgments may be enforced against him or his department in ways which are impossible in the case of the Crown itself. If on the other hand the Act had conferred the powers upon the Crown, as by saying 'Her Majesty may (etc.)', the Crown's immunity would prevent control by the courts, at least in theory.[5] The settled practice of conferring powers upon designated ministers therefore greatly assists the operation of legal remedies. The minister is treated in law as an ordinary person, with no special privileges. He is liable to compulsory remedies, such as injunctions, and he may be made liable for contempt of court. This is the essence of the rule of law.

Fundamental as these principles are, they have not escaped being called into question, either inadvertently[6] or intentionally, by judges with heretical constitutional ideas. A case of 1993,[7] in which the Home Secretary was found guilty of contempt of court, assumed exceptional importance when the judge of first instance and a dissenting judge in the Court of Appeal held that the courts had no coercive power over ministers and other Crown officers, but that their relationship could only be one of trust. The Court of Appeal by a majority and the House of Lords unanimously rejected these propositions, and Lord Templeman said:

> For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and their personal capacity, the courts are armed with coercive powers exercisable in proceedings for contempt of court . . . the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.

[4] See below, p. 819.

[5] In practice the courts may be able to grant remedies against the responsible minister, as explained below, p. 572.

[6] Statements in *Town Investments Ltd.* v. *Department of the Environment* [1978] AC 359 to the effect that ministerial executive acts are acts done by 'the Crown' (Lord Diplock) and that a minister is incorporated with the Crown and 'an aspect or member of the Crown' (Lord Simon) are, as legal propositions, radically misconceived and ignore constitutional principles, as explained below, p. 814. The case decided by a majority, reversing a unanimous Court of Appeal, that a lease granted to a minister made the Crown the tenant. If it is to stand at all, it should be confined to property transactions: see *M.* v. *Home Office* [1994] AC 377, distinguishing correctly between the Crown and its officers. *Town Investments* was quoted but not applied in *Linden* v. *Department of Health and Social Security* [1986] 1 WLR 164, holding that a lease to the Secretary of State made him and not the Crown the tenant, in *Pearce* v. *Secretary of State for Defence* [1988] 2 WLR 144, affirmed [1988] AC 755 and in *British Medical Association* v. *Greater Glasgow Health Board* [1989] AC 1211.

[7] *M.* v. *Home Office* [1994] AC 377, discussed below, p. 835 where an inconsistency as to the ultimate power of enforcement is noted.

Lord Woolf then supplied the detailed analysis for confirming the traditional powers of the courts.

Powers are frequently conferred upon 'the Secretary of State' without naming his department, and they are then exercisable by any Secretary of State,[8] though only the appropriate one will normally act. The one minister upon whom they have not in the past been conferred is the Prime Minister. There is no legal reason why they should not be, and the curious convention of treating the Prime Minister as unmentionable was merely an anomalous practice. Thus the most powerful of all ministers had in law less power than his colleagues. But in recent statutes, particularly those concerned with public security, the Prime Minister is given both powers and duties.[9]

The titles and functions of ministers and their departments are constantly being changed under schemes of reorganisation, normally effected under the Ministers of the Crown Act 1975.[10] Orders in Council may be made under this Act both for the transfer of functions from one department to another and for the dissolution of departments no longer required. If it merely transfers functions the order need only be laid before Parliament and is then subject to annulment if either House so resolves; but if it dissolves an existing department, the order may not be made until each House has presented an address to the Crown in its favour.[11]

These orders often confer corporate personality on a newly created department, so that it can hold property, make contracts, etc., in its own name and not merely as agent for the Crown. The usual, but not invariable, form is to make the minister a corporation sole, so that he and his successors have continuous corporate personality. This was done, for example, when the Department of the Environment, Food and Rural Affairs and the Department of Transport, Local Government and the Regions were created.[12]

Executive agencies

An important and far-reaching change in the organisation of government was made with the creation of numerous executive agencies (colloquially known as 'Next Steps' agencies). These agencies were established following a civil service

[8] Interpretation Act 1978, 1st sched.

[9] E.g. Parliamentary Commissioner Act 1967, s. 8; Regulation of Investigatory Powers Act 2000, s. 57.

[10] The Secretary of State for the Environment was shown as possessing powers under 65 different heads: *Index to the Statutes, 1235–1990*, p. 777. He is, of course, assisted by several non-cabinet ministers, though none of them is invested with legal powers.

[11] s. 5.

[12] SI 2001 No. 2568. No corporate personality was conferred on the Minister for the Civil Service when he took over the civil service functions of the Treasury (SI 1978 No. 1656), nor upon the Secretary of State for Foreign and Commonwealth Affairs when the Foreign and Commonwealth offices were amalgamated (SI 1968 No. 1657).

report to the Prime Minister, entitled 'Improving Management in Government: the Next Steps',[13] and are designed to deliver improved public services to both the citizen and other government departments. They have no role to play in the development of policy. Executive agencies are established on a semi-autonomous basis with a professional manager, usually recruited from outside the civil service, as chief executive. Executive agencies do not, however, have a separate legal existence from their parent departments, and their personnel remain in law servants of the Crown.

These agencies are designed to deliver public services more efficiently by concentrating on value for money and running their 'businesses' on profit and loss lines.[14] They operate under framework documents—essentially agreements between the chief executive and the responsible minister—which specify how the performance of the agency is to be measured.[15] Under the Government Trading Act 1990 executive agencies are sometimes financed on a trading fund basis and are not subject to the normal parliamentary supply procedures. The Royal Mint, the Vehicle Inspectorate, the Civil Service College, Companies House, the government property lawyers, the National Weights and Measures Laboratory, the Employment Service, the Benefits Agency, and the Prisons Service *inter alia* have been established as executive agencies. There are (in 2004) 127 executive agencies, employing 277,000 people and spending more than £18 billion each year.[16]

This reform, which was adumbrated by the Fulton Report,[17] has generally been welcomed.[18] It rests on an undeniable distinction between the managerial functions of government in the provision of services of all kinds, and the development and implementation of policy by government departments. However, doubts have been expressed over the weakening of parliamentary scrutiny and the normal rules of accountability over the public service functions of government.[19] The dismissal in October 1995 of the chief executive of the Prisons Service (Derek Lewis) by the then Home Secretary (Michael Howard) following several high profile escapes from custody illustrated this vividly. The Home Secretary did not accept responsibility to Parliament for 'operational matters' (such as, he said, the escapes); he was

[13] HMSO, 1988. The detailed government attitude to the agencies is set out in 'The Financing and Accountability of Next Steps Agencies' (1989, Cm. 914). An extensive literature exists on executive agencies.

[14] Oliver (as above), 65. The Civil Service (Management Functions) Act 1992 allows management functions, including pay and conditions of service, to be delegated to the chief executive; and this is usually done.

[15] But, since agencies have no corporate identity, these agreements cannot be legally enforced; the autonomy of the agency subsists only in public law. See Freedland, [1994] *PL* 86, 89 and Harden, *The Contracting State* (1992), 46.

[16] See the Civil Service Yearbook: www.civil-service.co.uk.

[17] *Report of the Committee on the Civil Service*, Cmd. 3638 (1968), para. 190. See G. Drewry [1988] *PL* 505, 506.

[18] Oliver (as above), 66, pointing out that the report is cross-party.

[19] Drewry (as above), 512–13; Drewry [1990] *PL* 322 at 325–8; and P. Giddings (ed.), *Parliamentary Accountability: A Study of Parliament and Executive Agencies* (Macmillan 1995).

only responsible for 'policy' and no failure of policy was shown.[20] The upshot was that there was no effective accountability to Parliament for the failings of the Prisons Service.[21]

After a review by the Cabinet Office, the government has accepted that while the establishment of executive agencies has generally brought benefits to 'customers', there is now a need to reconnect agencies with the strategic direction of their departments.[22] This is to enable the government's goal of improving public services to be met. Whether reducing the agencies' autonomy in this way will improve service delivery remains to be seen, but it will strengthen agencies' accountability through their ministers.

The contractualisation of government

Another important change in administrative style is the widespread privatisation of activities previously undertaken by the state and the introduction of some form of competition wherever possible.[23] These developments rest on the perception that the state delivers many services and performs many functions inefficiently. The private sector, driven by competition, can often perform these functions and deliver these services more effectively. The public is given the choice and will choose the best service. The state's role in these areas is thus limited to deciding how the discipline of the market is to be brought to bear and to providing the private sector with the opportunity to provide those services and functions. 'The state steers, it does not row' is the celebrated metaphor that captures this change.[24]

Private law concepts, primarily contract, have inevitably been prominent in this development.[25] Typically the government chooses a private contractor to deliver

[20] This justification depends on the chief executive enjoying operational autonomy in fact. But the dismissed chief executive showed significant interference by the minister in operational matters; and secured a substantial settlement for the premature termination of his appointment: The Times, 17 October 1995; Bradley and Ewing, *Constitutional and Administrative Law* (13th edn., 2002), 325.

[21] HC Deb, 16 October 1995, col. 31; HC Deb, 19 October 1995, col. 519. See the discussion in Bradley and Ewing (as above), 316. The government has rejected the proposal of the Treasury and Civil Service Select Committee that agency chief executives should be directly accountable to select committees. Cm. 2748 (1995) (emphatically reaffirmed after the 1997 change of government: Cm. 4000 (1998)).

[22] See *Better Government Services: Executive Agencies in the 21st Century* (Cabinet Office, 22 Jul 2002) and *Improving Service Delivery: the Role of Executive Agencies* (National Audit Office, 28 Mar 2003).

[23] For accounts see Harden, *The Contracting State* (1992), Freedland, [1994] *PL* 86 and Sunkin and Payne (eds.), *The Nature of the Crown*, ch. 5 (M. Freedland). This is part of a wider development termed 'New Public Management'. See Harlow and Rawlings, *Law and Administration*, 2nd edn. (1997), 128, 150 and Osborne and Gaebler, *Reinventing Government* (1992).

[24] Osborne and Gaebler cited in Harlow and Rawlings (as above), 131.

[25] For 'government by contract' see further below, p. 793.

the service and enters into a contract with that person. Considerable changes in administrative law are implied by such changes. Services that were previously delivered by a government department or other public body (subject to judicial review) are now delivered by a private body under a contract to which the ordinary recipient of the service is usually not a party.

The forms by which these changes are achieved vary greatly. The privatisation of previously public utilities (telecommunications, electricity supply, gas supply etc.) is one form. And since these utilities are often powerful players in the relevant market their regulation is vital.[26] The private finance initiative is another. Here private bodies contract with public bodies to build, maintain and manage facilities (such as schools or hospitals) to be used by the public body in return for a fixed payment out of its current income. The benefits of such arrangements are the efficiency of the private sector being brought to the management of the facility as well as large capital sums being raised by the private body, but dedicated to a public use, without impacting upon the public finances. On the other hand, paying regularly out of current income over a long period may turn out to be more expensive than outright purchase.

Another form, adumbrated above, is direct 'contracting out' where a government body simply contracts with a private party for the provision of some benefit. This is not novel in the sense that every time a government department buys a paper clip, uses the services of a consultant or makes use of a private transport service it 'contracts out'. And it has been doing such things for centuries. But Part II of the Deregulation and Contracting Out Act 1994 sets up a mechanism whereby certain functions of ministers and officials may be delegated to private contractors. Although a veneer of accountability is maintained by deeming that the acts of the contractor 'shall be treated for all purposes as done . . . [by the minister or official]' these provisions have attracted much criticism.[27] Other forms include the establishment of NHS Trusts as suppliers of services to health authorities.

The impact of these developments on administrative law is a matter of some debate.[28] Most applications for judicial review arise from governmental activities—such as the administration of immigration controls, and maintenance of prisons—largely untouched by the changes described above. Indeed, judicial control of regulators may offer new vistas for judicial review.[29] There will doubtless be fresh challenges to administrative law but classic principles, flexibility and judicial ingenuity will ensure that the shift of some previously public power into private hands will not leave the citizen unprotected.[30]

[26] See below, p. 147.

[27] Freedland, [1995] *PL* 21.

[28] See generally, Taggart (ed.), *The Province of Administrative Law* (1997), and in particular the contributions by Taggart, Hunt, and Aronson.

[29] See below, p. 156.

[30] See Oliver in Taggart (as above), 217, finding common values in private and public law. They will prove important in this task.

THE CIVIL SERVICE

General aspects

The civil service comprises all the permanent and non-political offices and employments held under the Crown, with the exception of the armed forces. All these officers and employees form the permanent administrative staff of the central government. The legal test of a civil servant is that he should be in the non-military service of the Crown, i.e. there must be a legal relationship of master and servant. This test excludes the great majority of public corporations. The legal nature of Crown service is investigated in a later section. Meanwhile some broader features may be indicated here.[31]

The grand total of civil servants, if all clerical and industrial employees are included, is about 516, 220.[32] But the number of those who occupy positions of any constitutional importance and who have authority to take decisions is very much smaller, probably less than 10,000. Perhaps half this number are the true governors of the great administrative machine, formerly known as the administrative class, below whom there used formerly to be the executive class. This system of classes was criticised as over-rigid by the Fulton Committee in 1968[33] and was thereupon abolished by the government, since when it has not been so easy to estimate the precise size of the more important classes within the civil service. In addition there are great numbers in the clerical and industrial grades employed in work which is similar to other civilian work outside the service of the Crown. Employees of the Post Office are not civil servants.[34]

Although administrative law is constantly concerned with the acts of government departments, decided upon in the majority of cases by civil servants rather than by ministers personally, the departments do not have many legal powers conferred upon them in their own names. The powers of the central government are normally conferred upon ministers themselves, as already explained, and are exercised by their departments in the ministers' names. Powers are, however, conferred directly upon civil servants who have adjudicatory functions such as social

[31] For general information and history see the Fulton Report (below); Holdsworth, *History of English Law*, xiv. 106–40; Parris, *Constitutional Bureaucracy*. The word 'bureaucracy' came into use in the 1830s. In 1838 Lord Palmerston had to explain it to the young Queen Victoria: Carr, *Concerning English Administrative Law*, 1. See further, Hennessy, *Whitehall*.

[32] 2002 figures including those in executive agencies. See Civil Service Statistics 2002—www.civil-service.gov.uk/statistics. There has been significant growth since the 1997 change of government.

[33] Report of the Committee on the Civil Service, Cmnd. 3638 (1968), para. 215. The Report will be referred to as the Fulton Report. For the government's decision to abolish the former classes see 767 HC Deb. col. 456 (26 June 1968).

[34] See below, p. 144.

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security officers and inspectors of taxes and the Commissioners of Customs and Excise. Part II of the Deregulation and Contracting Out Act 1994, however, permits many functions of ministers or office holders to be exercised by other persons—even non-civil servants such as private contractors.[35]

Machinery of control

Apart from the period 1968–81 the general control of the civil service has been the responsibility of the Treasury.

Treasury control was brought, temporarily, to an end in 1968, in implementation of the Fulton Report. General control of the service was transferred to a new Civil Service Department, headed by a minister for the civil service.[36] The powers of control were vested in this minister, and in fact the office was held by the Prime Minister. The senior permanent official of the Civil Service Department became the titular head of the home civil service. By the Civil Service Order in Council 1969 the minister was empowered to make regulations and give instructions for controlling the home civil service and for the classification, remuneration and other conditions of service of its staff, whether permanent or temporary.

The legal sanction behind the government's powers of control over the civil service is nothing more than the Crown's power to dismiss its servants at pleasure, so that the Crown can prescribe or vary their conditions of employment as it wishes.[37] The civil service is regulated under Orders in Council[38] which have no statutory basis and are held by the courts to be made under the royal prerogative.[39] This is the authority by which the service formulates its disciplinary procedures. A civil servant of at least two years' standing threatened with dismissal or premature retirement can appeal to the Civil Service Appeal Board[40] and will have the benefit of the statutory law about unfair dismissal and other matters, as explained below.

[35] See below, p. 795; [1995] *PL* 21 at 23–6 (Freedland).

[36] See 767 HC Deb. col. 455 (26 June 1968): SI 1968 No. 1656; Civil Service Order in Council 1969 (22 Oct.).

[37] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 at 409 (Lord Diplock). For this passage see Appendix 1.

[38] Notably the Civil Service Order in Council 1982, under which regulations are made and the code on pay and conditions of service is issued.

[39] But note the alternative basis suggested by Lord Diplock (as cited above), namely a special rule of constitutional law.

[40] See [1972] *PL* 149; *R.* v. *Civil Service Appeal Board ex p. Bruce* [1988] ICR 649; *R.* v. *Civil Service Appeal Board ex p. Cunningham* [1991] 4 All ER 310. For matters affecting national security see Security Procedures in the Public Service, Cmnd. 1681 (1962); [1963] *PL* 51 (M. R. Joelson).

Recruitment and character

The ideals of the modern civil service were proclaimed in the Northcote–Trevelyn Report of 1853.[41] In the future entry was to be by competitive examination[42] instead of patronage; and promotion was based on merit. The Civil Service Commission, an independent body established in 1855, was set up to achieve this and it has been very successful. Although it was feared at the time that the stress on examinations would create a civil service consisting of 'statesmen in disguise', in fact the service has been noted for its combination of executive ability with political neutrality.

Apart from Ministers who come and go with the tides of politics, government departments consist almost wholly of permanent career officials. Ministers, however, have increasingly felt a need for advice of a politically sympathetic kind and have brought numbers of personal advisers with them into their departments. But these are not civil servants and leave the department when the Minister goes. The detachment of civil servants from the political battle is an important element in preserving the stability of the state notwithstanding regular changes of government.[43] One consequence of this detachment is that Ministers should take responsibility in Parliament for what happens in their departments and that the civil servants involved should generally remain anonymous.[44] But public inquiries when something has gone wrong sometimes identify the officials responsible[45] and Permanent Secretaries give evidence to the Select Committees. This loss of anonymity should be treated with caution for it tends to undermine the necessary detachment from the public arena of politics.[46]

The original 'philosophy of the amateur' that was much criticised by the Fulton Report of 1968, has been abandoned; and professionalism now pervades the service. It is noteworthy, though, how few lawyers are employed in the civil service, outside the Department of Constitutional Affairs. And they are employed as technicians—as legal advisers or as draftsmen—rather than to assist in the

[41] Reprinted in the Fulton Report (Cmnd. 3638 (1968), Appendix B).

[42] The current practice is to supplement school and university examinations with special examinations and interviews.

[43] There are stringent (non-statutory) restrictions on the political activities of civil servants, particularly in the higher grades and, by statute, civil servants cannot be MPs (House of Commons Disqualification Act 1976). These restriction do not infringe the European Convention on Human Rights (*Ahmed* v. *UK* (2000) 29 EHRR 1 (similar restrictions on local authority employees upheld)).

[44] But see, above, p. 48 dealing with executive agencies.

[45] See the *Inquiry into the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecutions, 1995–6*, HC 115 (The Scott Report).

[46] There have been suggestions that the political impartiality and objectivity of the service should be given statutory protection ([1998]) *PL* 463 (Lewis)). There is considerable support across the political parties for such protection (see *HL Deb.* 634, col. 691, 1 May 2002) and the opposition has introduced a Civil Service Bill (12 January 2004) with this purpose as well as putting the Civil Service Commission on a statutory footing.

development of policy. A distinctly legal voice in the administration is seldom heard. This can sometimes lead to a certain antagonism between the legal and official mentalities. A harbinger of changing attitudes may be the publication of the booklet, 'The Judge over Your Shoulder', by the Cabinet Office. It is designed to alert civil servants to 'danger areas' where their decisions might expose a minister to challenge in the courts. And it certainly tends to improve the quality of decisions.

Official secrecy

A counterpart of the virtues of impartiality and anonymity is the occupational vice of secrecy, of which the civil service is continually accused despite the vast number of informative publications which it issues. The official reluctance to allow the public to see departmental papers was buttressed by the Official Secrets Acts 1911–39, which were a serious impediment to openness in government.[47] The principal Act of 1911 was a hasty piece of catch-all legislation which passed through the House of Commons in one day without debate at the time of the Agadir crisis. Section 2 (now repealed) was absurdly broad in scope, rendering criminal all unauthorised disclosure of information from official sources, regardless of whether the public interest demanded secrecy or not.[48] Prosecutions required the consent of the Attorney-General, and it was only by executive control that the law was rendered tolerable. An indiscriminate law of this kind is a breeding-ground of abuse.

Continuous complaint about this oppressive law, and the difficulty of obtaining convictions under it,[49] led to a committee of inquiry in 1972, the Franks Committee, which condemned the main provision of the Act of 1911 and recommended less indiscriminate legislation.[50] Although the government received the Committee's report favourably,[51] the proposed legislation, based on the report, foundered in the House of Commons in 1979 amid confusion and controversy.[52] Eight years

[47] For their history and defects see David Williams, *Not in the Public Interest.*

[48] The Franks Committee (as below) at p. 112 epitomised the primary provision as making it an offence 'for a Crown servant or government contractor to make an unauthorised disclosure of information which he has learnt in the course of his job'. It also covered communication of information obtained in contravention of the Act or entrusted in confidence by an official, including the police.

[49] In 1986 the House of Commons Select Committee on the Treasury and Civil Service reported that section 2 was now unenforceable (7th Report, HC 1985–6 No. 92–1). For the government's comments see Cmnd. 9841.

[50] Departmental Committee on Section 2 of the Official Secrets Act 1911 (chairman, Lord Franks), Cmnd. 5104 (1972).

[51] See Cmnd. 7285 (White Paper, 1978); *Disclosure of Official Information: A Report on Overseas Practice* (HMSO, 1979).

[52] The details are given in the 6th edn. of this book at p. 59.

later, following the *Spycatcher* saga,[53] the government once more proposed reform, and the Official Secrets Act 1989 was enacted. The 1989 Act repeals the notorious section 2 of the 1911 Act and decriminalises much that was previously criminal. However, in other respects it remains restrictive.

First, the Act makes it a criminal offence for a person who is, or has been, a member of the security or intelligence services to disclose any information obtained by virtue of his position.[54] Crown servants or government contractors—who are not also members of the security or intelligence services—also commit an offence if they disclose information relating to security or intelligence matters but that disclosure must in addition be 'damaging'.[55]

Secondly, although the Act abandons the 'catch-all' approach of section 2 of the 1911 Act, it creates broad categories of protected information whose disclosure is generally a criminal offence. Apart from the security or intelligence information already mentioned, these categories are defence,[56] international relations[57] and law enforcement.[58] Disclosure without lawful authority of defence information and information about international relations must be 'damaging'[59] before an offence is committed, but this is not so with information relating to law enforcement.[60] Furthermore, a person—not a Crown servant or government

[53] This tale is too notorious to need a detailed account here. In brief, the Attorney-General sought injunctions prohibiting newspapers from publishing extracts from P. M. Wright's *Spycatcher* which contained confidential information about the security services. Although the book had already been published elsewhere, interim injunctions were obtained: *Attorney-General* v. *Guardian Newspapers Ltd.* [1987] 1 WLR 1248. Final injunctions, however, were refused by the House of Lords: *Attorney-General* v. *Guardian Newspapers Ltd.* (No. 2) [1990] 1 AC 109. Once the material was in the public domain, it was futile to attempt to restrain further publication.

[54] s. 1(1) and (2). The provisions of s. 1 can be extended to non-members of the security and intelligence services by written notification from a minister of the Crown (s. 1(1)(*b*), (6), (7) and (8). It is a defence to a charge under s. 1 to show the defendant did not know and had no reasonable cause to believe that the information related to security or intelligence matters (s. 1(5)).

[55] s. 1(3). A disclosure of information will be 'damaging' if it causes actual damage to the work of the security and intelligence services or if it is likely to have that effect or if the information falls into a class of information likely to have that effect (s. 1(4)).

[56] s. 2.

[57] s. 3.

[58] s. 4.

[59] The precise meaning of 'damaging' depends on the context. For defence information it relates to damage, or likely damage, to the capability of the armed forces of the Crown or which leads to loss of life or injury to members of the armed forces or serious damage to their equipment or installations or which endangers the UK's interests abroad or seriously obstructs the promotion and protection of those interests or which endangers British citizens abroad (s. 2(2)). For information relating to international relations 'damaging' relates to damage, or likely damage, to UK interests abroad or seriously obstructs the promotion and protection of those interests or which endangers British citizens abroad (s. 3(2)).

As before, there is a defence where the defendant did not know and had no reasonable cause to believe that the information was protected or that its disclosure would be damaging (s. 2(3), s. 3(4)).

[60] s. 4.

contractor—who comes into possession of information disclosed in breach of the Act commits an offence if he makes a further 'damaging' disclosure of that information and he had reasonable cause to believe (or know) that the disclosure would be damaging.[61]

The 1989 Act has been much criticised.[62] There is no public interest defence—so the civil servant who makes an unauthorised disclosure in order to reveal serious wrongdoing is as guilty as one who acts in the interests of a foreign power.[63] The Act has been seen as designed to render convictions for unauthorised disclosure easier to obtain rather than to facilitate the flow of information from government to citizen.[64] Moreover, the civil law of confidence and breach of contract remains in place: unauthorised disclosure of official information, whether or not that disclosure is an offence under the Act, will often be liable to be forbidden by injunction.[65] There are no clear plans to amend the 1989 Act or to introduce a public interest defence.[66] However, after the collapse of the high profile trial of a Government Communications Headquarters employee, who had 'leaked', to the press, information about allegedly improper surveillance, a review was announced.[67]

The protection of personal information

In the modern world, information about individuals is held by many bodies, private and public, and there is a clear need to regulate the processing of such information as well as the use and disclosure of it. This is achieved by the Data Protection Act 1998.[68] Unlike its predecessor, the Data Protection Act 1984, the Act of 1998 defines 'data' widely. Thus automatically processed information (such as that held on a computer) as well as information which is held in other forms in a way that specific information relating to a particular individual is readily

[61] s. 5(2) and (3).

[62] See e.g. S. Palmer, 'Tightening Secrecy Law: The Official Secrets Act 1989' [1990] *PL* 243.

[63] Confirmed in *R.* v. *Shayler* [2003] 1 AC 247 (HL) which also held that the 1989 Act did not breach Article 10 (freedom of expression) of the European Convention (restrictions justified under Article 10(2)).

[64] Palmer (as above), 256.

[65] But not if the information was no longer confidential. A claim for profits made by breach of contract may lie (*Attorney-General* v. *Blake* [1998] 2 WLR 805).

[66] 299 HC Deb., col. 6, 28 July 1997.

[67] The Times, 27 February 2004.

[68] This Act implements Council Directive 95/46 ([1995] OJ L281/31) which member states were obliged to implement by 1998. Article 1 of the Directive imposes a duty upon member states to protect the 'fundamental rights and freedoms of natural persons and, in particular, their right to privacy with respect to the processing of personal data'. The Act, however, does not use the language of fundamental rights. The Data Protection Act 1984 is repealed and complicated regulatory machinery is set up. Only a very brief account of this can be given here.

accessible[69]—for instance a card index or files held under individuals' names—is covered by the Act. Subject to a range of qualifications and exemptions individuals have a right of access to personal data about themselves;[70] and where the personal information held is shown to be inaccurate the court may order rectification or erasure of the offending material.[71] An individual who suffers damage as a result of a breach of the Act by a data controller may recover damages from the controller.[72]

The Act establishes the necessary administrative machinery to ensure that the 'data protection principles' are observed by data processors.[73] These principles, which are both detailed and complex lay down, very broadly,[74] that processing should not take place without the consent of the individual who is the subject of the data, or pursuant to the processor's legal obligations, or to protect the interests of the data subject or where it is necessary for the administration of justice or other central government function.[75] Processing is also lawful where it is pursuant to the 'legitimate interests' of the processor provided that it is not prejudicial to the data subject's 'rights, freedoms or legitimate interests'.[76] More onerous restrictions apply where 'sensitive personal data' are being processed.[77] Subject to some qualifications, processors may not process personal data unless they are registered with the Information Commissioner.[78] There are many exemptions from particular provisions of the Act in order to protect national security, to prevent crime, to assess or collect tax and related purposes.[79] The exemptions allowing processing for journalistic, literary and artistic purposes and for the purpose of research may be noted.[80] The Act binds the Crown.[81]

The Information Commissioner polices the 'data protection principles' and if satisfied that they are being breached may issue an 'enforcement notice' requiring the data processor to take remedial action.[82] It is a criminal offence to breach an

[69] s. 1(1).
[70] ss. 7–12.
[71] s. 14.
[72] s. 13.
[73] s. 4(4).
[74] No more than a rough outline now follows.
[75] 2nd sched.
[76] 2nd sched., para. 6(1).
[77] 3rd sched. This is data relating to race, ethnic origin, political opinions, religious or similar beliefs, health, sexual life, membership of a trade union and criminal proceedings against the individual (para. 2).
[78] s. 17.
[79] Part IV.
[80] ss. 32–33.
[81] s. 63.
[82] s. 40. The Commissioner also has powers, on the request of any person affected by processing of data in beach of the Act, to require the data processors to provide the information necessary to assess whether there has been a breach (ss. 42–43), but this is restricted where the journalistic, literary and artistic purposes exemption is engaged (s. 44).

'enforcement notice'.[83] But there is a right of appeal to the Information Tribunal[84] and a further appeal to the High Court on a point of law.[85]

The interception of communications

Legislation now provides protection for the communication of messages both by post and by telecommunication systems. After many years of controversy, the legislation was prompted by litigation which established that telephone-tapping was not a tort at common law[86] but was a violation of the European Convention on Human Rights unless legally restricted by precise and justifiable rules.[87] The Interception of Communications Act 1985 first gave the Home Secretary restricted powers to issue interception warrants, constituted a tribunal to deal with complaints and with power to award compensation and a Commissioner to review the working of the Act. That Act, however, was overtaken by advances in technology and it failed to provide adequately for human rights. It is now replaced by the Regulation of Investigatory Powers Act 2000, which in part follows the scheme of the earlier Act but makes wider provision, covering both public and private telecommunications systems. The Home Secretary must believe that a warrant is necessary in the interests of national security, for the prevention or detection of serious crime, for safeguarding the economic well-being of the country or for giving effect to international crime-prevention arrangements. The Act provides more elaborately for interception warrants and for who may apply for them, including chief officers concerned with defence, intelligence and public security. The Tribunal and the Commissioner are the subject of new provisions.

New areas brought under control by the Act are 'directed surveillance', 'intrusive surveillance' and 'covert human intelligence sources'. An example of this last class would be a police officer working under cover. The jurisdiction of the tribunal is extended accordingly and there are 'surveillance commissioners' who are the same as the commissioners appointed under the Police Act 1997 to monitor searches of property, being holders or former holders of high judicial office. There are also powers to compel the decrypting of encrypted information.

[83] s. 47(1).

[84] s. 48. The tribunal is established under s. 6(3) and (4). The chairman and deputy chairman are appointed by the Lord Chancellor (powers now exercised by the Secretary of State for Constitutional Affairs: SI 2003 No. 1887) and the other members, who must be legally qualified, are appointed by the Home Secretary to represent the interests of data controllers and data subjects.

[85] s. 49.

[86] *Malone* v. *Metropolitan Police Commissioner* [1979] Ch 344, *Malone* v. *UK* [1985] 7 EHRR 14.

[87] *Malone* v. *UK* [1985] 7 EHRR 14 (art. 8 of the Human Rights Convention infringed).

Freedom of information

The growing recognition that 'open government is part of effective democracy'[88] led first to a Code of Practice on Access to Government Information[89] and then after the change of government in 1997, to the Freedom of Information Act 2000.[90] The Act was preceded by a White Paper[91] which proposed a somewhat more far-reaching reform. Nonetheless, it is clear that an important change in the culture of government is under way. Instead of keeping matters secret as a matter of course, government and other public bodies will need to justify a failure to disclose relevant information upon request. The relationship between citizen and state is being significantly altered.

The crucial provision of the Act is s. 1(1) which provides that 'any person making a request for information to a public authority is entitled—(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him'. A lengthy schedule to the Act specifies the public authorities involved. They include central government departments (but not the Security Service, the Secret Intelligence Service and GCHQ), the Armed Forces of the Crown (but not the special forces), the NHS, local authorities, state-funded schools, colleges of further education, universities in receipt of financial support from the state (as well as their colleges) and the police (including police authorities).[92] The public authority must comply promptly with any request for information and in any event within twenty working days.[93] All public authorities must publish a 'publication scheme' setting out the manner in which it intends to make information public and whether a fee is payable.[94] If reasonably practicable the applicant is entitled to inspect the document itself, not just a copy or summary.[95]

The general duty to provide information is subject to widespread exemptions. The public authority may refuse a request for information where the cost of

[88] From the *Open Government* White Paper.

[89] Implemented in terms of the *Open Government* White Paper, Cm. 2290 (1993), which concluded that a statutory freedom of information regime was not necessary. See [1993] *PL* 557 (Birkinshaw).

[90] See *The Law of Freedom of Information* (2003) (Macdonald and Jones). There is similar but separate legislation in Scotland (Freedom of Information (Scotland) Act 2002).

[91] *Your Right to Know. The Government's Proposals for a Freedom of Information Act*, Cm. 3818 (1997). For comment see Palmer, 'Freedom of Information—Principles and Problems' in *Constitutional Reform in the United Kingdom: Practice and Principles* (Centre for Public Law, 1998), 147–56 and [1998] *PL* 176 (Birkinshaw).

[92] s. 3 (1) and 1st sched. The schedule may be amended by order: s. 5.

[93] s. 10. But where a fee is payable (under s. 9) time runs from the payment of the fee (s. 10(2)).

[94] s. 19. The Commissioner must approve the scheme (s. 19(1)(a)) and he may publish model schemes (s. 20).

[95] s. 11.

complying would be excessive[96] or where a vexatious or repeated request is made.[97] Other exemptions—too numerous to list comprehensively here—include information that is accessible to the public by other means[98] or which is intended for publication in the future.[99] Unqualified exemptions exist for information supplied by security services,[1] national security[2] and information relating to the development or formulation of government policy, communications between ministers as well as Cabinet minutes, the advice of Law Officers and the operation of ministerial private offices.[3] But the exemptions in regard to defence,[4] international relations,[5] inter-administration relations within the United Kingdom,[6] economic matters,[7] law enforcement[8] and other information held by government departments and other public authorities[9] are qualified. The qualification is generally that disclosure would 'prejudice' the relevant interest. For instance, such 'other [governmental] information' need not be disclosed if, in the reasonable opinion of the 'qualified person', the disclosure would 'prejudice' the collective responsibility of ministers, 'inhibit' free and frank deliberation or 'would otherwise prejudice or would be likely to prejudice, the effective conduct of public affairs'.[10] In the White Paper a less restrictive test of 'substantial harm' was proposed in this and other areas.

There are further exemptions concerning communications with Her Majesty,[11] endangering health and safety,[12] personal information,[13] information provided in confidence,[14] legal professional privilege,[15] cases where disclosure would be prejudicial to commercial interests[16] and where disclosure is prohibited under another enactment or a community obligation.[17] The minister can add exemp-

[96] s. 12. For this exemption to apply the cost of complying with the request must exceed a limit set by the Secretary of State.

[97] s. 14.

[98] s. 21.

[99] s. 22.

[1] s. 23. A minister's certificate to that effect is conclusive (s. 23(2)) but there is an appeal to the Tribunal (s. 60).

[2] s. 24. A minister's certificate to the effect that the information concerned falls within the exemption is conclusive (s. 24(3)) but there is an appeal to the Tribunal (s. 60).

[3] s. 35.

[4] s. 26.

[5] s. 27.

[6] s. 28.

[7] s. 29.

[8] s. 31.

[9] s. 36.

[10] s. 36(2).

[11] s. 37 (includes communications about honours).

[12] s. 38.

[13] s. 40 (information exempt if disclosure would breach the 'data protection principles' explained above, p. 61).

[14] s. 41.

[15] s. 42.

[16] s. 43.

[17] s. 44.

tions by order.[18] Where information is exempt the public authority is generally not obliged to confirm or deny that it holds the information requested.[19]

The machinery necessary to administer the duty to disclose is set up by the Act. The Secretary of State issues a code of practice to guide public authorities as to good practice in regard to the general right of access set out in Part 1 of the Act[20] and the Secretary of State for Constitutional Affairs issues a code of practice in regard to the keeping, management and destruction of records.[21] The Information Commissioner has general functions with regard to the encouragement of good practice and reports to Parliament.[22] In particular, individuals may complain to the Commissioner where they consider that a request for information has not been dealt with properly; if after investigation the Commissioner considers that there has been failure to comply with Part 1 of the Act he may issue an 'enforcement notice'.[23] Failure to comply with such a notice is considered a contempt of court.[24] There is an appeal to the Information Tribunal from the decisions of the Commissioner,[25] and a further appeal on a point of law to the High Court.[26]

THE LAW OF CROWN SERVICE

Nature of Crown service

Crown service is one of the most curious departments of public law. In most other democratic countries the position and rights of state employees form an important branch of administrative law, and the tenure of posts in the civil service gives rise to many questions for the courts, whether they be ordinary courts of law or special administrative courts. In England the position is different. The civil service, despite its great size and importance, is largely staffed and regulated under arrangements which are legally anomalous. It has generally been held that at common law civil servants of the Crown, and military servants also, have no legal right to their salaries and no legal protection against wrongful dismissal. Although recently the

[18] ss. 4, 5.

[19] s. 17.

[20] s. 45.

[21] s. 46. Lord Chancellor's powers transferred to Secretary of State by SI 2003 No. 1887.

[22] ss. 18, 47–49. The Information Commissioner was previously the Data Protection Commissioner.

[23] ss. 50–52.

[24] s. 54. The Commissioner certifies to the High Court that there has been a failure to comply and the court then deals with the matter 'as if [the public authority] had committed a contempt of court'.

[25] s. 57.

[26] s. 59.

picture has changed substantially, the law has long regarded the civil service as if it still consisted of a handful of secretaries working behind the scenes in a royal palace. Although it has lost its domestic character in every other respect, it is still in a primitive state of legal evolution.

Another paradox is that in practice the situation is just the opposite of what these legal rules would suggest. Crown service, though legally the most precarious employment, is in reality the most secure. This is merely convention, but in the civil service the convention is deeply ingrained, so that there are probably better grounds for complaining that civil servants are excessively protected than for criticising their defencelessness in law.[27] Even when a public inquiry reveals serious failings in the conduct of civil servants, they are rarely dismissed.[28]

Crown servants of all ranks are in law the servants of the Crown and not of one another.[29] A civil servant therefore has no contractual rights against his department, his minister or any superior officer. Whoever engages him acts merely as the Crown's agent, and his contract of employment[30] is directly between himself (as servant) and the Crown. Any remedy must therefore be sought against the Crown alone.[31]

Tenure: no protection at common law

The best-known decision on the legal insecurity of civil service tenure concerned the dismissal of a consular agent in Nigeria. He had been engaged for a term (as he said) of three years certain, but was prematurely dismissed. He sued the Crown by petition of right, but the Court of Appeal refused him relief.[32] The court substantially accepted the Crown's argument that:

[27] The Fulton Committee found it hard to believe that the rate of dismissals for misconduct and inefficiency should not have been higher: Cmnd. 3638 (1968), para. 123.

[28] There were no dismissals of civil servants in the Crichel Down affair of 1954 (see p. 920) or the 'Arms to Iraq' affair (see p. 852). The government has settled actions brought for abuse of public office without disciplining the senior civil servants concerned (*The Times*, 9 December 1999).

[29] *Bainbridge* v. *Postmaster-General* [1906] 1 KB 178; *Secretary of State for the Environment* v. *Hooper* [1981] RTR 169.

[30] Civil servants' contracts of employment are discussed below, p. 65.

[31] Even where a statutory authority administers a public service (e.g. the National Health Service) on behalf of a minister, those employed in that service are servants of the Crown. See *Wood* v. *Leeds Area Health Authority* [1974] ICR 535, applying *Pfizer Corporation* v. *Ministry of Health* [1965] AC 512. See also *Marshall* v. *Southampton Health Authority* [1986] QB 401 at 414 (European Court of Justice, opinion of Sir Gordon Slynn).

[32] *Dunn* v. *The Queen* [1896] 1 QB 116; similarly *Hales* v. *The King* (1918) 34 TLR 589; *Denning* v. *Secretary of State for India* (1920) 37 TLR 138. But see *Cameron* v. *Lord Advocate* 1952 SC 165, distinguishing *Dunn's* case where it was alleged that a promised post in Nigeria was never provided at all. See also Hogg, *Liability of the Crown*, 2nd edn., 175; (1975) 34 *CLJ* 253 (G. Nettheim). Dunn's claim against the officer who engaged him for breach of warranty of authority (see below, p. 813) also failed: *Dunn* v. *Macdonald* [1897] 1 QB 401.

> . . . servants of the Crown hold office only during the pleasure of the Crown, except in cases where it is otherwise provided by statute . . . The action of a civil servant of the Crown might, if he could not be dismissed, in some cases bring about a war. A contract to employ a servant of the Crown for a fixed period would be against the public interest and unconstitutional. It is not competent for the Crown to tie its hands by such a contract.

The basis of the rule that Crown servants are dismissible at pleasure, therefore, is the principle that the public interest requires that the government should be able to disembarrass itself of any employee at any moment. All the emphasis was on public policy. There was no suggestion that the rule had any connection with the royal prerogative.[33]

The rule so laid down was followed in later decisions.[34] Yet the reasons put forward for this policy will not really bear examination. Any employer can always dismiss a servant: the only question is whether, if he does so, he should pay damages for breach of contract.[35] No master can be compelled to employ a servant, any more than a servant can be compelled to serve a master. The argument that the Crown could not otherwise relieve the public of an undesirable servant therefore falls to the ground. It may be said that the Crown should not be put in the dilemma of ignoring the public interest or else committing a breach of contract—for a breach of contract, despite Mr Justice Holmes's famous theory to the contrary,[36] is a wrongful act. But to that it can be answered that it is of even greater importance that engagements expressly entered into should at least be honoured in the breach, if not in the observance. The Crown should be an honest man, and if driven to break its contract ought to pay damages, as it does for breach of other contracts. Yet the latest decision has confirmed that civil servants can be dismissed at will.[37]

In the armed forces the lack of any legal remedy for wrongful dismissal has been made clear in a parallel line of decisions which are, if anything, more categorical than those dealing with civil servants.[38] The military cases tend to the conclusion that this type of Crown service is not contractual at all.[39] This was flatly stated by Lord Esher MR in 1890:[40]

[33] It is ascribed to the prerogative in *R.* v. *Civil Service Appeal Board ex p. Bruce* [1988] ICR 649, but presumably in the loose sense noted below, p. 216.

[34] e.g. *Rodwell* v. *Thomas* [1944] KB 596; *Riordan* v. *War Office* [1959] 1 WLR 1046, affirmed [1961] 1 WLR 210.

[35] See below, p. 539.

[36] Holmes held that a contract was a promise to perform or to pay damages at the promisor's option: *The Common Law*, 301.

[37] *R.* v. *Lord Chancellor's Department ex p. Nangle*, discussed below, pp. 64 and 668. Civil servants' contracts, however, assert that 'because of the constitutional position of the Crown, [civil servants] cannot demand a period of notice as of right when [their] employment is terminated'. For criticism see [1995] *PL* 224 (M. Freedland).

[38] *Re Tufnell* (1876) 3 Ch. D 164; *Grant* v. *Secretary of State for India* (1877) 2 CPD 445; *De Dohse* v. *R.* (unreported, House of Lords), cited in *Dunn* v. *The Queen* (above).

[39] For the modern position in regard to civil servants see p. 65 below.

[40] *Mitchell* v. *R.* [1896] 1 QB 121, note.

> The law is as clear as it can be . . . that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown and give no occasion for an action in respect of any alleged contract . . . The courts of law have nothing to do with such a matter.

Remuneration: confusion at common law

The judicial reluctance to give even a money judgment against the Crown on a contract of service led to a decision in 1943 that a Crown employee has not even a contractual right to arrears of pay.[41] The wife of an Indian civil servant, who had made default in payments of alimony, attempted to attach arrears of pay due to her husband. It was held that since the husband could not sue for the pay, it was not legally due to him and so not attachable by his creditors.[42]

In decisions such as these, as in the cases on dismissal, the courts seemed determined to reduce the contractual element in Crown service almost to vanishing point, tending to the conclusion that it was not contractual at all.[43] But these views are no longer correct. The Privy Council, after hints that a wrongfully dismissed civil servant might have a contractual remedy,[44] has held that the law of Ceylon allowed a civil servant to sue the Crown for increments of salary.[45] Closer to home a Divisional Court has held[46] that there is no constitutional bar to a contract of employment between a civil servant and the Crown, and more positively in a later case,[47] that civil servants do, after all, have contracts of employment with the Crown.[48] However, since the court also made it clear that civil servants could still

[41] *Lucas* v. *Lucas* [1943] P 68. See similarly *High Commissioner for India* v. *Lall* (1948) LR 75 IA 225 (Privy Council); but contrast *Picton* v. *Cullen* [1900] 2 IR 612. As to military pay see *Gibson* v. *East India Co.* (1839) 5 Bing. NC 262; *Mitchell* v. *R.* (above).

[42] Following the Scots case of *Mulvenna* v. *The Admiralty* 1926 SC 842 (dockyard telephone attendant's contract of service with Crown held subject to implied condition that the right to a salary was not legally enforceable).

[43] *Inland Revenue Commissioners* v. *Hambrook* [1956] 2 QB 641 at 654.

[44] *Shenton* v. *Smith* [1895] AC 229; *Reilly* v. *The King* [1934] AC 176. See also *Robertson* v. *Minister of Pensions* [1949] 1 KB 227 at 231; *Terrell* v. *Secretary of State for the Colonies* [1953] 2 QB 482 at 498 (below, p. 70).

[45] *Kodeeswaran* v. *A.-G. of Ceylon* [1970] AC 1111 at 1123. The Court of Appeal of New South Wales did the same in *Suttling* v. *Director General of Education* [1985] 3 NSWLR 427 (two-year appointment held binding and arrears of salary awarded). The House of Lords has allowed a Crown servant to recover arrears of pay by petition of right but without consideration of the legal difficulties: *Sutton* v. *A.-G.* (1923) 39 TLR 294.

[46] *R.* v. *Civil Service Appeal Board ex p. Bruce* [1988] 3 All ER 686 (affirmed on different grounds in the Court of Appeal: [1989] 2 All ER 907).

[47] *R.* v. *Lord Chancellor's Department ex p. Nangle* [1992] 1 All ER 897 (civil servant accused of sexual harassment; after internal disciplinary procedures, transferred and denied increment in salary; held, since he had a contract of employment with the Crown, he could not challenge the fairness of the disciplinary procedures by way of judicial review).

[48] The difference between these cases turns on whether the parties had contractual intention. Para. 14 of the Civil Service Pay and Conditions of Service Code said that 'a civil

be dismissed at will, this finding does little more than give the civil servant the right to sue for arrears of pay.

In these cases it was the Crown that sought to establish the existence of contracts,[49] because, if civil servants' appointments were contractual, the courts would, as explained below,[50] deny them recourse to judicial review. This can be disadvantageous for civil servants.[51] For instance, judicial review will no longer be available to the civil servant when his conditions of employment are changed. Of course, contractual consent to such changes will now be required. But this provides only illusory protection, since the civil servant can be dismissed at will if he does not consent. Only in the anomalous world of Crown employment could the establishment of hitherto non-existent legal rights for employees foreshadow a reduction in the actual protection of their employment. Indeed the government has, in the interests of decentralisation of managerial responsibility within the civil service (including executive agencies), adopted the policy of regularising its contractual relations with senior civil servants,[52] and has published a draft model contract. These changes seem unlikely to enhance the legal protection of civil servants although they may render management more effective.

Statutory regulation of Crown employment

The Crown, as the largest employer of labour in the country, could not remain unaffected by the far-reaching laws on employment, labour relations and social security enacted in recent years. These statutes may be said without exaggeration to have transformed the legal character of Crown service, changing it from a relationship which was almost ignored by the law into one in which the employee has many legal rights and in which the relationship is in some important ways minutely regulated by legal rules. But these rights are generally enforceable through specialised tribunals rather than through the ordinary courts.

The application of social legislation to Crown employment is not entirely a contemporary innovation. For example, the national insurance system has covered

servant does not have a contract of employment enforceable in the courts'. In *ex p. Bruce* May LJ held that this showed that the parties did not intend to contract; but in *ex p. Nangle* Stuart-Smith LJ disagreed: the parties had the intention to create legal relations and that was enough, notwithstanding para. 14.

[49] The Crown's attitude to this question has not been consistent. Barely a year before *ex p. Nangle* the Crown had, in order to defend an action brought by a civil servant, asserted, in *McClaren* v. *Home Office* [1990] IRLR 338, that civil servants did not have contracts of employment.

[50] See p. 639.

[51] See [1991] *PL* 485; (1991) 107 *LQR* 298 (S. Fredman and G. Morris).

[52] See Cm. 2627 (1995). See [1995] *PL* 224 (M. Freedland).

employees of the Crown from its inception in 1911.[53] The Race Relations Act 1976, prohibiting racial discrimination in employment, was made binding on the Crown.[54] The redundancy payments scheme of 1965, now contained in the Employment Rights Act 1996, is not made binding on the Crown directly, but it provides for the inclusion in the statutory scheme of such corresponding arrangements as the Crown may make,[55] as it has in fact done. Most of the other rights secured by that Act apply equally to Crown employment, with the exception (as was to be expected) of the right to a minimum period of notice before dismissal.[56]

The most radical alteration of the position of the Crown's employees at common law is that which brings them within the provisions against unfair dismissal first enacted in 1971 and now contained in the Employment Rights Act 1996.[57] Under this Act Crown employees are entitled to financial compensation for unfair dismissal, as defined in the Act,[58] once they have completed the one-year qualification period.[59] Claims are made to an employment tribunal, from which appeal lies to the Employment Appeal Tribunal,[60] thence with leave to the Court of Appeal on a question of law, and thence to the House of Lords. In some circumstances the tribunal may make an order for reinstatement or re-engagement, but the only effect of such an order is to make compensation payable if it is not obeyed.[61] These provisions are applied generally to the civil service of the Crown but not to the armed forces.[62] A civil servant who is dismissed, therefore, may be able to obtain compensation if the dismissal is unfair, even though it may not be a breach of contract. This gives him the protection of the principles of natural justice, including the right to be heard in his own defence, since it has been held that dismissal in violation of natural justice is unfair dismissal.[63] It would also seem right to assume that dismissal in breach of agreed terms of engagement would be unfair dismissal, even if not technically a breach of contract. The statutes are careful not to prejudice the question whether the service of the Crown is or is not contractual, translating the ordinary language of contracts of employment into that of 'Crown employment'.

Employers and trade unions may, alternatively, make a 'dismissal procedures agreement', which the Secretary of State may approve if he is satisfied that it

[53] National Insurance Act 1911, ss. 53(1), 107(3). See now Social Security Act 1986, s. 79.
[54] s. 75, replacing Act of 1968, s. 27.
[55] Act of 1996, s. 171.
[56] Act of 1996, s. 191.
[57] Pt. X, not applying to the police, who are also excluded from some other benefits (s. 200).
[58] ss. 95–107.
[59] Reduced from two years to one as from 1 June 1999.
[60] s. 111; and see Industrial Tribunals Act 1996.
[61] ss. 114, 115, 117.
[62] s. 138.
[63] *Earl v. Slater & Wheeler (Airlyne) Ltd.* [1973] 1 WLR 51 (dismissal unfair but justified, so no compensation awarded).

provides remedies for unfair dismissal which are on the whole as beneficial as those of the Act. In that case the employee's rights under the agreement are substituted for those under the Act. A Civil Service Appeal Board was established in 1972 to deal with complaints of unfair dismissal or premature retirement and the Secretary of State approved it for the purposes of the Act.[64] The Appeal Board is subject to judicial review, as is explained later.[65]

Three other Acts which confer important rights on Crown employees are the Equal Pay Act 1970,[66] the Sex Discrimination Act 1975[67] (both of which apply to the civil service but not to the armed forces) and the Public Interest Disclosure Act 1998 (which does not apply to Crown employees in the security services or in the armed forces).[68] This latter Act protects 'whistleblowers'—those who make disclosure about criminality or other wrongdoing or malpractice at their place of employment—against victimisation by employers.[69]

Continuing anomalies

Now that employment under the Crown is so intensively regulated by social and labour legislation, it is all the more surprising that its legal fundamentals remain anomalous. A civil servant may now claim statutory compensation for unfair dismissal, but his basic legal rights to enforce the terms of his employment, such as his right to tenure and his right to pay, remain in some doubt. His terms of service are a strange amalgam of certainties and uncertainties.

The judiciary

Judges may be regarded as servants of the Crown in the sense that they are 'Her Majesty's judges', holding offices granted by the Crown and bound by oath well and truly to serve the sovereign in those offices.[70] On the other hand it is axiomatic that judges are independent: the Crown has no legal right to give them

[64] See [1972] *PL* 149.

[65] Below, p. 640.

[66] See s. 1(8).

[67] See s. 85.

[68] ss. 11 (national security), 10 (armed forces). For discussion of the policy underlying protection of 'whistleblowers' see Forsyth and Hare (eds.), *The Golden Metwand*, 297–318 (Y. Cripps).

[69] s. 2. The disclosure must be a 'protected disclosure' and made either to the employer, a prescribed person (usually the relevant regulator), or exceptionally to others to whom it is reasonable to make the disclosure (s. 1). The 'whistleblower' must not act for personal gain (s. 1).

[70] Promissory Oaths Act 1868, s. 4; Supreme Court Act 1981, s. 10(4); Courts and Legal Services Act 1990, s. 76.

instructions,[71] and one of the strongest constitutional conventions makes it improper for any sort of influence to be brought to bear upon them by the executive.[72] They do not therefore satisfy the test of the relationship of master and servant at common law, which is that the master must have power to control the servant. Consequently, as explained, the Crown bears no liability for acts of the judiciary, and the judiciary themselves have an extensive immunity.[73]

In a constitutional sense it is nevertheless evident that the judges in administering justice supply one of the most important services of the Crown. As has been pointed out in a Privy Council judgment, 'servant' may have a different meaning in public law from that which it has in private law: the test of 'control' is inappropriate; and 'servants of the Crown' most aptly means 'persons by whom the functions of government of a state are carried out'.[74] In this context judges and others performing judicial functions may well fall within the meaning of 'servants of the Crown' or of similar expressions. They were treated as 'persons in His Majesty's service' under the National Economy Act 1931.[75]

It is a cardinal principle that the superior judges, unlike others in the service of the Crown, should enjoy security of tenure. In the case of the judges of the High Court and the Court of Appeal their tenure is protected by the Supreme Court Act 1981,[76] replacing the Act of Settlement 1700, under which they hold office 'during good behaviour subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament'. The salaried judges in the House of Lords (Lords of Appeal in Ordinary) are protected in similar terms by the Appellate Jurisdiction Act 1876.[77] Only once has a judge been removed on an address from both Houses.[78] All holders of judicial office, if appointed after 1993, are subject to a retirement age of 70.[79] Appointments below High Court level may be extended on an annual basis until 75.[80] Peers who have held high judicial office may sit in the judicial committee of the House of Lords on an *ad hoc*

[71] Below, p. 824.

[72] For a remarkable ministerial attempt to influence the High Court to release the imprisoned Poplar councillors (below, p. 616) see [1962] *PL* 62 (B. Keith-Lucas). The Constitutional Reform Bill 2004 (see below, p. 69) will, if enacted as proposed, create a statutory duty on ministers to 'uphold the continued independence of the judiciary' (s. 1).

[73] Below, p. 771. See A. Olowofoyeku, *Suing Judges: A Study of Judicial Immunity* (1993).

[74] *Ranaweera* v. *Ramachandran* [1970] AC 962 at 972 (Lord Diplock, dissenting); *R.* v. *Barrett* [1976] 1 WLR 946 (registrar of births 'serving under the Crown').

[75] See below, p. 824.

[76] s. 11(3). Although the Crown Court is part of the Supreme Court (s. 1), circuit judges and recorders, who are judges of the Crown Court, are not judges of the Supreme Court (s. 151(4)).

[77] s. 6.

[78] Sir Jonah Barrington, an Irish judge (removed in 1830).

[79] Judicial Pensions and Retirement Act 1993, s. 26. Judges of the High Court, Court of Appeal and House of Lords appointed before 1993 must retire at 75 (Judicial Pensions Act 1959 s. 2 and Act of 1993, s. 26(11)).

[80] Act of 1993, s. 26(4), (5), (6).

basis until 75.[81] Judges will need to be appointed before they reach 50, if they are to qualify for a full pension at 70.[82]

The lower ranks of the judiciary, on the other hand, have scarcely more legal protection against dismissal than have other holders of office under the Crown. Circuit judges, county court judges, recorders and magistrates are by statute subject to removal by the Lord Chancellor for incapacity or misbehaviour.[83] Nor is there any legal principle to safeguard the tenure of judges in the absence of statute. This was decided in the case of a judge of the Supreme Court of Malaya who had been appointed in 1930 on the understanding that the retiring age should be 62. When Malaya was overrun by the Japanese in 1942 while the judge was abroad he was retired on a pension, some time before he had reached 62, on the footing that his office had been abolished. He claimed that he was protected by the Act of Settlement or alternatively by a contract that the Crown should employ him until the retiring age. Both claims were rejected, the first on the construction of the Act, and the second because the Crown could not (just as in the case of civil servants) be fettered by contract.[84]

The tenure of the judiciary of all ranks, however, is as firmly protected in practice as it could be by positive law. Any undue interference with it would raise a political storm. Fearless judicial impartiality is the indispensable basis of the rule of law, and has been respected as a constitutional principle since the revolution of 1688 put an end to the abuses of the Stuart kings.

Constitutional Reform Bill 2004

This measure, if enacted as proposed, will affirm the independence of the judiciary but in addition it proposes far-reaching reforms. The office of Lord Chancellor will be abolished,[85] his functions have for the most part already been transferred to the Secretary of State for Constitutional Affairs.[86] A Supreme Court of the United Kingdom is proposed to take over the judicial functions of the House of Lords and those of the Privy Council in regard to devolution.[87] A Judicial

[81] Appellate Jurisdiction Act 1876, s. 5(3) as amended by Act of 1993, 6th sched., para. 2.

[82] Judicial Pensions and Retirement Act 1993, Pt. 1.

[83] Courts Act 1971, ss. 17, 21; justices of the peace are removable from the commission of the peace on the order of the Lord Chancellor, under prerogative power except in certain statutory cases, e.g. under Justices of the Peace Act 1949, s. 1. Members of certain statutory tribunals may not be removed by ministers without the consent of the Lord Chancellor, the President of the Court of Session or the Lord Chief Justice of Northern Ireland, as the case may be: Tribunals and Inquiries Act 1992, s. 7. The Lord Chancellor's powers under the 1992 Act have not been transferred to the Lord Chancellor (SI 2003 No. 1887).

[84] *Terrell* v. *Secretary of State for the Colonies* [1953] 2 QB 482.

[85] s. 12.

[86] See SI 2003 No. 1887.

[87] s. 17. See s. 31 for the jurisdiction of the new court.

Appointments Commission is also proposed which will put forward recommendations for judicial appointment, with the final decision (subject to certain restrictions) being in the hands of the Secretary of State for Constitutional Affairs.[88] The measure is controversial having been criticised trenchantly by the Lord Chief Justice in his Squire Centenary Lecture who doubted whether these proposals pay 'sufficient attention to retaining or replacing the checks upon which, in the past, the delicate balance of our constitution has depended'.[89]

SOME GOVERNMENTAL FUNCTIONS

The modern administrative state has many functions and the performance of those functions requires an administrative machine of immense complexity. Each part of that machine is created and moulded by rules of administrative law. But it is not practicable to set out all those rules here. Only a sketch may be provided of some of the functions of more importance to administrative law. However, this is far from a comprehensive guide. In particular there are some areas, for instance, planning, where the subject is so specialised and complicated that only the briefest account can be given.

The compulsory purchase of land[90]

It has long been possible for land to be compulsorily purchased for public purposes and many government departments, local authorities and public corporations have such powers. All these powers, however, are under central government control for every purchase must be confirmed by a minister. The procedures determining whether the land may be taken and requiring notice, etc., to be given to interested parties, are generally found in the Acquisition of Land Act 1981 while the assessment of compensation is determined under the Compulsory Purchase Act 1965. In order to enable the acquiring authority to obtain safe title to the land the validity of a compulsory purchase order may only be challenged within six weeks of the date on which notice of confirmation of the order is published.[91]

[88] See Part III of the Bill.
[89] See (2004) 63 *CLJ* (in press) and see www.law.cam.ac.uk/squire/about_lib_woolf.php.
[90] For a detailed account see Brand (ed.), *Encyclopedia of Compulsory Purchase* (1960–1999). For historical and comparative discussion see M. Taggart, 'Expropriation and Public Purpose' in Forsyth and Hare (eds.), *The Golden Metwand*, 91–112. See also below, p. 805.
[91] Act of 1981, ss. 23–5. See below, p. 728.

Town and country planning[92]

One of the most prominent twentieth-century developments in administrative law has been the control exercised over the 'development' of land.[93] 'Development' is very widely defined to include both the carrying out of any building, engineering or mining operations on the land and the making of any material change in the use to which the land or buildings are put.[94] The basic rule of planning law is that permission must be sought from the local planning authority (usually a local authority) before any development takes place. The decision whether to grant such permission is made against the background of a development plan (largely drawn up by the planning authority and confirmed by the Secretary of State), the planning policy of the Secretary of State (as made known by circulars, White Papers and planning guidance notes (PPGs)) and EC Council Directive No. 85/337 (which requires in certain cases that environmental impact assessments are made and taken into account).[95] Permission, if granted, is usually made subject to various conditions.[96]

There is no right of appeal against the grant of planning permission. But against refusal of permission there is a right of appeal to the Secretary of State;[97] and in certain circumstances there is a further right of appeal to the High Court on a question of law. The validity of many planning decisions, like the compulsory purchase decisions just mentioned, can only be challenged in the High Court by way of a special statutory species of judicial review.[98] The challenge must be made within six weeks of the contested decision and only on the grounds that it 'is not within the powers of this Act' or other statutory provisions.[99] The courts, however,

[92] See Sir D. Heap, *An Outline of Planning Law*, 11th edn. (1996); Moore, *A Practical Approach to Planing Law*, 8th edn. (2002) and Grant (ed.), *Encyclopedia of Planning: Law and Practice* (1960–2003).

[93] The modern system of planning law was inaugurated by the Town and Country Planning Act 1947. The primary statute is now the Town and Country Planning Act 1990.

[94] Act of 1990, s. 55.

[95] Act of 1990, s. 70(2). And for the special weight given to the development plan, see s. 54A.

[96] Act of 1990, s. 70(1); but the conditions must fairly and reasonably relate to the proposed development. See below, p. 404.

[97] Act of 1990, s. 79(2). This usually involves an informal hearing (or an appeal on written representations) before an inspector. Increasingly, the decision is taken by the inspector himself under delegated powers from the minister (s. 79(1)). Each year a small number of particularly sensitive or important planning appeals are decided by the Secretary of State himself, after an inquiry conducted by an inspector who recommends to the minister. This procedure, including the right of appeal to the court on a point of law, was held not to breach Article 6(1) of the European Convention on Human Rights: *R. (Alconbury Developments Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295 (HL). Discussed above, p. 448.

[98] Act of 1990, s. 288. Below, p. 727.

[99] But the 'powers of this Act' include the classic grounds of judicial review: see below p. 733.

retain their jurisdiction to grant ordinary applications for judicial review where this is not excluded—for instance, where the grant of planning permission contains conditions which are ultra vires.[1]

A breach of planning control is not generally a criminal offence but the planning authority may issue an enforcement notice requiring that the breach be remedied,[2] e.g. the demolition of a building erected without permission. A failure to heed the enforcement notice within the set time is an offence and substantial fines can then be imposed.[3] The breach may be remedied by the planning authority at the owner's expense. There are other forms of enforcement of which the 'stop order' is the most drastic. It requires that the activity specified in an enforcement notice should cease before the enforcement notice itself would take effect (usually 28 days).[4]

The National Health Service

The National Health Service, and the connected welfare services, provided on both a national and local basis, are a vital area of public administration. However, although on occasion the health service does generate important administrative law cases, particularly where difficult decisions about the allocation of limited resources have to be taken,[5] on the whole the most important issues arise in the context of tribunals[6] or before the National Health Service Commissioner.[7]

The basic structure of the health service is set out in the National Health Service and Community Care Act 1990 which retains the basic structure of regional health authorities and family practitioner health authorities set up in the earlier legislation (since 1946). The 1990 Act also sets up NHS Trusts as the providers of health services to the health authorities who acquire the services on behalf of individuals resident within their areas. A further step has been taken with the Health and Social Care (Community Health and Standards) Act 2003, which enables NHS Trusts, if supported by the Secretary of State, to apply to the Independent Regulator of NHS Foundation Trusts for 'foundation status'. This transforms them into independent not-for-profit organisations with considerable autonomy.

[1] *R. v. Hillingdon LBC ex p. Royco Homes Ltd.* [1974] QB 720. See below, p. 405.

[2] Act of 1990, s. 172(1).

[3] s. 179. But there is an appeal to the Secretary of State against an enforcement notice (s. 174(1)) and one ground of appeal is that planning permission ought to have been granted (s. 174(2)).

[4] Act of 1990, s. 183(1)–(5A).

[5] *R v. Cambridge Health Authority ex p. B* [1995] 1 WLR 898 (CA) and below, p. 386.

[6] See below, p. 905.

[7] See below, p. 104.

Social security[8]

The operations of the welfare state are naturally much to the fore in administrative law. Benefits are distributed to very large numbers of people under legislation, both primary and secondary, of formidable complexity. Many of the problems that arise, however, are dealt with by tribunals discussed elsewhere.[9] The welfare state provides both benefits in kind and in cash. The cash benefits may be divided into those which are financed, at least in part, from contributions by the beneficiaries (such as jobseeker's allowance, sickness and industrial injury benefit) and non-contributory benefits (such as certain pensions, child benefit and income support). The non-contributory benefits themselves are divided into those that are means tested ('income-related' in current jargon) and those which are not. The principal statutes are today the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992 and the Jobseeker's Act 1995. The usual pattern is that decisions are taken by adjudication officers but a disappointed claimant has a right of appeal to a unified appeal tribunal.[10]

But not all benefits follow this pattern. With the social fund, for example, the decisions of the social fund officers are subject to internal review but no other appeal.[11] With housing benefit—paid to tenants on low incomes—decisions are taken by local authorities and there is no appeal but rudimentary provision is made for internal review.[12] Local authorities are also under a duty to 'secure accommodation' for the homeless—broadly those in priority need who are not intentionally homeless.[13] Since 1996 an applicant has had a right of appeal (after an internal review) to the county court on a point of law.[14]

Prisons[15]

Prisoners have in recent years been conspicuous litigants in judicial review proceedings and have enjoyed many successes. In addition the European Court of Human Rights has brought about notable improvements in prison administration

[8] For a detailed account see Calvert (ed.), *Encyclopedia of Social Security Law* (1960–1999).
[9] See below, p. 905.
[10] See below, p. 915.
[11] Social Security Administration Act 1992, ss. 64–66.
[12] Social Security Administration Act 1992, ss. 63, 134–35.
[13] Housing Act 1996, s. 195 replacing similar legislation in force since 1977.
[14] Act of 1996, s. 204. 'Point of law' includes the full range of issues that could be raised on judicial review: *Begum (Nipa)* v. *Tower Hamlet LBC* [2000] 1 WLR 306 (CA). This procedure was held not to breach Article 6(1) of the European Convention on Human Rights: *Runa Begum* v. *Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430 (HL), discussed above, p. 448–9.
[15] For the detail see Livingstone and Owen, *Prison Law*, 3rd edn. (2003).

and discipline in fulfilment of its maxim that justice cannot stop at the prison gate.[16] The Human Rights Act 1998 now underpins and strengthens these developments.

Prisons are the responsibility of the Home Secretary under the Prison Act 1952. Under that Act, as amended, he makes the Prison Rules[17] which make provision for many aspects of prison life including privileges, remission of sentence, religion, medical attention, work, education, correspondence, discipline and numerous other matters. The purpose of the training and treatment of convicted prisoners is expressly stated to be to encourage and assist them to lead a good and useful life. The Prison Rules are supplemented by Prison Service Orders and by Prison Service Instructions (which take the place of the previous system of Standing Orders and circular instructions).[18] It is undisputed that 'a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'.[19] Breaches of the rules, however, do not give rise to a claim for breach of statutory duty.[20] But Prison Rules will be declared ultra vires where, for instance, they intrude upon the prisoner's fundamental right of access to the courts[21] and Prison Service Orders will be read as subject to fundamental civil

[16] For instance, *Golder* v. *UK* (1975) Series A, No. 18 (strict censorship of prisoner's correspondence successfully challenged; right to correspond with legal advisers, Members of Parliament and others established); *Weeks* v. *UK* (1987) Series A, No. 114 confirmed in *Thynne, Wilson and Gunnell* v. *UK* (1990) Series A, No. 190 (although independent, Parole Board's role in release of 'discretionary' lifers was only advisory; this was insufficient protection of the right to have lawfulness of detention determined by a court; Criminal Justice Act 1991, s. 35, imposing duty on Home Secretary to follow recommendation, enacted to secure this).

[17] SI 1999 No. 728 and regularly amended, usually annually, since. A consolidated and up-to-date version (2003) of the rules is printed in Livingstone and Owen (as above). See [1981] *PL* 228 (G. Zellick).

[18] These have no express statutory authority but provide in great detail for innumerable aspects of daily life in prison.

[19] *Raymond* v. *Honey* [1983] AC 1 at 10; *R.* v. *Home Secretary ex p. Leech* (No. 2) [1994] QB 198 at 209. Prisoners may not vote for or be elected to Parliament under the Representation of the People Acts 1981 and 1983 respectively. See [2002] *PL* 524 (H. Lardy).

[20] *Hague* v. *Deputy Governor of Parkhurst Prison* [1992] 1 AC 58 (prisoners in lawful custody have no action for false imprisonment, even if held in intolerable conditions or otherwise in breach of the rules). Cf. *Toumia* v. *Evans* [1999] *The Times*, 1 April (prisoner's claim for false imprisonment against trade unionist who had ordered, contrary to routine, that cells should not be unlocked, held arguable (*Hague* not cited)). See also, *R.* (*Murijaz*) v. *Mersey Care NHS Trusts* [2003] EWCA 1036; [2003] 3 WLR 1505 (seclusion of lawfully detained mental patient capable of breaching Article 3 and Article 8 of the ECHR).

[21] *Ex p. Leech* (as above) (over-broad power permitting governor to read prisoner's correspondence (including pre-litigation correspondence with solicitor) declared ultra vires so far as it related to correspondence with solicitor). See further *Weeks* (as above) and *Campbell* v. *United Kingdom* (1992) Series A No 233-A (only in exceptional circumstances could correspondence with lawyers be read). See *R. (Daly)* v. *Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 (policy requiring absence of prisoner from cell when legally privileged correspondence examined (but not read) held unlawful as disproportionate intrusion on prisoner's rights). See above, p. 871.

liberties.[22] The right of access to the courts naturally includes the right to consult a solicitor,[23] and any attempt by the prison authorities to impede it may be treated as contempt of court.[24] Even operational or managerial decisions affecting prisoners are subject to judicial review.[25] Through a Member of Parliament a prisoner may complain to the Parliamentary Commissioner for Administration.

Prison discipline

Any disciplinary penalty imposed upon a prisoner must be authorised by the Prison Act or by the Rules. The Rules provide that minor disciplinary offences are dealt with by the prison governor,[26] who can impose a variety of punishments (known as awards), such as cellular confinement for up to fourteen days, stoppage of privileges or earnings for up to forty-two days.[27] More serious charges, such as attempted escape or assault on a prison officer, are dealt with by the courts.[28] Governor's awards are subject to judicial review.[29] But there is also a non-statutory system of internal appeals.[30] After appealing to an area manager, the prisoner may take his grievance to an independent Prisons Ombudsman who may review both procedure and merits. The ombudsman's decisions, however, are not binding on the Home Office.[31]

[22] *R.* v. *Home Secretary ex p. Simms* [2000] AC 115 (HL) (journalists visiting prisoners required by Standing Order to sign undertakings not to use information obtained for professional purposes; SO interpreted as subject to fundamental civil liberties and thus not justifying indiscriminate ban on interviews with journalists since this would infringe the right to seek access to justice).

[23] *R.* v. *Home Secretary ex p. Anderson* [1984] QB 778 (Standing Order that required prisoner to make internal complaint simultaneously with approach to lawyer to discuss civil claim set aside).

[24] *Raymond* v. *Honey* (as above) (governor's temporary stopping of application to court held contempt but no penalty imposed).

[25] *R.* v. *Deputy Governor of Parkhurst Prison ex p. Hague* [1992] 1 AC 58.

[26] Rule 49 ensures that elementary fairness is applicable to disciplinary charges before the governor (notice of charge, 'full opportunity' to hear case against him and present his own case).

[27] Rule 50. Some 95 per cent of offences are dealt with by governors. But a disciplinary charge before the governor might be sufficiently grave to engage Article 6 of the European Convention on Human Rights; and in these cases legal representation before the governor was required: *Ezeh* v. *UK* (2003) 15 BHRC 145. Serious offences are now referred to an adjudicator who can add days to the sentence (Prison (Amendment) Rules 2002 (SI 2002 No. 2116)).

[28] The system whereby Boards of Prison Visitors exercised disciplinary powers in more serious cases was often criticised (since they lacked independence and legal expertise) and was ended in 1992 (SI 1992 No. 514).

[29] *R.* v. *Deputy Governor of Parkhurst Prison ex p. Leech* [1988] 1 AC 533 (HL) overruling *R.* v. *Deputy Governor of Camphill Prison ex p. King* [1985] QB 735. See below, p. 633.

[30] Rule 56 (Home Secretary may quash any finding of guilt by governor and remit or reduce punishment).

[31] See Livingstone and Owen (as above). The Prisons Ombudsman also investigates all prison suicides. See www.ppo.gov.uk.

Early release of prisoners

The Criminal Justice Act 1991[32] governs the early release of prisoners. The Home Secretary is placed under a duty to release short-term prisoners on licence after serving half their sentence and long-term prisoners after serving two-thirds.[33] On the advice of the Parole Board, however, long-term prisoners and mandatory life prisoners may be released on licence after serving only a half of their sentence.[34] The Home Secretary also has a duty, if the Parole Board so directs, to release discretionary life prisoners after they have served their tariff period, i.e. the period considered by the trial judge as appropriate taking into account the seriousness of the offence.[35] When long-term and life prisoners' licences are revoked and they are recalled to prison, they are given the right to know the reasons and to make written representations.[36]

Fairness now pervades the procedure whereby it is determined how long a prisoner remains incarcerated. Judicial policy, at the domestic as well at the European level, strongly favours imposing judicial standards of fairness upon decisions setting a tariff or deciding whether to follow the recommendation of the Parole Board.[37] Pursuant to this policy, the statutory provision reserving the setting of the tariff to the Home Secretary in the case of 'mandatory lifers' has been found by the House of Lords to be a breach of Article 6 of the European Convention on Human Rights and a declaration of incompatibility was made.[38] The Home Secretary has announced a reform process to secure compliance while ensuring 'accountability to Parliament for these most critical decisions. This', he said, 'is fundamental to our democracy and to the maintenance of confidence in the criminal justice system.'[39]

On the other hand, a statement setting out the current policy in regard to home leave does not found a legitimate expectation; and prisoners, disappointed by a change in this policy, have no remedy.[40]

[32] ss. 32–51.

[33] s. 33. If the sentence is for less that one year the prisoner is released unconditionally. A long-term sentence is one in excess of four years.

[34] s. 35.

[35] s. 34.

[36] s. 39. *Waite* v. *UK* (2003) 36 EHRR 54 requires an oral hearing in these circumstances.

[37] The cases are discussed below, p. 549.

[38] *R. (Anderson)* v. *Home Secretary* [2002] UKHL 46, [2003] 1 AC 837. The impugned provision is the Crime (Sentences) Act 1997, s. 29. See also *Stafford* v. *UK* (2002) 35 EHRR 32. For the position in regard to child murderers see: *T* v. *UK* (2000) 30 EHRR 121 and *Re Thompson and Venables* [2001] 1 All ER 737.

[39] HC Deb Vol 395, Col 100W, 25 November 2002. The Home Secretary envisages Parliament setting the principles that will guide the judiciary in fixing the tariff or the Parole Board in deciding upon release on licence.

[40] *R.* v. *Home Secretary ex p. Hargreaves* [1997] 1 WLR 906 discussed below, p. 374.

Immigration[41]

Immigration cases are a prominent and important feature of administrative law, and in particular they are the part of the subject where the remedy of habeas corpus plays its most conspicuous part. At common law the Crown has the prerogative power to refuse an alien admission to the realm[42] but the subject is now largely statutory. The relevant law (primarily—but not exclusively—the Immigration Act 1971, the Immigration and Asylum Act 1999[43] and the Nationality, Immigration and Asylum Act 2002 and subordinate legislation made under these Acts) confers wide discretionary powers upon the Home Secretary,[44] backed up by powers of detention and deportation; and the consequences for individuals may be extremely severe.

The Act of 1971 (as amended by the British Nationality Act 1981) grants the right of abode in the United Kingdom exclusively to British citizens. In broad terms British citizenship is acquired by birth in the UK to parents at least one of whom is already a citizen or settled in the UK, or by birth outside the UK to parents at least one of whom is a British citizen.[45] Special provision is made for those who acquired rights of abode before 1981, others from within the British Isles (i.e. the Irish) and nationals of EU member states who have overriding rights under the Treaty of Rome.[46]

To all others immigration officers may refuse admission to enter or grant it permanently or temporarily or subject to any conditions.[47] Detailed guidance as to the exercise of this discretion is found in the Immigration Rules.[48] These specifically provide that they are to be applied without regard to a person's race, colour or religion.[49] The rules are an elaborate code, covering leave to remain and also leave to enter as well as variations to such leave and deportation. They provide, for example, for temporary visitors, students and au pair workers, for those seeking employment (who must first have obtained a work permit unless nationals of EU countries or otherwise dispensed); for those coming for settlement (including

[41] I. A. MacDonald and N. J. Blake, *Macdonald's Immigration Law and Practice*, 4th edn. (2004).

[42] *Musgrave* v. *Chun Teeong Toy* [1891] AC 472; *R* v. *Immigration Appeal Tribunal ex p. Secretary of State* [1990] 1 WLR 1126. This prerogative power is preserved by the Act of 1971, s. 35(5). In reliance upon this power the Secretary of State frequently grants 'exceptional leave to remain' to persons who do not qualify for such leave under the immigration rules. See [1992] *PL* 300 (C. Vincenzi). See also [1985] *PL* 93 (C. Vincenzi) for discussion of whether there was a prerogative power to expel friendly aliens.

[43] This Act implements the White Paper, *Faster, Firmer and Fairer—A Modern Approach to Immigration and Aslyum*, Cm. 4018 (1998).

[44] The Home Secretary, for instance, may direct exclusion of particular individuals because of anticipated threats to public order (*R. Farrakhan)* v. *Home Secretary* [2002] Q.B. 1391 (wide margin of discretion extended to minister; leader of 'Nation of Islam' excluded)).

[45] British Nationality Act 1981, s. 1.

[46] See *Van Duyn* v. *Home Office* [1975] Ch. 358.

[47] Act of 1971, s. 3.

[48] The current rules are in HC 395 (1994). The rules, updated, are found on: www.ind.homeoffice.gov.uk.

[49] Rule 2.

spouses and fiancées joining their partners) who must usually have obtained an entry clearance or entry voucher before leaving their country of origin; and for those seeking asylum, who must show well-founded fear[50] of being persecuted[51] for reasons of race, religion, nationality, membership of a particular social group[52] or political opinion. But asylum seekers who arrive in the United Kingdom from 'a safe third country' may be removed to that country for investigation of their claim.[53] A procedure exists whereby particular countries may be designated by the Home Secretary as 'safe third countries' in which 'in general there was no serious risk or persecution'. Applicants from these countries may then be removed under an expedited procedure and with attenuated rights of appeal.[54]

Deportation

Aliens and Commonwealth citizens (without the right of abode) are subject to deportation after recommendation by a court on conviction.[55] In addition the Home Secretary may order deportation of such persons when he considers that deportation would be 'conducive to the public good'.[56]

Far more numerous are the persons who are not deported but are administratively removed.[57] These are: illegal entrants, i.e. those who enter or seek to enter in breach of the law,[58] overstayers (i.e. those who remain in the UK after expiry of their leave), those in breach of a condition attached to leave (such as a condition against taking employment), and those who are members of the family of a person

[50] The fear must exist throughout the country of origin. Thus where there is a safe area to which the asylum seeker might reasonably relocate, asylum may be denied: *E* v. *Home Secretary* [2003] EWCA Civ. 1032; [2004] 2 WLR 123 (CA).

[51] This includes persecution by 'non-state agents' where the state is unable or unwilling to intervene: *R.* v. *Home Secretary ex p. Adan* [2001] 2 AC 477 (HL); *Nouue* v. *Home Secretary* [2001] INLR 526 (CA). See *Karanakarau* v. *Home Secretary* [2003] 3 All ER 449 (CA) for the approach to proof of this issue.

[52] See *Islam* v. *Home Secretary* [1999] 2 WLR 1015 (HL) (Pakistani women suspected of adultery comprised 'a particular social group'). Cf. *Ouanes* v. *Home Secretary* [1998] 1 WLR 218 (Algerian midwives giving controversial contraceptive advice not 'a particular social group'). Members of a family involved in a feud are not 'a particular social group' (*Skenderaj* v. *Home Secretary* [2002] 4 All ER 553. Compulsory military service is not a convention reason (*Fadli* v. *Home Secretary* [2001] Imm AR 392 (CA)).

[53] Act of 1999, s. 9 (removal to EU countries under the Dublin Convention), s. 10 (removal to other safe third countries). Where a third country does not apply the Convention in a way consistent with its true meaning (e.g. as not applying to persecution by 'non-state agents') that country is not a 'safe' third country (*ex p. Adan*).

[54] Asylum and Immigration Appeals Act 1993, Schedule 2, para. 5 (as amended). Although the designation must be approved by both Houses of Parliament, the court may still review it on the grounds of illegality, procedural impropriety and unreasonableness (*R. (Javed)* v. *Home Secretary* [2001] 3 WLR 323 (CA) (designation of Pakistan found irrational).

[55] Act of 1971, s. 3(5).

[56] Act of 1971, s. 3(5)(b).

[57] Deportation orders were formerly much more widely used. See Act of 1999, s. 8.

[58] Act of 1971, s. 33. This includes entry by deception.

in the just mentioned categories. They can be removed by immigration officers without deportation orders, and may be detained pending a decision and then removed.[59] They are also liable to fine and imprisonment. Carriers who bring in passengers without proper documents or clandestine entrants may be fined and made to bear the expense of their return.[60]

Rights of appeal in immigration, deportation and asylum cases

The Immigration and Asylum Act 1999 as amended by the Nationality, Immigration and Asylum Act 2002 reforms and streamlines the system of appeals that existed under the earlier legislation. The thrust of the reform is to create a 'one stop' and comprehensive appeals system, thus simplifying the previous system with its multiplicity of appeals and avoiding the consequent delays. The appellate authorities are unchanged as adjudicators[61] and the Immigration Appeal Tribunal.[62] Under the Act of 2002 if, in an human rights or asylum case, the Home Secretary certifies that the appeal relates to a 'clearly unfounded claim', the appeal may only be brought from outside the UK.[63] Thus applicants may be promptly removed prior to any appeal.

Appeals against refusal of leave to enter may be made against the decisions of immigration officers to an adjudicator.[64] An appellant may also, on appeal, object to the country to which it is planned to remove him.[65] There are similar rights of appeal against a decision to vary or to refuse to vary any limited leave granted.[66] Deportees may appeal to the adjudicator against the Secretary of State's decision to make (or his refusal to revoke) a deportation order.[67] But there is no right of

[59] Act of 1971, 2nd sched.

[60] Part II (ss. 26–36) of the Act of 1999 contains the current provisions.

[61] Act of 1999, s. 51 (and 3rd sched.). The adjudicators are appointed by the Lord Chancellor.

[62] Act of 1999, s. 50 (and 2nd sched.). The members of the tribunal are appointed by the Lord Chancellor. The procedural rules are in SI 2000 No. 2333 and SI 2001 No. 4014.

[63] Act of 2002, s. 115. In *R. (L)* v. *Home Secretary* [2003] EWCA Civ. 25; [2003] 1 WLR 1230 (CA) the 'fast track' procedure for dealing with such cases was upheld as giving sufficient opportunity to establish that the claim was not 'clearly unfounded'. See [2003] *PL* 260 and [2003] *PL* 479 (R. Thomas).

[64] Act of 1999, s. 53. A person may appeal under this section against the refusal of a certificate of entitlement or entry clearance (s. 53(2)). But he cannot appeal on the ground that he has right of abode unless in possession of a UK passport describing him as having right of abode or the necessary certificate of entitlement (s. 54(1)). And he cannot remain in the UK while appealing against refusal of leave unless he holds a current entry clearance or work permit (s. 54(3)).

[65] s. 53(3) and (4).

[66] Act of 1999, s. 55; but only if the change requires the appellant to leave the UK within 28 days. Note the restrictions in s. 56.

[67] Act of 1999, s. 57; the appellant may also object to the country to which he is to be deported.

appeal to an adjudicator where the ground of the decision is that 'his deportation is conducive to the public good in the interests of national security or of the relations between the United Kingdom and any other country or for other reasons of a political nature'.[68] There is also an appeal to the adjudicator where an immigration officer (or the Home Secretary) has acted in a way that is unlawful under s. 6(1) of the Human Rights Act 1998.[69] Asylum-seekers, whether refused leave to enter or threatened with deportation, may appeal to the adjudicator on the ground that their removal would be contrary to the Geneva Convention Relating to the Status of Refugees.[70] But an asylum-seeker's right of appeal is removed where the decision is taken on grounds of national security.[71] Where a claim for asylum is made after an application for leave or the variation of leave or an order directing removal is made, the right of appeal is also lost.[72] Special provision is made for the welfare support of destitute asylum-seekers (and their dependants). This is intended to be provided predominantly in kind.[73] Applications for asylum must be made 'as soon as reasonably practicable' or else welfare support will be denied.[74]

In order that any appeal may be comprehensive and deal with all relevant issues appellants must disclose all grounds of appeal.[75] An adjudicator must allow the appeal if he finds that the decision was not in accordance with law or with the immigration rules, or if he considers that discretion should have been exercised differently, and he may review any finding of fact.[76] Subject to any applicable procedural rules, there is a further appeal to the Immigration Appeal Tribunal.[77] There is a further appeal, with leave, to the Court of Appeal on a point of law.[78]

[68] Act of 1999, s. 58. But there is a right of appeal to the Special Immigration Appeals Commission established under the Special Immigration Appeals Commission Act 1997. This Commission, headed by a person who has held or holds high judicial office, takes the place of the non-statutory body of 'three wise men' who advised the Home Secretary in the past. This procedure did not survive scrutiny by the European Human Rights Court in *Chahal* v. *UK* (1997) 23 EHHR 413. There is a further appeal to the Court of Appeal on a point of law. See *Home Secretary* v. *Rehman* (*Consolidated Appeals*) [2003] 1 AC 153 (national security threatened not only by acts directed against the UK but also by acts against other (friendly) countries; whether deportation 'conducive to the public good' 'prima facie a matter for the executive discretion').

[69] Act of 1999, s. 59. For the Human Rights Act 1998, s. 6(1), see below, p. 167.

[70] Act of 1999, s. 63. Asylum-seekers have the rights guaranteed to them by the Convention: Asylum and Immigration Appeals Act 1993, s. 1.

[71] Act of 1999, s. 64(1)–(6) (so certified by the Home Secretary). But the appellants may go to the Special Immigration Appeals Commission (Act of 1997, s. 2).

[72] Act of 1999, s. 64(7). And see s. 70(5) (right of appeal lost when Home Secretary certifies that the appeal is made solely to delay removal).

[73] Act of 1999, ss. 4, 90, 91, 95, 98. The Act of 2002, Part II, makes provision for 'accommodation centres' for asylum seekers pending determination of their claims.

[74] 2002 Act, s. 55. See *R. (Q) v. Home Secretary* [2003] EWCA Civ. 364 holding that regard should be had to the asylum seeker's state of mind (and information) in assessing whether they had claimed in time.

[75] Act of 1999, ss. 68–70.

[76] Act of 1971, s. 19. 1999 Act, sched. 4, para. 21.

[77] Act of 1971, s. 20.

[78] Act of 1971, s. 20.

The provisions of the Immigration and Asylum (Treatment of Claimants) Bill 2004, seeking to exclude judicial scrutiny from the immigration and asylum appeals process are discussed in Appendix Two.

Extradition of fugitive offenders

Extradition is the surrender by one country to another of some person charged with or convicted of serious crime. Extradition is less prominent in administrative law than are immigration and deportation, since the legislation and the case law are concerned more with courts of law than with administrative authorities. Nevertheless some of the decisions are relevant to general principles of judicial review and most of them illustrate the remedy of habeas corpus.

The law is now dominated by the Extradition Act 2003, which replaces the previous consolidating statute, the Extradition Act 1989, and the Backing of Warrants Act (Republic of Ireland) Act 1965.

In the first place the 2003 Act, Part 1,[79] creates a fast track extradition arrangement between EU Member States, known as the 'European Arrest Warrant'.[80] Under this procedure the EAW, which must be in the prescribed form specifying the judicial authority issuing the warrant, details of the alleged offence (including possible sentence) as well as particulars of the person to be arrested, is sent to the National Criminal Intelligence Service (the Crown Office in Scotland)[81] for certification as authentic and then execution. In other words, diplomatic channels are not used at all. Upon arrest the suspect is brought before a judge within 48 hours. This initial hearing is simply to confirm that the person named in the warrant is the person who has been arrested.[82] If the suspect does not consent to extradition an 'extradition hearing' takes place within 21 days. But this hearing does not assess the strength of the case against the suspect; it is simply concerned with whether there are any of the specified 'bars to surrender'. The most prominent 'bars to surrender' include whether the offence is one to which the procedure applies,[83] whether the accused will be subject to double jeopardy if extradited, whether the purpose of the prosecution is to persecute the accused on the grounds of his or her race, religion, nationality,

[79] ss. 1–68.

[80] This was initiated by a EU Council Framework Decision of 13 June 2002 adopted pursuant to Title VI of the Treaty on European Union (2002/584/JHA) Official Journal 18.7.2002 L 190/1. There is nothing in the 2003 Act, however, that prevents the extension of this procedure to non-EU Member States. It cannot be extended to states which retain the death penalty (s. 1(3)).

[81] These are the designated authorities in terms of s. 2(9).

[82] s. 7(3).

[83] See ss. 64, 65 for the offences to which the procedure applies. Any offence punishable by three years qualifies, even if it is not an offence under the law of any part of the UK.

political opinions, gender or sexual orientation or to prejudice the trial on any of these grounds and whether there has been delay that would render the surrender unjust or oppressive or if the accused was at the relevant time below the age of criminal responsibility or if their medical or physical condition makes it unjust or oppressive to extradite him or her. If there is no 'bar to surrender' the judge must order the extradition but there are provisions for appeal. Not all EU Member States have been designated.[84] For Member States that have not been designated the previous arrangements under the 1989 Act continue to apply.

In the second place, the 2003 Act makes provision for extradition to countries which have been designated under Part II. Most countries have been designated under this part.[85] But the request for extradition is made through diplomatic channels. The Home Secretary must refer the request to the appropriate judge if it complies as to matters of form.[86] The judge may issue an arrest warrant but he must have reasonable grounds for believing that the offence is an extraditable offence and there is evidence against the suspect that 'would justify the issue of a warrant for the arrest of a person accused of the offence within the judge's jurisdiction'.[87] Thereafter an extradition hearing takes place. The judge may refuse to order extradition if there is insufficient evidence 'to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him'.[88] There must also not be a specified bar to extradition.[89] These are not dissimilar to those mentioned above. There is a right of appeal from the judge to the High Court.[90] Crucially, however, the final decision rests with the Home Secretary; and he may refuse to order extradition on several grounds.[91] At all stages the extradition must be compatible with the accused's rights under the Human Rights Act 1998.[92]

The Act allows for the requirement of evidence before arrest to be eased for countries designated by the Home Secretary to simply a requirement of information.[93] This has allowed the UK to negotiate an extradition treaty with the USA[94]

[84] The currently designated states are: Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden and the UK (SI 2003 No. 3333).

[85] The list stretches from Albania to Zimbabwe. The list includes Commonwealth Countries, British Overseas Territories and Hong Kong (but not China). See SI 2003 No. 3334.

[86] s. 70. If there is a competing request from another Part II territory, the Home Secretary may choose between them: s. 126.

[87] s. 71(3)(a).

[88] s. 84(1).

[89] These are set out in s. 79.

[90] s. 103.

[91] s. 93. The grounds include that the accused may be subject to the death penalty or tried for an offence other than that for which he is being extradited.

[92] s. 87.

[93] s. 71(4) and a similar rule applies at the extradition hearing: s. 84(7).

[94] 31 March 2003. But it will still be necessary to submit evidence of guilt when the UK seeks extradition of an alleged offender from the USA.

in which there is no consideration of the evidence against the accused before extradition. Several other countries have been designated in the same way opening the way to similar treaties.[95]

COMPLAINTS AGAINST ADMINISTRATION

Non-legal remedies

Much of this book is devoted to explaining the legal remedies which may be invoked against governmental action which is irregular or improper. But there are other, non-legal remedies which are also important. The picture cannot be seen in true perspective without some knowledge of them.

The administration of so many services and controls under the vast bureaucratic machinery of the central government inevitably causes many grievances and complaints. If something illegal is done, administrative law can supply a remedy, though the procedure of the courts is too formal and expensive to suit many complainants. But justified grievances may equally well arise from action which is legal, or at any rate not clearly illegal, when a government department has acted inconsiderately or unfairly or where it has misled the complainant or delayed his case excessively or treated him badly. Sometimes a statutory tribunal will be able to help him both cheaply and informally. But there is a large residue of grievances which fit into none of the regular legal moulds, but are nonetheless real. A humane system of government must provide some way of assuaging them, both for the sake of justice and because accumulating discontent is a serious clog on administrative efficiency in a democratic country. The aggrieved citizen's classical constitutional remedy of complaining to his Member of Parliament and getting him to put a parliamentary question to a minister is quite inadequate for this purpose.[96]

The primary necessity is the impartial investigation of complaints. It has always been possible for the government to commission a special inquiry, but this is far too ponderous and expensive a process for the ordinary run of grievances. What every form of government needs is some regular and smooth-running mechanism for feeding back the reactions of its disgruntled customers, after impartial assessment, and for correcting whatever may have gone wrong. Nothing of this kind existed in our system before the establishment of the Parliamentary Commissioner for Administration (or ombudsman) in 1967, except in very limited spheres.[97] Yet

[95] SI 2003 No 3334, reg. 3.

[96] Already noted above, p. 30.

[97] Complaints were investigated impartially, for example, by district auditors as regards certain local government expenditure and by the Council on Tribunals as regards tribunals and inquiries.

it is a fundamental need in every system.[98] This was why the device of the ombudsman suddenly attained immense popularity, sweeping round the democratic world and taking root in Britain and in many other countries, as well as inspiring a vast literature.[99] Ombudsmen have since been established for the health service (1973), for local government (1974) and for many other areas of national life.[1] There is a Welsh Administration Ombudsman who may investigate the Welsh Assembly itself as well as other Welsh public bodies.[2] The Scottish Parliament is under a duty to make provision for the investigation of maladministration reported to its members[3] and has duly established an ombudsman.[4] A European ombudsman charged with the investigation of complaints against the institutions of the European Communities is established under the Treaty of Maastricht.[5]

The ombudsman: tribune of the people

Ombudsman is a Scandinavian word meaning officer or commissioner. In its special sense it means a commissioner who has the duty of investigating and

[98] The need for an ombudsman is not obviated by a system of separate administrative courts of the French type and ombudsmen, under an appropriate local name, are often established in such systems.

[99] A few references are: for Britain: Gregory and Hutchesson, *The Parliamentary Ombudsman*; Stacey, *The British Ombudsman*; Wheare, *Maladministration and its Remedies*, ch. 5; Seneviratne, *Ombudsmen in the Public Sector*; for other countries: Gellhorn, *Ombudsmen and Others*; Gellhorn, *When Americans Complain*; Rowat, *The Ombudsman Plan*; Rowat (ed.), *The Ombudsman, Citizen's Defender; Il Difensore Civico* (Turin, 1974); D. W. Williams, *Maladministration, Remedies for Injustice*; [1958] *PL* 236 (Stephan Hurwitz); [1959] *PL* 115 (I. M. Pedersen); [1968] JSPTL 101 (Sir Edmund Compton, the first Parliamentary Commissioner); [1980] *CLJ* 304 (A. W. Bradley); (1990) 53 *MLR* 745 (G. Drewry and C. Marlow); [1992] *PL* 353 (A. W. Bradley); [1993] *PL* 221 (W. K. Reid, a sometime Parliamentary Commissioner responding to suggestions that the office is insufficiently known to the public); [1996] *PL* 384 (Sir C. Clothier, a sometime PC, discussing fact-finding by the Commissioner). Further literature is referred to below.

[1] Discussed below, p. 104 (Health Service Commissioner), p. 125 (Local Commissioners for Administration) and p. 107 (list of other ombudsmen).

[2] Government of Wales Act 1998, s. 111 and 9th sched. As the Annual Reports for the Welsh Administration Ombudsman and Health Service Ombudsman show the number of complaints is low. In 2002–03 for instance there were only 69 Administration cases and 180 Health Service cases and all cases were dealt within 56 weeks. Proposals have been made for further integration of all public sector Ombudsmen in Wales (*Ombudsmen's Service in Wales: Time for Change* (Consultation Paper, Welsh Office 2002). Discussed [2003] *PL* 656 (M. Seneviratne).

[3] Scotland Act 1998, s. 91.

[4] Scottish Public Services Ombudsman Act 2002.

[5] Article 195 (ex 138) of the Treaty of Rome. Complaints are made directly to the ombudsman who is appointed by the European Parliament. Of the 102 cases completed in 1996, maladministration was found in 34. Many complaints (65 per cent) are inadmissible, mostly because they concern activities of national authorities. The ombudsman can (and does) act on his own initiative. See *The European Ombudsman*, HL paper 18 (1997–98).

reporting to Parliament on citizens' complaints against the government. An ombudsman requires no legal powers except powers of inquiry. In particular, he is in no sense a court of appeal and he cannot alter or reverse any government decision. His effectiveness derives entirely from his power to focus public and parliamentary attention upon citizens' grievances. But publicity based on impartial inquiry is a powerful lever. Where a complaint is found to be justified, an ombudsman can often persuade a government department to modify a decision or pay compensation in cases where the complainant unaided would get no satisfaction. For the department knows that a public report will be made and that it will be unable to conceal the facts from Parliament and the press.

The essence of the ombudsman's technique is to receive the complaint informally, to enter the government department, to speak to the officials and read the files, and to find out exactly who did what and why. No formal procedure is involved at any stage, nor is any legal sanction in question.

As his name implies, the ombudsman first appeared in Scandinavia. Sweden has had the institution, in a somewhat special form, for over a century and a half. But it was as established in Denmark after 1954 that it suddenly captured the attention of other countries, largely as a result of the missionary spirit of the first Danish ombudsman.[6] The first Commonwealth country to adopt it was New Zealand, which established an ombudsman (under that name) in 1962.[7] His reports soon showed the success of the experiment, and the innovation flourished and was adopted elsewhere.

Ministerial responsibility undermined?

The main opposition to a British ombudsman was founded, it need hardly be said, on the sacred principle of ministerial responsibility.[8] It was argued that it was fundamental to the constitution that, since the minister was responsible to Parliament for all that was done in his department and officials did not bear public responsibility, it would be wrong for an ombudsman to go behind the minister's back and pry into the workings of his department. But the truth was that some of the supposed corollaries of ministerial responsibility had become an abuse, sheltering mistakes and injustices and making it impossible for complainants and their Members of Parliament to find out what had really happened. As one Member of Parliament complained,[9] 'ministerial responsibility is a cloak for a lot of

[6] Professor Stephan Hurwitz, whose visits to Britain aroused great interest and to whom a number of complaints were sent by hopeful Britons.

[7] Parliamentary Commissioner (Ombudsman) Act 1962 (NZ).

[8] For an illuminating discussion of the misconceptions surrounding ministerial responsibility in this context see Sir K. Wheare, *Maladministration and its Remedies*, ch. 3.

[9] 806 HC Deb. col. 648 (12 November 1970, Mr F. Willey).

murkiness, muddle and slipshoddery within the departments'.[10] Nor was the principle as inviolable as the critics supposed. The Comptroller and Auditor-General had acted as a kind of financial ombudsman since 1866, reporting to the House of Commons on wasteful government expenditure with the aid of several hundred inspectors working permanently in the departments and 'engaged in an internal and continuous, and to a large extent preventive, check on maladministration'.[11] Experience soon showed that his investigations, so far from conflicting with ministerial responsibility, helped it to work better by enabling both Parliament and ministers to correct faults in administration which would otherwise never have been brought to light.[12] Experience has now shown that minister and ombudsman operate for the most part on different levels and with general constitutional compatibility. Indeed, a minister has said that the Parliamentary Commissioner system 'works extremely well [but] not always comfortably for the Government'.[13]

The Act of 1967

The Parliamentary Commissioner Act 1967 established an ombudsman for the United Kingdom under the title of Parliamentary Commissioner for Administration. The first thing to emphasise is the word 'Parliamentary'. The Commissioner may receive complaints only through members of the House of Commons,[14] and not, as in many other countries, from the public directly. He must report the result of his investigation to the member through whom the complaint came.[15] On his functions generally he reports to the two Houses of Parliament, and in particular he appears before the House of Commons' Select Committee on the Parliamentary Commissioner, which frequently examines both him and officials of the department which he criticises.[16] His case reports, issued quarterly, and his annual and special reports, together with the reports of the Select Committee, are the main sources of information about his work. The annual reports contain catalogues of injustices remedied, briefly summarised. In the quarterly reports selected cases are reported in full detail, but anonymously although the government

[10] Quoted by Wheare (as above), 95.

[11] Wheare (as above), 110. Significantly, the first British ombudsman was a former Comptroller and Auditor-General.

[12] As ministers now acknowledge: see 109 HC Deb. 1056 (4 February 1987).

[13] Mr Francis Maude MP, Financial Secretary to the Treasury, in evidence to the Select Committee on the Parliamentary Commissioner (see Second Report, HC 1991–92, No. 158, p. 1).

[14] s. 5(1)(a).

[15] s. 10. A copy must go to the government department concerned.

[16] The government contended that ministerial responsibility required that the Select Committee should examine only heads of departments and such officials as they wished to accompany them, but the Committee asserted their right to examine subordinate officers: Second Report, Session 1967–68, HC 350, para. 24.

department involved is necessarily indicated. The Select Committee has also begun to issue thematic reports, such as *Maladministration and Redress*,[17] which when accepted and implemented by government can improve the quality of administration.

The Parliamentary Commissioner is thus in effect an agency of Parliament, helping to remedy grievances and check administrative errors and abuses. But, like the Comptroller and Auditor-General, he is appointed by the government despite the parliamentary character of the office;[18] and, like a High Court judge, he holds office during good behaviour, i.e. permanently, to the retiring age.[19] The first three commissioners were appointed from the civil service, and, unlike most of the world's ombudsmen, none of them had legal training. Since 1978, however, an independent lawyer has been Parliamentary Commissioner, and a number of non-civil servants are now on his staff. But for legal advice the Commissioner must go to the Treasury Solicitor, who may well be advising the government department under investigation.

The Commissioner charges no fees to complainants. He is one of the services of the welfare state.

Matters included and excluded

The Act of 1967 gave the Parliamentary Commissioner jurisdiction only over the central government, and only over the departments listed in a schedule.[20] The Parliamentary and Health Service Commissioners Act 1987 extended the schedule of departments from less than fifty to more than a hundred. In addition a large number of non-departmental public bodies[21] including the British Library, the Arts Council, the Equal Opportunities Commission, the Commission for Racial Equality, the Research Councils, Industrial Training Boards and the Nature Conservancy Council.[22]

The list of departments may be amended by Order in Council and thus it is kept

[17] HC 112 (1994–95). This encourages the early admission of error by departments as well as prompt financial compensation where this is quantifiable and appropriate. The government's generally positive response is in HC 316 (1994–95) and see *Annual Report 1997–98*, p. 9, commending 'speedier and more effective redress'.

[18] Nominally by the Crown: s. 1. But the practice is to consult the Chairman of the Select Committee before appointment: Cmnd. 6764 (1977). The Act of 1987 (below), s. 6, allows an acting Commissioner to be appointed to fill a temporary vacancy.

[19] s. 1. This contrasts with many other countries which favour short-term appointments. Provision for his removal on grounds of ill health is made by the Parliamentary and Health Service Commissioners Act 1987, s. 2.

[20] s. 4 and 2nd sched., now replaced by the Act of 1987.

[21] Colloquially known as quangos (quasi-autonomous non-governmental organisations).

[22] There are special Commissioners for the National Health Service and for Local Administration (as explained below).

up to date as changes take place.[23] But the Act of 1987 restricts additions to bodies which are government departments or which act on behalf of the Crown, or official bodies financed as to half at least by Parliament or statutory fees or charges and wholly or partly appointed by the Crown or a government department; nor may bodies be added which are involved in education or non-industrial training, professional qualifications and conduct, or the investigation of complaints. The government's purpose, as explained to Parliament, is to confine the list to bodies 'subject to some degree of ultimate ministerial accountability to Parliament, in that they are dependent for their financing and continuing existence on government policy'.[24] The establishment of executive agencies[25] and the 'contracting out' of some government services has not affected the Commissioner's jurisdiction, since he may investigate any action taken by 'or on behalf of' a body subject to his jurisdiction.[26]

An important point is that the Act of 1967, unlike the corresponding New Zealand Act, expressly includes ministers along with their departments.[27] The Parliamentary Commissioner may therefore investigate and criticise decisions taken by ministers personally.

A number of matters are excluded by the Act of 1967 and so are not subject to the Commissioner's investigation.[28] These are set out in a schedule which may be summarised as follows.

Action affecting foreign affairs.
Action taken outside the United Kingdom (except action by consular officers).[29]
Action taken in connection with territory overseas.
Extradition and fugitive offenders.
Investigation of crime.
Protection of state security (including passport matters).
Legal proceedings before any court of law in the United Kingdom or any international court or tribunal, and all disciplinary proceedings in the armed forces.
The prerogative of mercy and the reference of questions to certain courts.
The hospital service.

[23] s. 4(2) as amended by the Act of 1987. The administrative actions of court staff fall within the Commissioner's jurisdiction: Courts and Legal Services Act 1990, s. 110. By an order made under s. 4(2), the jurisdiction of the Parliamentary Commissioner has been extended to a wide range of non-departmental public bodies as diverse as the British Museum, the Apple and Pear Research Council and the Higher Education Funding Council (SI 1999 No. 277).
[24] 109 HC Deb. 1057 (4 February 1987).
[25] See above, p. 47.
[26] Act of 1967, s. 5(1) and see the Commissioner's *Annual Report*, 1992, HC 1992–93 No. 569, 2.
[27] s. 4(4).
[28] s. 5(3) and 3rd sched. The notes to the 2nd sched. also make various exclusions.
[29] Parliamentary Commissioner (Consular Complaints) Act 1981, replacing SI 1979 No. 915.

Contractual and commercial transactions, other than the acquisition of land compulsorily or by agreement and the disposal of surplus land so acquired.
All personnel matters (including pay, discipline, removal) in the civil service and the armed forces, or where the government has power to take or determine or approve action.[30]
The grant by the Crown of honours, awards, privileges, or charters.
Action taken by the administrative staff of a court or tribunal on the direction or on the authority, express or implied, of a judge or a member of the tribunal.

Two controversial items in the list of exclusions are personnel administration in the civil service and contractual and commercial transactions. The Select Committee has made repeated attempts to bring these into the Parliamentary Commissioner's jurisdiction, since he receives a flow of complaints about them, but so far without success.[31] The list of exclusions may also be criticised in other respects, e.g. as regards passports.[32]

But a Cabinet Office 'Review of Public Sector Ombudsman'[33] foreshadows significant changes including the abolition of the MP filter—it can 'no longer', said the review, 'be sustained in the era of joined-up government'—and the extension of the Commissioner's jurisdiction to contractual matters. The Review also recommended a collegiate Commission that would comprise all, or most, of the public sector ombudsmen including the Parliamentary Commissioner, the Health Service and Local Government Commissioners.

Statistics and inferences

Britain was the first large country to adopt an ombudsman, and there were reasonable grounds for giving him a limited sphere of operation at the outset. The volume and the productivity of his work can be seen from the table, which is derived from his annual reports.

The number of complaints within the Commissioner's jurisdiction has actually proved to be moderate. There has, however, been a sharp growth in the number of complaints since 1990. The well-publicised success of the Commissioner in obtaining compensation for those who had lost money in the Barlow Clowes scandal, described below, as well as the flood of complaints concerning the Child Support Agency, described below, may in part be responsible for this. But it is extraordinary that Members of Parliament send him so many complaints

[30] e.g. where the Home Secretary refuses approval of appointment of a chief constable.

[31] The inclusion of commercial and contractual matters was recommended by the Royal Commission on Standards of Conduct in Public Life, Cmnd. 6524 (1976) and by the Commissioner himself: *Annual Report for 1983*, para. 9.

[32] See *Our Fettered Ombudsman* (JUSTICE, 1977), ch. 14; Commissioner's Annual Report for 1978, para. 13.

[33] Published on 13 April 2000 and followed by an undated Consultation Paper in June of that year. Discussed [2000] *PL* 582 (M. Seneviratne).

The Parliamentary Commissioner: Statistics for selected years

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002
1. Complaints received from MPs	1,031	838	837	719	701	704	945	1,332	1,920	1,459	1,721	1.973
2. Complaints rejected or informally resolved[a]	686	574	658	549	529	535	661	870	1,413	1,569[b]	1,787	2,235
3. Partially investigated and discontinued	16	8	9	2	8	12	6	9	6	unknown	unknown	unknown
4. Investigation completed[c]	225	202	183	168	120	177	186	226	260	376	247	136
5. Maladministration found[d]	142	145	170	166	107	157	177	200	246	351	226	116
6. 5 as a percentage of 4	63	72	93	99	89	91	95	88	93	93	91	85
7. Top departmental score in 5[e]	59	60	77	81	63	70	94	87	161	167	108	233

[a] Mostly because outside jurisdiction but includes some rejected in Commissioner's discretion.
[b] Includes cases carried over from previous year.
[c] Includes cases carried over from previous year.
[d] Includes cases where the complaint was not fully upheld but some element of maladministration was found.
[e] The top scoring departments are usually Social Security and the Inland Revenue.

(well over half the total) with which under their own legislation he has no power to deal. The theory behind the requirement that complaints must be submitted through MPs was that the MP would act as a filter and eliminate futile cases. In fact it seems that they prefer to let complaints be rejected by the Commissioner rather than to reject them themselves. This imposes the additional burden of screening complaints upon the Commissioner's staff and is also, in part, responsible for delays in dealing with complaints.[34] In any event pressure of work now means that the Commissioner (or a deputy) can no longer give personal consideration to every report of an investigation. Straightforward reports where no novel point arises and there is no dispute over the facts are issued by senior staff.[35] And the Commissioner announced in 1998 that, in the interests of speed, some complaints would not be investigated as thoroughly as previously.[36]

Another notable statistic is the high percentage of cases where some degree of maladministration is found. To some extent this is attributable to cases which bring in numerous complaints on the same subject.[37] Nevertheless it seems fair to infer that the Commissioner's power of penetration has been growing. At the same time it should be emphasised that his investigations which discover no maladministration are by no means wasted. In explaining that the department's action was justified he may enable the aggrieved citizen to understand what the department has failed to make intelligible to him, or what he may have refused to recognise himself, and this alone helps to eliminate friction in the work of government.[38] Frequently the Commissioner justifies the civil service to the citizen, and on a broad view the civil service undoubtedly emerges with credit from its ordeal by inquisition.

Maladministration: discretionary decisions and rules

The key provision of the Act of 1967[39] is that the Commissioner may investigate action taken 'in the exercise of administrative functions' by or on behalf of any of the scheduled central government departments where

[34] See *Annual Report 1997–98*, HC 845 (1997–98), p. 7. Delays have been significantly reduced, but are still too long. In 1996 it took 87 weeks to screen and investigate but by 2003 the delay was 41 weeks and three days (*Annual Report 2002–2003*, HC 847, p. 14).

[35] HC 380 (1995–96) (Select Committee), paras. 10–13.

[36] *Annual Report 1997–98* (as above), 7–8.

[37] Note, though, that in the Barlow Clowes case the Commissioner treated the many similar complaints as a single complaint for statistical purposes.

[38] See the Health Service Commissioner's report, HC 161 (1974), paras. 35, 36; Parliamentary Commissioner's *Annual Report for 1978*, para. 49.

[39] s. 5(1).

(a) a written complaint is duly made to a member of the House of Commons by a member of the public[40] who claims to have sustained injustice in consequence of maladministration in connection with the action so taken; and

(b) the complaint is referred to the Commissioner, with the consent of the person who made it, by a member of that House with a request to conduct an investigation thereon.

Maladministration was a new term in the law, though not in the language.[41] The Act does not explain or define it, as is perhaps natural since it requires only that the complainant should *claim* that maladministration has occurred. Parliament was told that the word would cover 'bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on', and that 'it would be a long and interesting list'.[42] It is necessary, of course, that the complainant should have 'sustained injustice'; and the courts have held that the Commissioner should not report adversely unless that is so.[43] But the test of bias to found a finding of maladministration is less onerous than that required to found judicial review.[44]

Furthermore, the Act 'declares' that the Commissioner is not authorised to 'question the merits of a decision taken without maladministration by a government department or other authority in the exercise of a discretion vested in that department or authority'.[45] There is thus a distinction between a decision tainted by maladministration, which the Commissioner may question, and an unmeritorious decision, reached without maladministration, which he may not. The Commissioner's role is to identify and criticise maladministration; he does not provide an appeal on the merits against an unfavourable decision. In the past, after criticism by the Select Committee,[46] the Commissioner was willing to criticise decisions that were simply bad on their merits.[47] However, several dicta have indicated that the courts will intervene to stop a Commissioner who interferes with

[40] Not a very apt term, since it includes a corporation: s. 6(1).

[41] It has been in use at least since 1644: *OED*.

[42] 734 HC Deb. col. 51 (18 October 1966). In ombudsman circles this became known as the 'Crossman catalogue'. But clearly it is open-ended, as stated by Lord Denning MR in *R.* v. *Local Commissioner for Administration ex p. Bradford MCC* [1979] QB 287.

[43] *R.* v. *Local Commissioner for Administration ex p. Eastleigh Borough Council* [1988] QB 855. 'Injustice' includes that 'sense of outrage aroused by unfair or incompetent administration even where the complainant has suffered no actual loss': *R.* v. *Parliamentary Commissioner for Administration, ex p. Balchin* (No. 2) (2000) 2 LGLR 87. Discussed [2000] *PL* 201 (P. Giddings).

[44] *R.* v. *Local Commissioner for Local Government for North and North East England, ex p. Liverpool City Council* [2001] 1 All ER 462. This must be so since otherwise there would be a legal remedy. See below, p. 94.

[45] s. 12(3), 'drafted by the formidable pen of the Lord Chancellor himself' (Sir E. Compton, [1968] *JSPTL* at 110).

[46] HC 1967–68 No. 350, para. 14.

[47] e.g. where the Customs and Excise refused a discretionary refund of gaming licence duty 'on grounds which do not stand up to examination', the Commissioner obtained a refund of £22,500 for the complainant company (*Annual Report for 1970* HC 261, 36).

the merits in the absence of maladministration[48] and the practice of the Commissioner has changed: mere disagreement will not be the basis of criticism.[49] The distinction is drawn in the decided cases between the *manner* in which the decision is reached and implemented (which is the concern of the Commissioner) and the *merits* of the decision (which should be eschewed by the Commissioner).[50]

The manner in which a decision is reached or implemented can cover so many aspects of the decision that its merits, as a distinct concept, disappear. The Commissioner, for instance, regularly criticises the weight attached to particular circumstances in making the decision;[51] but criticism of the merits can, practically always, be presented as criticism of the weight attached to some consideration or circumstance. In New Zealand the ombudsman is expressly empowered to report on any decision which was unreasonable, unjust, based on mistake, or merely 'wrong'.[52] The Commissioner should enjoy a similar power: bad decisions are bad administration and bad administration is maladministration.

Along with the 'bad decision' goes the 'bad rule'. The Commissioner was at first unwilling to criticise departmental rules and regulations,[53] so that what was maladministration if done once apparently ceased to be so if done repeatedly under a rule. Here again the Select Committee induced him to change his mind.[54] After some initial confusion with the fallacy that statutory regulations, because they are legislative, do not involve administrative action,[55] the Select Committee concluded that statutory instruments and other statutory orders should fall within the Commissioner's field, at least as regards their effect and the action taken to review them.[56] Although the Commissioner seldom criticises non-statutory policy guidance given by ministers to decision-makers, he does criticise such procedural guidance where it is unfair.[57]

[48] *R.* v. *Local Commissioner for Administration ex p. Eastleigh Borough Council*, above.

[49] See e.g. *The Barlow Clowes Affair*, HC 1989–90. No. 76, introduction, para. 6.

[50] *R.* v. *Local Commissioner for Administration ex p. Bradford MCC* [1979] QB 287 at 311, 314, 318; *R.* v. *Local Commissioner for Administration ex p. Eastleigh Borough Council* (above), at 863. Note though that in *R.* v. *Local Commissioner for Administration ex p. Croydon LBC* [1989] 1 All ER 1033, Woolf LJ (at 1043) did not commit himself on this question.

[51] As was seen in the Barlow Clowes case (third area of maladministration), discussed below p. 97.

[52] Parliamentary Commissioner (Ombudsman) Act 1962 (NZ), s. 19. See (1971) 4 NZULR 361 (K. J. Keith).

[53] HC 6, 1967–68, para. 36.

[54] HC 350, 1967–68, para. 16; HC 9, 1968–69; HC 129, 1968–69, para. 17. For an example of criticism of a bad rule see *Annual Report for 1979*, para. 55.

[55] The Attorney-General so contended in the case of statutory instruments but not in the case of other statutory orders: see HC 385, 1968–69, para. 10.

[56] HC 385, 1968–69, para. 11, suggesting however a wider jurisdiction in the case of statutory orders other than statutory instruments.

[57] [1987] *PL* 570 (A. Mowbray).

Cases where there are legal remedies

An ombudsman is not a substitute for the ordinary courts and tribunals. Consequently the Act of 1967 provides that the Commissioner shall not investigate cases where the person aggrieved has or had a remedy in any court of law, or a right of appeal, reference or review in any statutory or prerogative tribunal.[58] But there is a significant proviso: the Commissioner may nevertheless investigate the complaint if he is satisfied that in the particular circumstances it is not reasonable to expect the remedy or right to be, or to have been, invoked. This proviso means that the line of demarcation between the Commissioner and the legal system is not a rigid one, and that much technicality and inconvenience can be eliminated by the Commissioner using his discretion. It may frequently happen that there is a possibility of a legal remedy but that the law is doubtful; in such cases the Commissioner may decide that it is not reasonable to insist on recourse to the law.[59] Where there is clearly a case for a court or tribunal, on the other hand, he will refuse to act.[60] It is not easy to tell from the Commissioner's reports how often he has made use of the proviso.[61] But it seems probable that, with or without doing so, he has investigated many cases where there would have been legal remedies.[62]

An example of a case where the Commissioner found maladministration, but the law later provided a remedy, is that of the revocation of television licences in 1975.[63] The Home Office had threatened to revoke the licences of members of the public who had taken them out before their current licences expired, in order to renew them, as they were legally entitled to do, before a large increase of fee came into force. Many complaints were made to the Commissioner and, after full investigation, he found the Home Office seriously to blame for not giving the public proper warning, for inefficiency and lack of foresight, and for insufficient frankness with the public. But he felt, illogically,[64] that he could not criticise them for acting as their lawyers had advised was legal, and he therefore refrained from

[58] s. 5(2).

[59] e.g. *Annual Report for 1968*, p. 19 (complaint against Customs and Excise investigated where legal remedy possible but doubtful). Legal proceedings need merely be appropriate rather than bound to succeed before the Commissioner may decline to investigate: *R.* v. *Commissioner for Local Administration ex p. Croydon LBC* [1989] 1 All ER 1033. See [1988] *PL* 608 (M. Jones).

[60] e.g. *Annual Report for 1968*, p. 148 (complaint of minister's dismissal of appeal against enforcement notice: right of appeal to High Court). In the Barlow Clowes case the Commissioner warned investors that he could not deal with their complaints if they brought their own legal actions (The Times, 13 July 1988). And see [1991] *PL* 408, 422 (R. Gregory and G. Drewry). *R.* v. *Commissioner for Local Administration ex parte H* [1999] ELR 314 (judicial review held an appropriate remedy, justifying a refusal to investigate by Commissioner, where maladministration continuing).

[61] Examples are given in (1971) 34 *MLR* 377 (D. Foulkes).

[62] See e.g. below, p. 981 n. 2; also HC 573 (1970–71), para. 13 (Select Committee).

[63] HC 680, 1974–75 (special report).

[64] Most acts of maladministration are legal.

asking them to reconsider their threat to revoke some 36,000 licences. But shortly afterwards the Court of Appeal held that the Home Secretary's threat to use his power of revocation for this purpose was wholly unlawful, being an abuse of a power given to him for other purposes.[65] It then became clear that the complainants had a legal remedy from the start. The Commissioner, had he known this, might not have thought fit to invoke the proviso, since the situation was eminently one for a test case in a court of law.[66]

A similar situation of great potential importance concerns the legal liability of regulators. In the Barlow Clowes case, discussed below, the government accepted the Commissioner's findings of maladministration by a government department and at great public expense paid compensation to investors who had lost money in the failed investment business. But litigation has since shown that regulators are subject to judicial review, so that there are legal remedies against them. The Commissioner could hardly make it a rule to exercise his discretionary power in all such cases, and it would seem, therefore that in future they will be excluded from his jurisdiction unless there are exceptional circumstances.

A certain overlap between the Commissioner and the legal system must be accepted as inevitable, and this, though untidy, is doubtless in the public interest.[67] The Commissioner provides a service which is free from both the expense and the uncertainty of the law. Although, unlike courts and tribunals, he has no decisive power, he has facilities for investigation and access to evidence which are not available to litigants. His probing into the television licence case revealed serious maladministration which it was salutary to bring to light. An ombudsman is a valuable adjunct to any system of administrative law, however comprehensive and efficient. In Britain he can also make good some of the system's failings, as the next section will illustrate.

Misleading statements and advice

A common form of maladministration is the giving of wrong information or advice by officials dealing with the public. The Commissioner has investigated many cases where the complainant had thus been misled and suffered loss, and in many of them he has persuaded the department to make compensation in money. This is a particularly interesting branch of his activities, since one of the defects of

[65] *Congreve* v. *Home Office* [1976] QB 629; see below, p. 362. The Home Office refunded the fees paid under threat of revocation.

[66] A similar example is the case concerning compensation for farmers whose poultry was slaughtered in the scare over salmonella enteritidis in eggs in 1989 (Fourth Report 1992–93, HC 1992–93, No. 519). The Commissioner commented that the compensation scheme was arbitrary, based on improper considerations and fell short of the government's legal obligations. Substantial additional payments were made. See also the Select Committee's view of the scheme (HC 1992–93, No. 593).

[67] See [1980] *CLJ* 304 at 320 (A. W. Bradley) for comment on this question.

the law, as will appear later,[68] is that it has failed to develop remedies for that situation. Although occasionally there may be a right of action for negligent misstatement, or under the developing doctrine of legitimate expectation, the Commissioner's policy seems once again to be to disregard any possible legal remedy.

The following are some examples of such cases. Where an official at an employment exchange wrongly told a director of a coal mine that he would not qualify for a redundancy payment, so that he did not claim one within the time allowed, the Commissioner's investigation procured a compensatory payment of £1,700.[69] Where the Customs and Excise department wrongly advised a company that its product would not be liable to purchase tax, and exaction of the tax drove the company into liquidation, the department agreed to pay £6,000 in compensation.[70] In the Barlow Clowes case, discussed below, a novel point arose. Did the misleading advice have to be given to the complainant? The Department of Trade and Industry had incorrectly advised the Barlow Clowes partnership in 1985 that they did not require a licence to carry on their business. The Commissioner found that this was maladministration notwithstanding that the misleading statement was not made to a complainant.[71] All the compensation payments were technically made ex gratia, on the assumption that there was no legal liability but that injustice and loss were suffered because of misleading official advice. It is probably a safe guess that without the Commissioner's intervention none of them would have been made.

As distinct from positive advice, a mere failure to warn may have a similar effect. Objections to many proposed orders affecting land, such as compulsory purchase orders, must be heard by a representative of the minister either at a public local inquiry or at a less formal hearing.[72] In one case a successful objector at a hearing asked for an award of costs, but the ministry had failed to warn him that costs could be awarded only after a formal inquiry. The Commissioner found maladministration and the department agreed to pay the complainant's costs on the inquiry basis.[73] In another case where the department had not given adequate publicity to the statutory time limit for claims under the Land Compensation Act 1973 the government introduced legislation to allow late claims in such circumstances.[74]

[68] Below, p. 340.

[69] *Annual Report for 1969*, HC 138, 28.

[70] *Annual Report for 1973*, HC 106, 7. For other examples, see *Annual Report for 1979*, para. 55 (misleading advice from 'jobcentre': £990 recovered); Select Cases 1981, ii. 32 (misleading advice about pension: £500 compensation paid): *Annual Report for 1986*, p. 7 (tax cases).

[71] *Barlow Clowes Affair*, para. 3.9; [1991] *PL* 192 at 428–9 (R. Gregory and G. Drewry).

[72] See below, p. 961.

[73] *Annual Report for 1974*, HC 126, 7.

[74] Local Government, Planning and Land Act 1980, s. 113.

Unjustified delay

Unjustified delay is a well recognised and common species of maladministration, either as a major or a contributory ground.[75] A husband who applied in April 1984 for entry clearance for his wife to join him in the United Kingdom had, despite many enquiries, to wait until May 1988 before it was granted. The Commissioner found that there had been unacceptable delay and the Home Office apologised and made an *ex gratia* payment of £1,000.[76] In another case, after administrative confusion between two counsel with similar names, a barrister did not receive the fees that were due to him from the Legal Aid Board. For 18 months he received no satisfactory response to his letters requesting payment and when payment was eventually made, it was sent to the wrong address. The Commissioner found that there had been serious delay. The Legal Aid Board apologised and paid interest on the main bill as well as a further £60 compensation for the fruitless correspondence.[77] And in the Barlow Clowes case, discussed below, one of the species of maladministration found by the Commissioner was a delay from early July 1987 (when the Department of Trade was alerted to the Stock Exchange's doubts about the firm) until 13 October 1987 (when a recommendation was made to the minister that the firm should be investigated).[78]

The importance of minimising delay should not be underestimated. Whether the subsequent decision is favourable to the applicant or not, the applicant will have been subjected to unnecessary frustration and stress; and small grievances will have grown into large ones.

The Barlow Clowes affair

The Parliamentary Commissioner's success in securing some £150m. compensation to those who had lost money in the Barlow Clowes affair has been his most spectacular single achievement thus far,[79] and deserves to be separately considered.

Barlow Clowes was a brokerage business selling gilt-based investments under a 'bond washing' scheme which transmuted highly taxed income into lowly taxed capital. When the tax loophole was closed in 1985, funds were diverted from the UK firm to associated firms in Gibraltar and Jersey and were put into highly speculative investments and high living for the fund managers, and interest was paid out of capital. Eventually the firms' liabilities greatly exceeded their assets and many investors lost their life savings. The Department of Trade and Industry,

[75] See [1997] *PL* 159 (McMurtrie).

[76] Selected Cases 1992, HC 1992–3, No. 11, ii. 2, 22–31.

[77] Selected Cases 1993, HC 1992–3, No. 400, i. 3, 34–6.

[78] *First Report, 1989–90, The Barlow Clowes Affair*, HC 1989–90, No. 76, paras. 6.53–6.61.

[79] *The Barlow Clowes Affair* (as above). The affair is extensively discussed in [1991] *PL* 192, 408 (R. Gregory and G. Drewry).

which was responsible for the regulation of the financial services industry,[80] was accused of having persistently disregarded evidence of serious malpractices and having known for several years that the UK firm was trading without the necessary licence, but only in late 1987 did they appoint statutory inspectors.[81] Calls for compensation from the government fell upon deaf ears.[82] But then the Parliamentary Commissioner, in response to a reference from Mr Alf Morris MP (the first of 159 MPs to refer cases to him), took up the case.

The Commissioner identified five areas in which there had been significant maladministration by the DTI.[83] First, the DTI had given erroneous advice to Barlow Clowes in 1975 that the firm did not need a DTI licence. Secondly, the DTI ought to have realised in 1984 that there was a separate Barlow Clowes partnership established in Jersey (which contradicted several of the representations made by the UK firm). This should have alerted the DTI that something untoward was happening. Thirdly, when alerted the DTI eventually decided to grant a retrospective licence in 1985; that decision had been taken 'maladministratively' in that too much regard was paid to the fact that such a licence would shield the DTI from criticism and too little to whether the grant of such a licence would be in the interests of the investors. Fourthly, the DTI, concerned that the capital of the fund was being eroded, had sought reassurances from accountants but these reassurances were too narrow to be satisfactory. Fifthly, there had been several months' delay in acting after warnings that all was not well from the Stock Exchange.

However, the important question was whether the maladministration identified had caused the losses to the investors. The Commissioner concluded that this was the case particularly in regard to the Jersey partnership. Had the significance of this been appreciated the Barlow Clowes operations would have been brought to a halt before most of the losses were incurred. Hence he recommended that compensation should be paid. The response of the government to the report is discussed below.[84]

Complaints, investigations, reports

A complaint to the Commissioner may be made by any 'member of the public'[85]—an expression wide enough to include prisoners and immigrants, two classes who

[80] Gregory and Drewry (as above), 194–96, set out the regulatory framework and the criticisms of it.

[81] Under the Financial Services Act 1986, s. 106.

[82] The independent inquiry set up by the government (the Le Quesne Inquiry) restricted itself to the facts rather than fault and the government decided that it provided no grounds for concluding that compensation should be paid (HL Deb. 500, cols. 1255–69 (20 October 1988): Gregory and Drewry (as above), 196–200.

[83] *The Barlow Clowes Affair*, paras. 3.9, 4.89, 4.99, 4.108, 6.53, 8.1 and Gregory and Drewry (as above), 206–14.

[84] Below, p. 101.

[85] Parliamentary Commissioner Act 1967, s. 5(1).

have both had success with various complaints.[86] Every complaint must be made through a member of the House of Commons, but the member need not be the complainant's own member, and a peer must likewise complain through an MP.

It has often been suggested that complainants should have direct access to the Commissioner, particularly since this is allowed in the case of the Health Service and Local Commissioners and in Scotland. The expectation that MPs would weed out ineligible complaints has not been fulfilled. Instead of rejecting every complaint made to him directly, however, the Commissioner now offers to forward suitable cases to the appropriate MP, so that the MP may then refer back to him. The Select Committee has decided that this roundabout procedure is an adequate substitute for direct access, but the Commissioner himself would prefer a uniform right of direct access to all Commissioners alike.[87]

The complainant may be an individual or a body corporate, provided it is not a local authority, public service body, nationalised industry, or a body which is appointed or financed by the government.[88] The complaint must be made by the person actually aggrieved, except that a suitable representative may make it after his death.[89] He need not be a British subject or a parliamentary elector, provided that he was resident in the United Kingdom or else present there when the impugned action was taken.[90] A British subject resident abroad may complain about consular matters, provided that he has the right of abode in the United Kingdom.[91]

The complaint must be made to the MP not later than twelve months from the day on which the person aggrieved first had notice of the matters alleged. But the Commissioner may dispense with this time limit if he considers it proper on account of special circumstances.[92]

The Commissioner has complete discretion in deciding whether to hold or pursue an investigation.[93] There is therefore no legal means of compelling him to act if he declines to do so.[94] It is also for him to determine whether a complaint is duly made.[95] But these powers do not allow him to extend his jurisdiction, e.g. by receiving complaints direct from members of the public, or by investigating authorities not permitted by the Act, or by acting on his own initiative.[96] Moreover, the Commissioner is subject to judicial review although the courts are

[86] See e.g. *Annual Reports for 1979*, HC 402, para. 35; *for 1983*, HC 322, para. 51; *for 1984*, paras. 33, 34; *for 1986*, HC 248, paras. 50, 51.

[87] *Annual Report for 1978*, para. 10; *for 1983*, para. 7.

[88] s. 6(1).

[89] s. 6(2).

[90] s. 6(4).

[91] Parliamentary Commissioner (Consular Complaints) Act 1981.

[92] s. 6(3).

[93] s. 5(5).

[94] *Re Fletcher's Application* [1970] 2 All ER 527 (leave to apply for mandamus refused).

[95] s. 5(5).

[96] He has regretted this last restriction, which does not apply elsewhere in the world: *Annual Report for 1983*, para. 8.

reluctant to intervene given the subjective nature of his discretion.[97] But, in one case, the Commissioner's failure to consider 'a potentially decisive element' in deciding that there had been no maladministration meant that that decision had to be reconsidered.[98] That reconsidered decision was also quashed for the failure of the Commissioner to give adequate reasons for not finding maladministration.[99]

An investigation must be private, and the head of the department and any other official complained of must be given an opportunity to comment. In other respects the Commissioner may determine his own procedure.[1] He will normally examine both the department's files and the officials personally. He may make contact with the complainant directly, sometimes by sending one of his staff to interview him in his home. He may call for information and documents from anyone, including ministers and officials, save only where they relate to the Cabinet.[2] For obtaining evidence he has all the compulsory powers of the High Court, including the power to administer oaths, and he can call upon the High Court to deal with obstruction or contempt.[3] No minister can veto his investigations. No plea of secrecy or Crown privilege can be put in his way,[4] for he is himself subject to the Official Secrets Acts.[5] But he can be prevented from disclosing secret information in his reports, if a minister certifies that this would be contrary to the public interest; and this may be certified for any class of documents and information generally as well as in particular cases.[6] Information obtained in the Commissioner's investigations may not be disclosed except in his reports and certain legal and consultative proceedings.[7]

Reports on investigations must be made by the Commissioner both to the Member of Parliament through whom the complaint came and also to the head of the government department and any of his officials who were complained against.[8] The Commissioner must also make a general report annually, to be laid before each House of Parliament; and he may make other reports from time to time, and in particular special reports where there has been a failure to remedy

[97] *R. v. Parliamentary Commissioner for Administration ex p. Dyer* [1994] 1 WLR 621. Cf. the Parliamentary Commissioner for Standards, below, p. 627.

[98] *R. v. Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1.

[99] *R. v. Parliamentary Commissioner for Administration, ex p. Balchin* (No. 2) (2000) 2 LGLR 87 (planning blight case; Commissioner failed to investigate the state of knowledge of officials at the time they did not draw county council's attention to alternative method of compensating owners).

[1] s. 7.

[2] s. 8(4). A certificate issued by The Secretary of State of the Cabinet with the approval of the Prime Minister is conclusive. Such a certificate was issued in the Court Line case: HC 498, 1974–75, para. 9.

[3] ss. 8, 9.

[4] s. 8(3).

[5] s. 11.

[6] s. 11(3).

[7] s. 11(2) as amended by Act of 1987, s. 4, allowing disclosure to Health Service Commissioners and vice versa.

[8] s. 10.

injustice caused by maladministration.[9] His present practice is to make quarterly reports containing selected case histories, often in full detail but always without naming complainants or officials, and to make annual reports with general comments and statistics. He has made a number of independent reports on important cases.[10] His reports are in general no less detailed and elaborate than the judgments of courts of law, and in some cases more so.

Remedies and effectiveness

The Commissioner's reports show that he has been able to remedy a great many cases of injustice where, almost certainly, no remedy would otherwise have been obtained. In general he has found that government departments are willing to pay compensation or otherwise make reasonable amends when he has exposed maladministration, though in some cases he has had to press hard for it. In 1972 the Select Committee observed with satisfaction that 'Government departments are very ready to accept the views of the Commissioner and to afford a remedy for injustice'.[11] A share of the credit is due to the Select Committee itself, which has kept up a steady pressure on the departments. Another influential factor is the department's knowledge that every case of maladministration will be reported to an MP. Even when the government does not accept the Commissioner's finding it sometimes pays compensation. In the Barlow Clowes case[12] the government did not accept the reasoning in the Commissioner's report, and published a lengthy document explaining why.[13] Nonetheless, 'in the exceptional circumstances of the case and out of respect for the office of Parliamentary Commissioner',[14] the government, while stressing that the case was not to be treated as a precedent, paid out £150m. Doubtless the political pressure from the many MPs with constituents who had lost money in the scandal fortified the government's respect for the Commissioner. These results seem to justify the verdict that the Commissioner 'has been remarkably effective'.[15] A notable improvement in administrative justice has been achieved.

In addition, a number of general reforms have resulted from the exposure of bad

[9] s. 10(3). For the occasion of the first such special report see *Annual Report for 1978*, para. 56.

[10] War Pensions (HC 587, 1970–71); Television Licences (above, p. 97); Barlow Clowes (above, p. 97).

[11] HC 334 (1971–72), para. 33.

[12] HC 1989–90, No. 76, discussed above.

[13] *Observations of the Government on the Report of the Parliamentary Commissioner for Administration* (HC 1989–90, No. 99); for discussion see [1991] *PL* 408 (R. Gregory and G. Drewry).

[14] HC Deb. 164, cols. 201–11 (19 December 1989; statement by Mr Nicholas Ridley MP).

[15] Wheare, *Maladministration and its Remedies*, 125.

practices, as the Commissioner now reports annually.[16] As the result of a special report criticising the Department of Health and Social Security for not duly back-dating an officer's disability pension, some £12,000 was paid out in over forty other cases and over thirty were reviewed.[17] A class of war pensioners was compensated after investigation of an exceptionally bad case where the Commissioner found that disabled officers had been deliberately and deceitfully refused part of their entitlement.[18] After this the Civil Service Department undertook a wide review of practices which might infringe the rights of individuals.[19] Where the Department of Transport's car-licensing reminder forms misled licensees into overpayment of licence duty and three complaints were upheld, the Department arranged for small refunds in over 100,000 similar cases at a cost of over £1 m.[20] The Commissioner has played a prominent part in drawing attention to the administrative standards of the Child Support Agency. A sorry catalogue of error, delay and incompetence has been revealed by his special reports on the topic[21] and his Annual Report keeps track of whether promised improvements have been implemented.[22] CSA cases continue to generate a disproportionate amount of the Commissioner's work and from 1994 to 1997 the Commissioner felt unable to investigate CSA cases fully unless a novel point arose.[23] Sufficient progress has now been made, through the success of informal enquiries and the appointment of a CSA independent case examiner, for the Commissioner to revert to his old criteria in deciding whether to investigate.[24] The shortcomings of the CSA range from simple delay in dealing with cases (often coupled with failure to reply to letters) to dangerous errors (informing a violent ex-spouse of wife's current address). In this intimate and personal area many errors can cause serious harm, e.g. an erroneous allegation that a partner is the parent of a child by someone else. As all the reports make plain, there remains ample scope for the CSA to improve although it is now more ready to make amends.[25]

The Commissioner has not always had success, and from time to time he has reported that a department has refused to make amends.[26] Most of the cases

[16] A first list was given in his annual report for 1972 (HC 72), para. 19.

[17] HC 587 (1970–71) (special report); HC 334 (1971–72), para. 28 (Select Committee). And see *Annual Report for 1974*, HC 126, para. 20; *for 1975*, HC 141, para. 28; HC 454 (1974–75), para. 28 (Select Committee).

[18] HC 312 (1977–78).

[19] *Annual Report for 1979*, para. 14.

[20] HC 247 (1978–79).

[21] HC 135 (1994–95), HC 20 (1995–96).

[22] See, for instance, *Annual Report 1995*, HC 296 (1995–96), 3–4; *Annual Report 1996*, HC 386 (1996–97), 2 and *Annual Report 1997–98*, HC 845 (1997–98), ch. 3.

[23] *Annual Report 1997–98*, 19.

[24] Ibid.

[25] Ibid., 23–5.

[26] See e.g. *Annual Report for 1974* HC 126, paras. 25, 35; *for 1978*, HC 205, para. 56. Even where arrears of tax have accumulated through the department's own fault the department has refused to make amends and it has refused to pay interest on overdue refunds (HC 334 (1971–72), para. 20). But some administrative reform has been achieved (HC 454 (1974–75), para. 1).

concern the Inland Revenue and Customs and Excise, since in the sphere of taxation the administrative mind is particularly stubborn.

Difficulty has also been experienced in securing redress for the injustice caused by the widespread 'blight' that affected many properties in Kent through the uncertainty extending over many years of the route of the Channel Tunnel Rail Link. The existing compensation schemes did not apply to many affected and the Commissioner[27] (and the Select Committee)[28] concluded that the Department of Transport had been guilty of maladministration in failing to consider the effect of their policy (which had generated the uncertainty); the DOT had a responsibility to consider whether some redress should be made available to those severely affected. The government's initial response was that there could be no compensation for 'generalised blight' but they agreed to reconsider the issue.[29] Eventually a compensation scheme was announced in 1996 which was improved upon by the incoming government in 1997 and has now been implemented. Once more the Commissioner and the Select Committee have seen their recommendations substantially implemented.

Although the head of the Inland Revenue testified that the Commissioner's investigations were 'gradually sapping morale and having a very bad effect indeed', the Select Committee found that they were not causing as much dislocation as had been feared.[30] In the long run the Commissioner should prove to be an ally of the civil service, since so many of his reports justify the department rather than the complainant. But even where they do not, the reports generally lead to improvements. Moreover, on the recommendation of the Select Committee a booklet *The Ombudsman in Your Files* has been prepared by the Cabinet Office and circulated through the civil service. It contains much useful advice which will ensure less maladministration and fewer complaints to the Commissioner.

Relations with the Council on Tribunals

The Commissioner is an ex officio member of the Council on Tribunals,[31] a body whose duties are explained elsewhere.[32] When he took office it was stated officially that he would not pursue issues covered by the Council on Tribunals, which handled complaints about administrative procedures involving statutory inquiries, such as planning appeals and compulsory purchase procedures.[33] But the Commissioner has not adhered to this plan. He has investigated and reported on a great

[27] HC 193 (1994–95); [1996] *PL* 31 (R. James and D. Longley).
[28] HC 270 (1994–95).
[29] HC 819 (1994–95).
[30] HC 334 (1971–72), para. 13 (the quotation is from p. 37).
[31] Parliamentary Commissioner Act 1967, s. 1(5).
[32] Below, p. 921.
[33] Cmnd. 2767 (1965), para. 8 (White Paper).

many matters which are squarely within the concerns of the Council on Tribunals, such as delays in planning appeals and the award of costs to successful objectors at inquiries.[34] These cases are so common that there is now a wide overlap between the Commissioner and the Council.

In fact the present position appears to be better than the original plan for exclusive spheres of operation. In probing the workings of government departments the Commissioner is strong and the Council is weak. The Council has none of the Commissioner's investigatory powers and it has not the facilities for handling numerous complaints; nor, most important of all, has it a committee of Parliament to back up its recommendations.[35] The Commissioner is therefore more likely to obtain satisfaction for the complainant, if his complaint is justified, and this matters more than a neat separation of functions.

The Health Service Commissioners

When the national health service was brought wholly under the central government by the National Health Service Reorganisation Act 1973, there was no longer any reason for excluding it from the system for investigating complaints. But separate provision was made in that Act which, while generally on the model of the Parliamentary Commissioner Act 1967, contained some important differences. The legislation was consolidated in the Health Service Commissioners Act 1993.[36]

The Act of 1973 constituted the new and separate offices of Health Service Commissioner for England and Health Service Commissioner for Wales. For Scotland there was separate but similar legislation.[37] In fact the practice was to appoint the Parliamentary Commissioner for Administration to all three of the new health service offices (for England, Wales and Scotland), so that there was a single administration for health service complaints along with others. In law, however, his functions were distinct, and he made separate reports on health service complaints in his capacity as Health Service Commissioner for all three countries.[38] In Scotland, however, these functions now belong to the Scottish Public Services Ombudsman under legislation of the Scottish Parliament.[39]

[34] e.g. HC 2 (1974), 22 (ministry's policy, based on Council on Tribunals' recommendations, wrongly applied; ex gratia payment of successful appellant's costs in planning appeal). Among many other examples are *Annual Report for 1974*, HC 126, 7; HC 334 (1972) para. 34; HC 454 (1975), para. 41 (delays in planning appeals); HC 529 (1974–75), 38, 41, 43, 49, 53, 55.

[35] See below, p. 925.

[36] As amended by the Health Service Commissioners (Amendment) Acts 1996 and 2000 (allowing investigation of GPs since retired). For discussion see [1999] *PL* 200 (P. Giddings).

[37] National Health Service (Scotland) Act 1972.

[38] But for Wales he has now been placed on a separate statutory basis (with reporting responsibilities to the Welsh Assembly) (Government of Wales Act 1998, s. 112, 10th sched.). Changes in Scotland are to be expected. See below, p. 136.

[39] Scottish Public Services Ombudsman Act 2002 asp 11.

The powers of holding investigations and making reports conferred upon the Health Service Commissioner are in general the same as those of the Parliamentary Commissioner. His reports on investigations must be sent to the complainant, any MP who assisted in making the complaint, the person complained of and the health service bodies involved.[40] His annual and special reports are made to Parliament.[41] The same Select Committee of the House of Commons examines the work of the Commissioner in all his various capacities. However, the complainant has direct access to the Commissioner and need not make his complaint through an MP.[42] Furthermore, a relative or other suitable person may complain on behalf of a person who has died or is unable to act for himself,[43] and a health service authority may itself refer to the Commissioner a complaint made to it about some matter within its own responsibility, so as to obtain an independent investigation.[44]

A number of matters are excluded from the Commissioner's powers of investigation.[45] These are the following.

Employment, pay, discipline or other personnel matters.
Contractual or commercial transactions, except when made for providing services for patients.
Matters subject to inquiry under the Act.[46]

There is also a saving clause to exclude cases where there is a legal remedy, subject to the same power to make exceptions as under the Parliamentary Commissioner Act 1967.[47] Subject to these limitations, the Commissioner may investigate any failure in the services provided by the various health service authorities listed in the Act, or any other action taken by them or on their behalf.[48] The complaint must allege 'injustice or hardship in consequence of a failure in a service provided by a health service body . . . or in consequence of maladministration connected with any other action taken by . . . such a body'.[49]

The Health Service Commissioner's reports follow much the same pattern as the Parliamentary Commissioner's. Generally speaking the results are similar. In the

[40] s. 14(1). If the health service body concerned is not a district health authority then a report goes to the Secretary of State; if it is, the report goes to the regional health authority (s. 1(e), (f)).
[41] s. 10(4) of the Act of 1996. Prior to this amendment these reports went to the Secretary of State who laid them before both Houses of Parliament.
[42] s. 9.
[43] s. 9(3).
[44] s. 10.
[45] s. 7. Previously, questions of 'clinical judgment' and actions taken by doctors, dentists and others which were the responsibility of family health service authorities were excluded. The Act of 1996, ss. 1, 2 and 6, removed these restrictions.
[46] i.e. where an inquiry is held under s. 84 of the Act of 1977.
[47] s. 4.
[48] ss. 2, 3(i)(b).
[49] s. 3(i).

year 1997–98 he received 2,660 complaints of which 1,990 were rejected directly[50] and a further 348 cases were rejected with advice to the relevant NHS body or agreement by it to take remedial action. Only 4 per cent of complaints were fully investigated and over 90 per cent of these are upheld in whole or in part.[51] The largest groups of complaints concerned nurses, medical staff and the handling of complaints by health authorities. In many such cases the complaint is of inconsiderate or rude behaviour, and an adequate remedy is an apology. The health service appears to generate a large volume of complaints about matters which are difficult to remedy, such as long waiting lists, postponement of operations, and inadequate nursing care.

Every health authority is required to ensure that all its hospitals have a regular complaints procedure in accordance with directions given by the Secretary of State, but no right of appeal or review conferred by that procedure can prevent an investigation by the Health Service Commissioner.[52]

Northern Ireland

In Northern Ireland the Parliamentary Commissioner for Administration deals in the normal way with complaints about action for which the United Kingdom government is responsible.[53] For complaints against the devolved government of Northern Ireland there is an Assembly Ombudsman (taking the place of the Parliamentary Commissioner for Northern Ireland who exists when there is no Northern Ireland Assembly).[54] In addition, an ombudsman system covering local authorities and other public bodies was introduced by the Commissioner for Complaints Act (Northern Ireland) 1969.[55] Northern Ireland thus enjoys the services of three ombudsmen with mutually exclusive jurisdictions.

Since 1973, however, the two Northern Ireland offices, i.e. that of Commissioner for Complaints and Assembly Ombudsman, have been held by the same Commissioner. Complaints to him as Assembly Ombudsman must be made through Assembly Members. As Commissioner for Complaints he may receive complaints direct. Unlike the UK Commissioner he may deal with personnel matters in both capacities, and as Commissioner for Complaints he may deal also with commercial and contractual matters.

One unusual provision is to be noticed in the Commissioner for Complaints Act of 1969. On a finding by the Commissioner of injustice caused by maladministra-

[50] Mostly because the internal complaints procedure was not exhausted or insufficient evidence of maladministration was provided.
[51] *Annual Report 1997–98*, HC 811 (1997–98).
[52] Hospital Complaints Procedure Act 1985.
[53] Parliamentary Commissioner Act 1967, s. 13.
[54] See SI No. 1996/1298 (NI8).
[55] See [1972] *PL* 131 (K. P. Poole).

tion, the person aggrieved may apply to the county court, which may award him such damages as it thinks just, or grant a mandatory or other injunction giving him specific relief; and where persistent maladministration seems likely, the Attorney-General may apply to the High Court for an injunction or other suitable order. Little use appears to have been made of this remedy.[56] Since ombudsmen normally work entirely by persuasion, backed with the force of publicity and parliamentary criticism, it is interesting to note this instance of the harnessing of legal remedies to the Commissioner's investigations. There have been calls for the extension of this remedy.[57]

Spread of the ombudsman principle

One of the many proofs of the success of the ombudsman principle is its continual extension into new areas. Having been instituted in Britain for the central government, it has now been extended to the national health service and local government. Every year there are new extensions of the principle in other countries. Few indeed are the constitutional innovations for which such widespread success can be claimed.

The principle has spread outside the sphere of government into that of business and finance. Voluntary ombudsman systems have been established successfully in the insurance and banking industries. Building Societies are obliged by statute to join a recognised scheme for the investigation of complaints by an adjudicator.[58] There is a Financial Services Ombudsman with a wide jurisdiction over persons 'authorised' to provide regulated financial services.[59] The professional conduct of licensed conveyancers is policed by a Conveyancing Ombudsman.[60] A Legal Services Ombudsman ensures that the professional bodies that exercise disciplinary functions over the various forms of legal professional established by the Courts and Legal Services Act 1990 deal with complaints about misconduct properly.[61]

[56] Recent reports of the Commissioner for Complaints do not refer to this remedy expressly, but in 1973 the county court awarded substantial damages in two cases of maladministration: Northern Ireland Commissioner for Complaints, *Annual Report for 1973* (Assembly paper 9, 1974), para. 14.

[57] [1988] *PL* 608, 621 (M. Jones).

[58] Building Societies Act 1986, ss. 83–84, making decisions binding but subject to appeal to the High Court on a question of law. 'Maladministration' has a different meaning in this non-governmental context and includes the exercise of professional judgment: *Halifax Building Society* v. *Edell* [1992] Ch. 436 (negligent valuation of property by society's employee was maladministration).

[59] Financial Services and Markets Act 2000, Pt. XVI and 17th sched. For 'authorised persons' see p. 151, below. There is both a compulsory and a voluntary jurisdiction; and the Ombudsman has power to make enforceable awards in the former case. See [2001] *PL* 308 (R. Nobles); [2002] *PL* 640 (R. James and P. Morris).

[60] Courts and Legal Services Act 1990, s. 43 and 7th sched.

[61] s. 22 and 3rd sched.

Prisoners have recourse to a non-statutory Independent Complaints Adjudicator.[62] There is an independent Housing Ombudsman.[63]

The so-called Pensions Ombudsman, who has power to determine as well as to investigate complaints of maladministration in occupational or personal pension schemes, is in reality a statutory tribunal and belongs to a later chapter. His awards are legally enforceable and are subject to a right of appeal to the High Court on a point of law.[64]

[62] See [1993] *PL* 314, 323–26 (R. Morgan). He is often referred to as the 'Prisons Ombudsman' but the Select Committee considers this title 'most inappropriate' since he is not wholly independent and a disatisfied complainant has further recourse to the Parliamentary Ombudsman (HC 380 (1995–96), para. 61). But the government has declined to change the name (HC 367 (1996–97)).

[63] Housing Act 1996, s. 51 and 2nd sched.

[64] Social Security Act 1990, s. 12 and sched. 3. Consequently he appears in the Table of Tribunals, below, p. 956.

4

LOCAL AND DEVOLVED GOVERNMENT

LOCAL ADMINISTRATION

Local authorities are organised in a hierarchy of geographical units by counties, districts and parishes, with special arrangements for London.[1] Nearly all local authorities are directly elected by the inhabitants of their areas, but there are also certain bodies such as joint fire service authorities which cut across county and district boundaries and have constitutions of their own. All local authorities work in more or less close conjunction with the central government, and they generally enjoy less autonomy than the bare legal framework would suggest. The social services and controls which in the aggregate make up the welfare state are administered partly centrally and partly locally. National insurance, income support, and the national health service are the province of the central government, whereas housing, public health and sanitation, welfare services for the handicapped, provision of accommodation for those in need, and the care of children are entrusted to local authorities. The provision of schools is another local responsibility, though subject to detailed central control. An efficient working partnership between central and local governments is therefore essential. In law, however, local authorities have their own independent existence and their own legal duties and liabilities. They are not part of the services of the Crown and they have no special privileges or immunities at common law.

[1] The primary sources for local government law in England and Wales are the Local Government Acts 1972 and 1974 and the Local Government Finance Act 1988; but there are many other less important statutes. Considerable discussion of the law is found in the Report of the Royal Commission on Local Government in England, 1969, Cmnd. 4040, and the Report of the Committee on the Management of Local Government, 1967. Sir John Maud was chairman of both the Commission and the Committee. Other important reports are those of the Layfield Committee (Local Government Finance, 1976, Cmnd. 6453) and the Widdicombe Committee (Conduct of Local Authority Business, 1986, Cmnd. 9797 with 4 volumes of research papers, Cmnd. 9798–801). The government's plans for reform are in *Modern Local Government: In Touch with the People*, Cm. 4014 (1998). General works are *Cross, Local Government Law*, 9th edn. (1996) by Bailey; *Cross on Principles of Local Government Law*, 2nd edn. (1997) by Bailey; Loughlin, *Local Government in the Modern State* (1986). For history see Holdsworth, *History of English Law*, x. 126; xiv. 204; Redlich and Hirst, *Local Government in England*.

Historical background

From the late fifteenth century onwards local government was in the hands of the justices of the peace, who replaced the obsolete medieval system of county and hundred courts supervised by the sheriff.[2] There were also commissioners created by statute for special purposes, such as the commissioners of sewers, empowered to make land drainage schemes, build sea-walls and levy rates, and there were the commissioners of customs created by the royal prerogative.

In the Tudor period the justices were given many new statutory powers which they exercised in their quarter sessions along with their judicial powers. They controlled the upkeep of roads and bridges, the licensing of alehouses, the poor law, the building of gaols, the levying of rates and so many other matters that they were in effect general purpose local authorities. Originally they were under the control of the Crown through the Council and the Star Chamber, but after the Revolution of 1688 they were free from political control. Then began the golden age of the justices, 'the uncrowned kings of every county', who could be called to account only by cumbersome legal process through the Court of King's Bench and the writs of certiorari, prohibition and mandamus. They governed 'in a spirit of autocratic dilettantism'[3] under a 'rule of law' of almost theoretical perfection.

The reign of the county justices did not really close until the Local Government Act 1888. But long before that there had been a proliferation of statutory authorities such as the Poor Law Commissioners (1834), highway boards, boards of health, burial boards and so forth, creating a dense governmental jungle. Remnants of the justices' powers can still be seen in their representation on police authorities and in their liquor licensing functions.

In addition there were the boroughs. Boroughs were corporations created by royal charter obtained (and commonly purchased) from the Crown. For a sufficient sum they could obtain grants of commercial and jurisdictional privileges, and representation in Parliament; and having corporate personality they could accumulate and administer their own property. A privilege which they often obtained was the power to elect their own magistrates, thus escaping from the rule of the county justices. From the Glorious Revolution to the early nineteenth century, the boroughs were left in peace much as the county justices were, remaining for a century and a half in a state of stagnation commonly accompanied by corruption. Reform finally arrived with the Municipal Corporations Act 1835, which created town councils in a large number of specified boroughs, with an extended franchise similar to that introduced for Parliament by the Reform Act 1832. The Act put an end to the election of borough justices, thus recognising the objections to an elective judiciary. Reform was completed by the

[2] Holdsworth, *History of English Law*, iv. 134.
[3] Redlich and Hirst, *History of Local Government*, i. 102.

Municipal Corporations Acts 1882 and 1883 and by the Local Government Act 1888.

Before this last Act there was only one municipal corporation in London: the ancient City, a corporation by prescription, confined within its own small enclave and with its medieval guild-based constitution untouched by the reforming statutes. The chief executive body, the Court of Common Council, acquired in 1888 the functions of a London borough council. The remainder of London, a vastly greater area, was administered by a medley of authorities, ultimately replaced by the London County Council and the London Borough Councils under the Local Government Act 1886 and the London Government Act 1899 respectively.

The genesis of the modern system

The watershed between the old and the new systems of local government may be said to be the two Local Government Acts of 1888 and 1894. These Acts carried forward the policy of entrusting administrative functions to elected 'general purpose' authorities; and they established the 'two-tier' system which is still the basis of much local government organisation today. The Act of 1888 established an elected county council for each county and transferred to it the administrative powers of the justices in quarter sessions. But the large cities[4] were made separate county boroughs. The Act of 1894 divided the counties, but not the county boroughs, into urban and rural districts and for each it established an elected urban or rural district council except where the district was a borough and already had a borough council. In the rural districts the Act of 1894 also instituted parish meetings and, for the larger parishes, parish councils; but the parish councils were given so little revenue that they could not make much contribution. The general scheme, therefore, was that powers were divided between the counties and the districts, except in the county boroughs where they were concentrated in a single authority. A greatly simplified structure of authorities thus emerged, keeping pace also with the extension of democracy. At the same time a framework of authorities had been created which could be used for the taking on of new tasks, for instance, housing and town planning. The law was consolidated and codified in a massive statute, the Local Government Act 1933, which stood as the basic enactment until the Local Government Act 1972.

The Local Government Act 1972

The new regime of local authorities was established by the Local Government Act 1972. This Act not only provided for the new system of areas and authorities: it replaced the massive Act of 1933 which contained the general law regulating local

[4] 'City' has no legal meaning distinct from 'borough'. Some boroughs traditionally claim the title of city and others have obtained it by royal letters patent. It has no significance except as a title of honour, like 'lord mayor'. See Local Government Act 1972, s. 245(10).

authorities' elections, proceedings, powers, functions, and finance. It is an equally massive Act, with thirty schedules. It is further supplemented by the Local Government Act 1974, dealing mainly with finance, rating, and the new machinery for complaints against local authorities.[5] Financial matters are dealt with in the Local Government Finance Act 1988. A feature of the scheme was the disappearance of the single-tier county borough. The former county boroughs have been merged in the new districts, so that they are now second-tier authorities. This means that they have lost their responsibilities for education (except in the metropolitan areas), social services, highways, traffic, and (subject to amalgamation schemes) the fire service and police.

Boroughs were abolished by the Act of 1972,[6] but the Act also contained a detailed plan for preserving borough titles, ceremonials, privileges and property, together with the rights of freemen of boroughs, since these were often a stimulus to local spirit. A new district council might petition the Crown for a charter conferring 'the status of a borough', entitling it to appoint 'officers of dignity' and preserving other privileges.[7]

Scotland does not come within the Act of 1972.[8]

In England the Act established six metropolitan counties, divided into thirty-six metropolitan districts, and thirty-nine non-metropolitan counties divided into 296 districts.[9] In Wales it established eight counties (non-metropolitan) divided into thirty-seven districts. The metropolitan counties, however, were abolished in 1986. The districts within them are defined by the Act of 1972. The non-metropolitan counties are fewer and larger than the old counties. The districts within the English counties are defined only by order.[10] Those in the Welsh counties are defined in the Act.[11]

The former English rural parishes continue to exist as parishes.[12] Wales has a new system of 'communities' covering the whole country.[13] Parish councils have limited powers for the purpose of facilitating the convenience and safety of everyday life in their areas.[14]

[5] See below, p. 125 for an account of this machinery (the Local Government Commissioners for Administration).

[6] s. 1(9)–(11).

[7] ss. 245, 246. Special arrangements were made for appointing 'officers of dignity' where the former borough became a mere parish (s. 246(3)).

[8] Scotland is divided into thirty-two single tier authorities: Local Government (Scotland) Act 1994.

[9] 1st sched. In terms of population (1971 figures) the largest metropolitan county was Greater Manchester with 2.7 m. and ten districts, the smallest was Tyne and Wear with 1.2 m. and five districts; of the non-metropolitan counties the largest was Kent with 1.4 m., the smallest was Isle of Wight with 109,000.

[10] SI 1972 No. 2039.

[11] Act of 1972, 4th sched., Pt. II.

[12] Act of 1972, s. 1(6).

[13] Act of 1972, s. 20(4).

[14] See the table on p. 122. Their powers have been extended by the Local Government and Rating Act 1997, Pt. II.

Extension of unitary authorities

Since 1992 further reform has taken place as policy shifted away from two-tier government in the non-metropolitan counties and towards powerful unitary authorities combining the functions of district and county councils. A Local Government Commission for England[15] was established by the Local Government Act 1992 with power to recommend 'the replacement . . . of the two principal tiers of local government with a single tier'[16] in non-metropolitan areas. Guidance given by the Secretary of State and which the Commission must take into account in conducting reviews favours the adoption of such single tier, or unitary authorities.[17] Once the Commission has made a recommendation the Secretary of State may, 'if he thinks fit' implement it by order.[18] Thus some of the unpopular counties (Avon, Humberside and Cleveland) created by the 1972 reorganisation have been abolished and their constituent parts have become unitary authorities. Many large urban areas (such as Peterborough, York and Milton Keynes) have been carved out of the counties of which they used to form part and established as unitary authorities.

London government

The overhaul of local government in London took place under the London Government Act 1963. The Act replaced the London County Council, created in 1888,[19] and the metropolitan borough councils, created in 1899,[20] by the Greater London Council and thirty-two London borough councils,[21] taking in a much larger area. The City of London, with its ancient constitution intact, forms in effect an additional London borough. London therefore continued under a two-tier system, the London boroughs corresponding generally to the metropolitan districts elsewhere,,until the abolition of the Greater London Council in 1986.

[15] The 1992 Act abolishes the Local Government Boundary Commission for England established under the 1972 Act. But the Boundary Commission for Wales remains (although amended by the Local Government (Wales) Act 1994). Unitary authorities have been established throughout Wales so there is no need for a Commission to recommend on structural change.

[16] s. 14(1)(a).

[17] s. 13(6). Guidance to the effect that the survival of two-tier local government would be the 'exception' was held unlawful in *R. v. Secretary of State for the Environment ex p. Lancashire County Council* [1994] 4 All ER 165 but revised guidance that still made clear that the Secretary of State's preference was for unitary authorities was upheld in *R. v. Secretary of State for the Environment ex p. Lancashire County Council* (1996) 160 *LG Rev* 442.

[18] s. 17. A recommendation may be implemented with or without modifications (s. 17(1)).

[19] Local Government Act 1888.

[20] London Government Act 1899.

[21] The GLC was incorporated but the London borough councils are not: the corporation was the whole body of burgesses, i.e. electors: London Government Act 1963, s. 1(2), (3).

London was reduced to a one-tier system by the Local Government Act 1985. The Inner London Education Authority was reconstituted as a directly elected authority and made subject to guidance from the Secretary of State, along with a further redistribution of functions. Two-tier government, however, was re-established in London in 1999. The people of London approved in a referendum[22] the new government's plans for a Greater London Authority consisting of a directly elected mayor and a separately elected London Assembly. There are twenty-five members of the assembly. Fourteen are elected from 'assembly constituencies' and eleven from London as a whole.[23] The mayor and assembly are elected on the same day every fourth year.[24]

The Authority's purpose is to promote economic and social development and to improve the environment in London; it has power 'to do anything which the Mayor considers will further [this] purpose'.[25] But the Authority may not incur expenditure in regard to housing, education, social services or health services where the London borough councils or other public bodies are competent to act.[26] The major areas in which the Authority may act include transport strategy, development, municipal waste, air quality, ambient noise and culture. In these areas the mayor, after consultation, will develop and implement strategies.[27] The Assembly reviews the mayor's excercise of his powers,[28] and the authority raises money by issuing a precept.[29]

Allocation of functions

The principal functions of local government are parcelled out among the main authorities by a long series of provisions of the Act of 1972, which where necessary adapt the empowering enactments to the new hierarchy of authorities.[30] Only in the case of the former rural parishes was no reallocation required; their functions are inherited directly by the successor parishes in England and by the communities in Wales.[31]

Subject to a certain amount of overlap, and subject also to special arrangements flowing from the extensive powers of cooperation and delegation given by the Act,

[22] Held in terms of the Greater London (Referendum) Act 1998.

[23] Greater London Authority Act 1999, s. 2.

[24] s. 3(3).

[25] s. 27(1).

[26] s. 27(5). And money may not be raised as incidental to the authority's functions (s. 28(2)).

[27] s. 33(1). But generally the mayor can only exercise a function jointly with the assembly (s. 29(2)).

[28] s. 49(1).

[29] s. 67 and Pt. III, generally.

[30] Pt. IX.

[31] See s. 179(4).

riding establishments, dogs, and dealers in game. There is also a mass of local legislation which in particular places may apply to food vendors, hairdressers, pet shops, market porters and other occupations. In some cases the Act will require a licence, in others it will require registration; but since either may be refused, the effect is the same. In some cases fire certificates must be obtained from the local authority. After the abolition of the metropolitan county councils three joint authorities, consisting of members of the district councils, were constituted in each metropolitan county to administer the police, the fire service and civil defence, and passenger transport.

Operations and proceedings

Despite its power to make byelaws, mentioned below, a council is an executive rather than a legislative body. It exercises its powers directly in its own name, taking decisions by majority vote of those present at a meeting of the council.[36] But among these powers is a very extensive power of delegation, so that the council need not decide everything itself. Under the Act of 1972 a local authority may 'arrange for the discharge of any of their functions' by a committee, a sub-committee or an officer of the authority, or by any other local authority.[37] This is a wider power than had been given by the Local Government Act 1933, which permitted delegation to committees only.[38] The policy of the Act of 1972 is to give councils greater freedom to organise their business in the most efficient way,[39] though naturally committees[40] are still used a great deal. The Act also reduced the number of cases where the council was required to act through specified committees, and where therefore it was not free to delegate otherwise. The most notable of the surviving exceptions are education committees and social services committees;[41] and only the authority itself may set the council tax or borrow money.[42] There are also wide powers for authorities to collaborate and to set up joint committees.[43] The legal aspects of delegation of power are discussed elsewhere.[44]

The public, including the press, have a right to attend meetings of local authorities and also meetings of their committees and sub-committees. In addition they are entitled to inspect agenda, minutes, reports, background papers and other

[36] Act of 1972, 12th sched., para. 39.

[37] s. 101.

[38] s. 85.

[39] As recommended by the Committee on the Management of Local Government, 1967, HMSO (chairman, Sir John Maud), and in The New Local Authorities: Management and Structure, 1972, HMSO (chairman, M. A. Bains).

[40] 'Committee' in this context means a body of more than one person: *R.* v. *Secretary of State for the Environment ex p. Hillingdon LBC* [1986] 1 WLR 192, affirmed [1986] 1 WLR 807.

[41] s. 101(8), (9), (7).

[42] s. 101(6).

[43] s. 101(5).

[44] Below, p. 311.

Allocation of functions in non-metropolitan areas

County council	District council	Parish or community council or meeting
Education	Housing	Footpaths
Town and country planning and development (S)	Town and country planning and development (S)	Allotments
Social services (S)	Public health and sanitary services	Bus shelters
Food and drugs (S)	Food and drugs (S)	Recreation grounds
Roads (mostly)	Minor urban roads	Village greens
Refuse disposal	Refuse collection	Burial grounds
Libraries	Entertainments	Parking places for motor cycles and bicycles
Highways	Recreation (S)	Car-sharing schemes
Traffic	Coast protection	Grants for bus services
Public transport	Local licensing	Taxi fare concessions
Recreation (S)		Traffic calming
Fire service		Crime prevention

S = shared or divided service.

the allocation of the most important functions in non-metropolitan areas is as shown in the table.[32]

'Town and country planning and development' includes the making of plans, the control of development and other functions under the Town and Country Planning Act 1990. 'Housing' includes slum clearance. 'Social services' includes old people's and children's homes, welfare services for children, old people, the blind, the physically handicapped, and the chronically sick and disabled, and supplying temporary accommodation for those in urgent need.[33] An important power of county and district councils is that of compulsory purchase of land, which is available, subject to ministerial approval, in conjunction with their other functions such as town development, slum clearance, housing, public buildings and works, coast protection schemes;[34] there are scores of statutes conferring this power.

Licensing powers are numerous and miscellaneous.[35] Among many other matters district councils license theatres, cinemas, pawnbrokers, moneylenders,

[32] For a fuller catalogue see Department of Environment circular 121/72, annexe A (printed in (1972) 70(2) LGR 1348). Many local authorities have additional powers under local Acts of Parliament.

[33] See Local Authority Social Services Act 1970, 1st sched., listing the numerous local authority social services. These range from the provision of homes to the supply of 'meals on wheels' and laundry facilities. Those listed under the National Health Service Act 1946 have since been transferred to the Secretary of State.

[34] Made under the Coast Protection Act 1949; see *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755 (below, p. 410).

[35] On licensing see Hart, *Local Government*, 9th edn., ch. 28; Street, *Justice in the Welfare State*, ch. 4. The Local Government (Miscellaneous Provisions) Act 1982 gave new powers over public entertainments, sex establishments, street trading, take-away food shops, acupuncture, tattooing and other things and the Public Entertainments Licences (Drug Misuse) Act 1997 gave power to revoke or refuse to renew entertainment licences after receiving a report from the Chief Constable regarding the supply or use of controlled drugs at or near the premises.

documents.[45] These rights are restricted where the business involves confidential information of certain kinds, such as information made confidential by government departments or by law, and personal information about employees, tenants, and children in care; negotiations about contracts, labour relations, and legal proceedings are also protected, among other matters. The authorities concerned include police and fire authorities and various other joint boards and committees.

There are criminal penalties for members of local authorities who take part in business in which they have a pecuniary interest.[46] Thus a tenant of a council house was held to be disqualified from debating the council's charges to its tenants.[47] But the Secretary of State has a dispensing power where the number of members disqualified is inconveniently large or dispensation is in the interests of the inhabitants.[48] The effect of interest or bias on the validity of an authority's decision is explained in Chapter 13.

Finance: revenue

The problems of the finance of local government are intensely political as well as economic. The political problems are centred round the fact that the revenue which local authorities can provide for themselves is quite unequal to their vastly extended functions. Consequently they depend upon central government grants, and inevitably the grants are subject to conditions. Local independence is therefore undermined by central control, to the point where some local authority services might rather be regarded as agency services for the central government, and confusion arises over where responsibility and initiative really reside. Political tension is all the greater when the central government and local authorities are controlled by opposed political parties.

The revenue which local authorities raise for themselves consists partly of miscellaneous receipts such as rents, fees and charges for services. But, in addition, local authorities have long had limited powers of taxation. Those powers, however, were in a state of flux and the subject of acute political controversy[49] for many years prior to 1992. The ancient, and much criticised, rates,[50] levied on the assessed annual value of the occupation of land and buildings, were replaced in 1988 by the

[45] Public Bodies (Admission to Meetings) Act 1960, as extended by Local Government Act 1972, s. 100 and Local Government (Access to Information) Act 1985. This is elaborate legislation. See also Health Service Joint Consultative Committees (Access to Information) Act 1986.

[46] Act of 1972, s. 94.

[47] *Brown* v. *Director of Public Prosecutions* [1956] 2 QB 369.

[48] s. 97.

[49] That frequently spilt over into the courts; see below, p. 122.

[50] Rates date from the Poor Relief Act 1601. They were considered by many to bear unfairly upon single occupiers of large properties. Furthermore, the full rate was, in the end, paid by only a minority of the electorate (nationally one-third and in some areas as low as one-quarter), so the majority had little incentive to vote for economical policies.

community charge,[51] a 'poll tax' on individuals and not based on property. This proved to be even more unpopular and was in its turn replaced in 1992 by the council tax, levied on dwellings according to their value.[52] Rates continue to be levied on non-domestic landed property under a uniform national system controlled by the Secretary of State. Today the non-domestic rate and the council tax are the primary sources of locally raised tax revenue for local authorities. In addition local authorities are in receipt of large subsidies from the central government by way of revenue support grant as explained below.

The collection of the council tax is in the hands of the district councils (or in London the borough councils) which are known as 'billing authorities'. An appeal lies to the local valuation tribunal[53] against the decision of the billing authority that a particular dwelling is chargeable, or that the person aggrieved is the person liable or that the calculation of the amount due is erroneous.[54] The Secretary of State may, however, restrict the grounds of appeal.[55]

The billing authorities collect the tax not only on their own behalf but also on behalf of various precepting authorities, primarily the county and parish councils, but including bodies which cover several local authority areas (such as the London Fire and Civil Defence Authority or police authorities).[56] Neither the precepting authorities nor the billing authorities have an unfettered discretion to set either precept or council tax; complicated calculations which may be judicially reviewed[57] are set out in the statute and have to be completed by both authorities.[58]

The central government has power to limit,[59] or 'cap', the level of the council tax imposed by the billing authorities or the precept issued by precepting authorities.[60] The Secretary of State may 'designate' authorities whose calculation of the amount of their budget requirement is considered by him to be excessive.[61] The authority

[51] Imposed by Local Government Finance Act 1988. Although the community charge was subject to various exemptions and rebates, it was unpopular because it was not progressive—a dustman paid as much as a duke. It was also very difficult to collect.

[52] By the Local Government Finance Act 1992.

[53] Previously known as Valuation and Community Charge Tribunals, now renamed as shown (Act of 1992, s. 15(1)).

[54] Act of 1992, s. 16.

[55] s. 16(3).

[56] s. 39.

[57] They may not be challenged in collateral proceedings but only by way of judicial review (s. 66(1)(c)).

[58] ss. 32–7 (billing authorities), ss. 43–51 (precepting authorities).

[59] The central government also had power to 'cap' the rates and the community charge. High-spending local authorities challenged the exercise of these powers in judicial review proceedings. These are discussed below p. 376.

[60] The current provisions are in the Local Government Finance Act 1992, Ch. IV A (ss. 52A–52Z, inserted by the Local Government Act 1999, s. 23(1) and 1st sched. Parish and community councils are not liable to be limited (ss. 39, 52A).

[61] Designation takes place according to a set of principles specified by the Secretary of State (s. 52(2), (3) and (4)). Different principles may apply to different categories of authority determined by the Secretary of State (s. 52B(6)). Under the Act of 1992 the classes of authority were statutorily determined (s. 54(3)).

may respond by making an explanatory statement. The Secretary of State may then make an order stating the amount which the authority's budget requirement cannot exceed. A draft of this order must be approved by the House of Commons. Designated authorities must thereupon make substitute calculations within the limits set by the Secretary of State.[62] Should they fail to do so the authority is denied access to its collection fund and left effectively insolvent.[63] Alternatively the Secretary of State may 'nominate' an authority with an excessive budget requirement. In this event the authority is designated in the following year or, less drastically, the Secretary of State may simply notify the authority of its budget requirement for the following year.

During the nineteenth century local government came more and more to depend upon grants from the central government. The faults of the system of grants in aid revealed themselves in due course: they encouraged extravagance, produced a bias towards grant-aided activities, and yet led to excessive central government interference. Since 1929 there has been a system of 'block grants' in aid of expenditure generally. The amount of grant was adjusted by various systems of weighting according to the population and resources of each area. The current system for determining the 'revenue support grant' is to be found in the Local Government Finance Act 1988.[64] The Act grants power to the Secretary of State, after consulting various authorities, to lay a revenue support grant report before the House of Commons. After approval by the House of Commons, the Secretary of State pays the amount approved to each authority.

Most of the capital expenditure of local authorities is financed by borrowing, often by issuing loan stock or by borrowing from the Public Works Loan Board.[65] But such borrowing requires the approval of the Secretary of State and compliance with any condition which he may impose.[66]

Finance: expenditure

Local councils are now statutory authorities, with the sole exception of the City of London, and they therefore have power to spend money only for such purposes as are authorised by Parliament.[67] But these purposes include what is reasonably incidental,[68] and the Act of 1972 expresses this principle in apparently generous

[62] ss. 52J, 52T.

[63] ss. 52K, 52V.

[64] Act of 1988, ss. 76–88.

[65] For the methods permitted see Act of 1972, 13th sched., para. 2.

[66] 13th sched., para. 1. Under para. 10 sanction is not required for loans to cover expenses pending receipt of revenue; an overdraft on current account is therefore permitted.

[67] Formerly boroughs founded by charter could claim the wider powers of chartered bodies: see below, p. 223. Under the Act of 1972 all local authorities are statutory (ss. 1(10), 20(6)) and have no powers other than those conferred by statute: *Hazell* v. *Hammersmith and Fulham LBC* [1992] 2 AC 1.

[68] Below, p. 213.

terms: it covers anything 'which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'.[69] But a power is not incidental simply because it is convenient, desirable or profitable. Thus speculative interest rate swap transactions which were beyond the local authorities' ordinary borrowing powers were not saved.[70] And a council could not guarantee the borrowings of a company set up by the council to construct a leisure pool when the council lacked the power to borrow itself for that purpose.[71]

The Royal Commission in 1969 recommended that local authorities should be freed from the ultra vires doctrine and allowed to spend money for purposes of their own, so as to give them more scope for enterprise and experiment.[72] A power of this kind is conferred by the Act of 1972, but subject to a strict financial limit: local authorities may not spend for these purposes in any year more than £2.50 per person resident in the area.[73]

Uncertainty over whether private finance schemes[74] were within the powers of local authorities led to the Local Government (Contracts) Act 1997. This provides that every local authority has a general power to contract with a provider of assets or services[75] 'for the purposes of, or in connection with, the discharge of [any statutory] function by the local authority'.[76]

The principles which require local authorities, like other public bodies, to spend money reasonably and with due regard to the interests of their council tax-payers are explained later, in the context of the ultra vires doctrine generally.[77] Many examples of the restraints imposed upon them by administrative law will be found throughout this book. The courts have invalidated excessive wages,[78] excessive rent subsidies[79] and free travel schemes.[80] But some of the decisions were given when the authorities' statutory powers were narrower than they are now.

[69] s. 111.

[70] *Hazell* v. *Hammersmith and Fulham LBC*, above. Such transactions are also void in Scotland: *Morgan Guaranty Trust Co.* v. *Lothian Regional Council*, The Times, 30 November 1993. See below, p. 796 for whether the money paid is recoverable.

[71] *Credit Suisse* v. *Allerdale BC* [1997] QB 306. See below, p. 796.

[72] Cmnd. 4040 (1969), para. 323.

[73] s. 137 as amended by the Local Government and Housing Act 1989, sched. 2. The figure given is for district councils. For metropolitan district councils and London borough councils the figure is £5; and parish councils may spend £3.50.

[74] See, below, p. 796.

[75] And to contract with a financier who provides funding for the provision contract.

[76] s. 1. See below, p. 779 for discussion particularly of the authority's power to certify that it has power to enter into the contract in question.

[77] Below, p. 398.

[78] See below, p. 398. This is the case of *Roberts* v. *Hopwood* [1925] AC 578, a classic example of the working of the former district audit system. See also *Asher* v. *Secretary of State for the Environment* [1974] Ch. 208; *Lloyd* v. *McMahon* [1987] AC 625. Contrast *Pickwell* v. *Camden LBC* [1983] QB 962.

[79] *Taylor* v. *Munrow* [1960] 1 WLR 151; below, p. 399.

[80] *Prescott* v. *Birmingham Cpn.* [1955] Ch. 210; below, p. 399.

The audit system

Audit of local authority accounts has a special importance in administrative law, since it is one of the mechanisms of judicial review. It is also of special interest since it has occasionally shown how a recalcitrant local authority may be able to defy the central government with impunity. The law has, however, been radically atered by the Local Government Act 2000, which has greatly relaxed the previous regime. Before that Act the audit system was the means whereby improper expenditure could not only be brought to light but also charged personally to the councillors or others responsible. The certainty that irregularities would be exposed and charged in the audit was often a more effective deterrent than the vague responsibility of councillors to their constituents. Every councillor and official was thus made conscious of his personal liability.

From 1844 to 1982 the central figure in this system was the district auditor, an official of the Department of the Environment (as it became) who was thus, in effect, a central government inspector.[81] In 1982 the corps of auditors was detached from the Department and put under the Audit Commission, a statutory body appointed by the Secretary of State and substantially controlled by him since he could give it binding directions.[82] The Commission's chief officer was the Controller of Audit, and auditors might be either officers of the Commission or independent accountants. The Commission had to maintain a code of practice which had to be approved by each House of Parliament.

All accounts of a local authority and its committees, a parish meeting, a combined police or fire authority, and certain other bodies had to be audited annually in accordance with the Act of 1998.[83] The commission, and likewise the Secretary of State, could also direct an extraordinary audit at the request of an elector or at their own motion.[84]

The accounts were open to inspection and any local government elector for the area (or his representative) could appear before the auditor and object to any item.[85] If it appeared to the auditor that an item was contrary to law, the auditor might apply to the court for a declaration accordingly; and the court might also order that any person responsible should repay the cost of it personally unless the item was 'sanctioned' by the Secretary of State or the person in question could persuade the court that he had acted reasonably or in the belief that the expenditure was lawful; and the court had to take account of personal means.[86]

[81] Local Government Act 1972, s. 156, allowing alternatively choice of an auditor approved by the Secretary of State.

[82] Audit Commission Act 1998, replacing Pt. III of the Local Government Finance Act 1992. For the Secretary of State's power to give directions, see s. 1(5) and 1st sched., para. 3.

[83] s. 2 and 2nd sched.

[84] s. 25.

[85] s. 16.

[86] s. 17.

Under the pre-1972 system the auditor had a mandatory duty to disallow unlawful expenditure and to surcharge those responsible, subject to appeal to the court or the Secretary of State, either of whom might remit the surcharge if satisfied that the person responsible ought fairly to be excused. Other causes of surcharge were wrongful omissions from the accounts or loss caused by wilful misconduct.[87]

This system of personal liability and surcharges was abolished by the Local Government Act 2000 and replaced by a system of 'advisory notices' to be issued by the auditor.[88] Items of account may be challenged as before, but so in addition may any decision, course of action or proposed action which seems likely to lead to unlawful expenditure. The advisory notice must specify which of these categories is concerned and it must be followed by a statement of the auditor's reasons within 7 days. It must require that before taking action the recipient shall give the auditor not more than 21 days' notice of the intended action.

The effect of an advisory notice is that the decision, course of action or expenditure becomes unlawful until the council has reconsidered the matter and the above-mentioned period of notice has expired. From then on the auditor has the same powers as previously to apply to the court for judicial review and the body or person concerned may appeal likewise. The court may order rectification of the accounts or award the usual remedies of judicial review for prohibiting unlawful action or quashing an unlawful decision.

Under the former system of surcharges the audit sometimes provided a battleground for acute political strife, when councillors deliberately disobeyed the law and were surcharged with the financial consequences of their misdeeds. On two occasions Parliament intervened by legislation to relieve them of personal liability for surcharges, once in 1927 when the borough councillors of Poplar were unable, or at least unwilling, to repay the cost of excessive rates of wages,[89] and once in 1975 when some twenty or more councils had refused to apply the 'fair rent' system to their council houses as required by the Housing Finance Act 1972.[90] These were occasions when the regular application of the legal machinery proved to be politically unacceptable—in other words, when political rebellion succeeded.

Political and ethical restrictions

As a result of complaints about what was called 'overt political campaigning at public expense' by some local authorities the Local Government Act 1986

[87] s. 18. See the notable case of *Porter* v. *Magill* [2002] 2 AC 357.
[88] ss. 90–91.
[89] Audit (Local Authorities) Act 1927, s. 2(6). See below, p. 398.
[90] Housing Finance (Special Provisions) Act 1975.

prohibited the publication by a local authority of any material which appeared to be designed to affect public support for a political party.[91] The Act also restricted the range of information which a local authority had power to publish, confining it to information about services and functions in its area. Prior to this legislation the courts had held that it was unlawful for local authorities to engage advertising agencies for the purpose of campaigning against government policy and legislation passing through Parliament, since their statutory power to publish information did not extend to attempts to persuade the public to agree with their politics.[92]

Byelaws

The Act of 1972 confers a wide power upon district and London borough councils 'to make byelaws[93] for the good rule and government of the whole or any part of the district or borough, as the case may be, and for the prevention and suppression of nuisances therein'.[94] This general power is not enjoyed by other authorities, but many statutes have conferred byelaw-making powers for particular purposes such as public health, housing and highways.[95] Furthermore, the general power given by the Act of 1972 may not be invoked where there is byelaw-making power under some other enactment.[96] It is therefore a residuary power.

Byelaws made under the Act of 1972 require confirmation by the Secretary of State,[97] and byelaws made under other Acts normally require ministerial confirmation.[98] They are therefore under firm central control. Confirming ministers issue model byelaws which local authorities will be expected to follow. Whether made under the Act of 1972 or otherwise, byelaws must be made under the authority's common seal and must be advertised and open to inspection for a month before the application for confirmation.[99] Unless some other Act authorises larger fines, the maximum penalty for infringement is a fine of £20 plus £5 per day for continuing offences.[1]

[91] s. 2, prohibiting also financial support for such publication.

[92] *R.* v. *Inner London Education Authority ex p. Westminster City Council* [1986] 1 WLR 28; *R.* v. *Greater London Council ex p. Westminster City Council*, The Times, 22 January 1985.

[93] This is the statutory spelling, but 'by-law' is common, as in by-election, by-product, etc., 'by' meaning secondary. The original derivation may be from 'byr', meaning village or town, or from 'by', meaning town.

[94] s. 235.

[95] Public Health Act 1936 (e.g. ss. 61, 81, 104); Housing Act 1985, s. 23; Highways Act 1980, s. 186.

[96] s. 235(3).

[97] ss. 235(2), 236(7).

[98] See Act of 1972, s. 236(1), (7).

[99] s. 236(4), (5).

[1] s. 237.

The law as to the validity of byelaws under the ultra vires doctrine is explained in the chapter on delegated legislation.

Central influence and control

After what has been said it is needless to emphasise that local government is subjected to central government in numerous and important ways. The Act of 1972 and other Acts conferring powers are shot through with restrictive provisions giving powers of yea or nay to the Secretary of State and ministers. After a review of the system in 1979[2] the Local Government, Planning and Land Act 1980 inaugurated a 'relaxation of controls',[3] repealing miscellaneous provisions requiring ministerial consent or allowing appeals to a minister and mitigating controls in various areas such as pollution, amenity, allotments and highways. But since at the same time the Act provided for sharply reduced rate support grants, and imposed new restrictions upon capital expenditure, its overall effect was to intensify central control. Since then the Local Government Finance Acts 1982–92 have given the central government a stranglehold on local authority revenue and expenditure.

Despite the lip-service paid to the need for financial independence, and the policy of reducing the number of earmarked grants, it is through financial administration that the central government's control makes itself most felt. The 'appropriate minister' may make regulations for prescribing standards and general requirements in relation to any function of a local authority,[4] and if he is satisfied that a local authority has fallen short of a reasonable standard, regard being had to any such regulations, he may, after hearing their representations, reduce their grant—though subject to the approval of the House of Commons.[5] With these powers in the background the central government is in a strong position to make its wishes felt in innumerable ways. It can restrict the authority's income by council tax-capping. It can exercise tight control over capital expenditure, both through the power to withhold loan sanction and by restricting aggregate expenditure. It has control over the remaining earmarked grants.[6] It may make regulations as to all the details of accounts and audit.[7] In both great matters and small it maintains a powerful financial grip.

Behind this powerful battery of weapons lies the ultimate sanction, the default power. This enables the minister, if he considers that the local authority is failing to

[2] Cmnd. 7634 (1979) (White Paper).

[3] Pt. I; and see ss. 183, 188.

[4] Local Government Act 1974, s. 5(2).

[5] s. 5(1).

[6] e.g. housing grants may be made subject to any conditions: Housing Act 1985, 15th sched., Pt. II. Act 1958, s. 28.

[7] Act of 1972, s. 166.

perform some function as it should, to make a legally enforceable order directing it what to do, or to take over its administration himself, or to put it into the hands of another authority such as a county council, charging the cost to the defaulting authority. There is no overall default power to be found in the Act of 1972. But such powers have long been a feature of particular Acts, and may be seen for example in the Public Health Act 1936,[8] the Education Act 1944[9] and the Housing Act 1985[10] in a variety of forms but all with the same general effect.

Default powers are of importance in administrative law because the courts sometimes regard them as a substitute for other remedies, as will be explained in due course.[11]

Joint boards for special purposes

Where there are special reasons for one authority to administer a larger area than a normal local government area, a statutory joint board may be established by ministerial order. Powers of this kind are given by the Public Health Act 1936,[12] the Education Act 1944,[13] the Transport Act 1968,[14] the Town and Country Planning Act 1990,[15] and other Acts. Unlike joint committees of local authorities, these joint boards have their own corporate existence and their own powers, including the power to issue precepts for raising revenue through the rates. Normally, but not invariably, joint boards are composed of members of the local authorities in the area, nominated by those authorities themselves.

COMPLAINTS AGAINST LOCAL GOVERNMENT

The Local Government Commissioners

In 1974 the Ombudsman system[16] was extended to complaints against local authorities by the Local Government Act 1974.[17] Two Commissions for Local

[8] ss. 171–7.

[9] s. 99.

[10] s. 164 (the 'right to buy'). See *R. v. Secretary of State for the Environment ex p. Norwich CC* [1982] QB 808.

[11] See below, p. 740.

[12] s. 6 (united port health districts).

[13] s. 6 and 1st sched. (joint education boards).

[14] s. 9 and 5th sched. (passenger transport authorities).

[15] s. 1 and 1st sched. (joint planning boards).

[16] See above p. 87 (central government ombudsman).

[17] Amendments were made by the Local Government Act 1988, 3rd sched.

Administration—one for England and one for Wales—were established.[18] The Parliamentary Commissioner is a member of both Commissions and the other Commissioners are appointed by the Crown and hold office during good behaviour until the retiring age.[19] The Local Commissioners investigate complaints made in writing directly[20] by members of the public against any local authority (including its committees, members and officers). The complainant, who must allege that he or she has sustained injustice through maladministration, must also specify the action in connection with which the maladministration is alleged.[21] The following matters are, however, excluded from the Local Commissioners' remit: legal proceedings, investigation or prevention of crime, contractual and commercial transactions, personnel matters and educational matters.[22]

Provisions similar to those in the Act of 1967 exclude cases where there is a remedy before a tribunal or court of law.[23] And the Commissioner should not question the merits of decisions taken without maladministration.[24] Local Commissioners have powers similar to those of the Parliamentary Commissioner to carry out their investigations[25] and there are similar provisions in regard to disclosure.[26] The report must be sent to the complainant, the local authority and the councillor (if any) who originally referred it.[27] There are special arrangements for publicising the report and re-publicising it if the authority's response is unsatisfactory. In order to encourage recalcitrant authorities to make amends for maladministration, the Commissioner may require an authority, at its own expense, to publish the details of the action recommended by the Commissioner and the reasons why the authority has failed to comply.[28]

[18] There is separate legislation for Scotland: Local Government (Scotland) Act 1975, Pt. II and the Scottish Legal Services Ombudsman and Commissioner for Local Administration in Scotland Act 1997, Pt. II.

[19] s. 23. The Welsh Administration Ombudsman is a member of the Welsh Commission (Government of Wales Act 1998, 12th sched., para. 11.)

[20] There is no requirement akin to the filter of complaints to the Parliamentary Commissioner through MPs. If a complaint is made to a local councillor it must be referred to the Local Commissioner (s. 26(5)). But the Select Committee on the Parliamentary Commissioner takes evidence from the Local Commissioners, reports on and supports their work.

[21] s. 26(2) as interpreted in *R. v. Local Commissioner for Administration ex p. Bradford MCC* [1979] QB 287.

[22] s. 26(8) and 5th sched. The Commissioners have frequently asked for wider powers.

[23] s. 26(6). There is a similar proviso to allow the Commissioner to accept complaints where there would be legal remedies.

[24] s. 34(3).

[25] s. 30. This extends to privileged, confidential files relating to adoption since adoption was within the Commissioner's jurisdiction: *Re a Subpoena issued by the Commissioner for Local Administration* (1996) 8 Admin. LR 577.

[26] s. 32(3) as amended by the Local Government, Planning and Land Act 1980, s. 184.

[27] s. 30(1), (3).

[28] s. 31(2D), (2E) and (2F).

Each Commissioner makes an annual report to a representative body of local authorities who then publish the joint report (in England entitled *The Local Government Ombudsman*).[29] The Local Commissioners have been successful in obtaining satisfaction for many complainants and in remedying injustice. They deal with many more complaints than does the Parliamentary Commissioner. In 2002–03 there were 17,610 complaints of which the greatest numbers related to housing (6,691) and planning matters (3,522). Of these 2,213 were outside jurisdiction, 4,106 were premature, 3,735 were settled by the local authority before the matter was fully investigated and in only 145 was maladministration found.[30]

Local authorities have now been given power to pay compensation, or provide some other benefit, to any person who has been, or may have been, adversely affected by any exercise of their functions which in their opinion amounts, or may amount, to maladministration.[31] This wide power is not made subject to any of the exceptions which restrict the powers of the Local Commissioners, nor is there any prescribed precedure.

POLICE

Independence local police forces and police

An outstanding fact about the British police is that they are not under the direct control of the central government: they are organised into local forces maintained by local police authorities.[32] The modern police system, which replaced the inefficient system of constables inherited from the Middle Ages, was devised in the golden age of political liberty in the nineteenth century and this continues to be reflected in the absence of control by the central or local government as well as local organisation of the police.

Recent decades, however, have seen growing central government influence over local policing. The central government now sets objectives for local forces and prescribes the way their performance is to be measured.[33] The Home Secretary

[29] s. 24.

[30] *Annual Report* 2002/03.

[31] Local Government Act 2000, s. 92.

[32] These are bodies corporate independent of the elected local authorities. Their typical membership of seventeen comprises nine local councillors appointed by the councils within the force area, three magistrates appointed by the local justices and five independent members appointed by the other members from a short list approved by the Home Secretary. They elect their own chairman, s. 4 of and 2nd Schedule to the Police Act 1996. They appoint, discipline and may dismiss the chief constable, deputy chief constable and assistant chief constables: Act of 1996, ss. 11, 12.

[33] Act of 1996, ss. 37, 38.

has power to give directions to police authorities whose forces have been found, after inspection, not to be 'effective and efficient'.[34] As an alternative he may require the police authority to submit to him an 'action plan' designed to remedy the force's failings.[35] Furthermore, the Home Secretary lays a notional policing plan before Parliament every year which sets out inter alia 'strategic policing priorities'.[36] Moreover, he may also draw up a code of practice for chief officers of police to which they must 'have regard' in discharging their functions.[37] Chief officers must also 'have regard' to the local policing plan drawn up by the police authority.[38] Finance supplies another potent instrument of central influence; for many years the bulk of a police authority's income has come by way of central grant, with most of the rest coming by way of a precept paid by the local council tax payers.[39]

Despite all the regulatory and financial powers of the central and local authorities, the responsibility for deciding whether, for example, the police shall arrest some particular person or investigate a particular offence rests upon the police and no one else. This is an important facet of the constitution, and a prime safeguard against the evils of a police state.

The legal status and responsibility of police officers

In their ordinary daily acts and decisions the police are as independent of the local police authority as they are of the central government: a police officer holds a public position, that of peace officer, in which he owes obedience to no executive power outside the police force. Thus, for example, in the leading English case, where the police had by mistake arrested the wrong man on a criminal charge, an action for damages against the local police authority met with no success because the police in making the arrest were acting on their own authority not that of the authority.[40] It is equally fallacious to suppose that police officers are servants of the Crown.[41] They do, indeed, hold office under the Crown and when appointed they swear that they will well and truly serve the sovereign in the office of constable. But

[34] Act of 1996, s. 40 as substituted by the Police Reform Act 2002. Representations from the authority and the chief officer must first be heard and the authority must be given an opportunity to propose remedial action that would render the direction redundant (s. 5). And note the absence of any power in the Home Secretary to direct the chief constable. cf. Act of 2002, s. 33 (Home Secretary may direct suspension or dismissal of chief constable).

[35] Act of 2002, s. 5 inserting s. 41A into the Act of 1996.

[36] Act of 1996, s. 1 inserting s. 36A into the Act of 1996.

[37] Act of 1996, s. 2 inserting s. 39A into the Act of 1996.

[38] Act of 1996, s. 10(2).

[39] Local Government Finance Act 1992, s. 39.

[40] *Fisher v. Oldham Corporation* [1930] 2 KB 364.

[41] *A.-G. for New South Wales v. Perpetual Trustee Co. Ltd.* [1955] AC 457 at 480.

this does not make them servants of the Crown; and the Crown is not liable for any wrongdoing by the police.[42]

This independence of constables means that there is no vicarious liability by their employer for their misdeeds. But special statutory provision ensures that chief constables are liable for their subordinate police constables, so that the victims of wrondoing are not left with no effective remedy, damages and costs being paid out of the police fund.[43]

The independence of chief constables

The authorities quoted apply with special force to the chief constable since he has command over his force but no one has command over him. Lord Denning cited them with approval when he said:[44]

> I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps so as to post his men that crimes may be detected; and that honest citizens can go about their affairs in peace. . . . But in all these things he is not the servant of anyone save the law itself. No minister of the Crown can tell him that he must, or must not, keep observation on this place or that . . . Nor can the police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.

But the chief constable is answerable to the law and should he fail to enforce the law—for instance, by adopting a policy not to enforce the law at all in certain circumstances—the law will intervene. In an application of these principles the House of Lords has upheld the decision of the chief constable to restrict the policing of a port area to two days a week, notwithstanding daily and violent protests obstructing trade in the area.[45] The courts, it was said, would 'respect the margin of appreciation or discretion which a chief constable has'.[46] Judicial review may be granted against chief constables for procedural failings in disciplinary matters,[47] but only exceptionally in the employment or operational field.[48]

[42] *Lewis* v. *Cattle* [1938] 2 KB 454.

[43] Police Act 1996, s. 88.

[44] *R.* v. *Metropolitan Police Commissioners ex p. Blackburn* [1968] QB 118 at 135 approved (Lord Hoffman) and *R.* v. *Chief Constable of Sussex ex p. International Trader's Ferry Ltd* [1999] 2 AC 418 discussed below, p. 387.

[45] *International Trader's Ferry Ltd*, above. Discussed more fully below, p. 387.

[46] *International Trader's Ferry Ltd*, at p. 90 (Lord Slynn). On the European law aspects of this case, see below p. 387.

[47] *R. (O'Leary)* v. *The Chief Constable of Merseyside* (unreported 9 February 2001) (failure to disclose prejudicial report).

[48] *R. (Morgan)* v. *Chief Constable of South Wales* (unreported 9 April 2001) (removal from list of those ready for promotion) and *R. (Tucker)* v. *Director General of National Crime Squad* [2003] EWCA Civ. 2, [2003] The Times, 27 January (CA), [2003] *ICR* 599 (cancellation of secondment to NCS).

Complaints and discipline

The police are a disciplined force and have always been in charge of their own discipline, including the investigation of complaints. But this makes them judges in their own cause, with the result that many complainants are unsatisfied. For many years the Police Complaints Authority supervised the investigation of serious complaints (and others referred to them by the police authorities or the chief constable). Its place has now been taken by the Independent Police Complaints Commission, established by Part II of the Police Reform Act 2002. This new organisation may itself investigate complaints made about the police—without the police being involved at all. To this end it has the powers of search and seizure necessary to enable it to carry out a proper investigation. Most investigation of complaints will still be undertaken by police officers, however, but in addition to supervision of an investigation by officers, the Commission will be able now to conduct a managed investigation in which it has powers to direct the police team that conducts the actual investigation.

REGIONAL DEVELOPMENT AGENCIES

Regional development agencies for each of the nine English regions were established in 1998.[49] Their chief purpose is 'to further the economic development and regeneration' of their areas but they have others such as the promotion of 'business efficiency, investment, . . . competitiveness [and] employment'.[50] Although they have power to do anything expedient for, or incidental to, their purposes, they may not give financial assistance or acquire an interest in a body corporate without the consent of the Secretary of State.[51] The members of the agencies are appointed by the Secretary of State,[52] who may also delegate some of his functions to them.[53] They are funded by the central government[54] and must develop a regional strategy in accordance with the Secretary of State's guidance.[55] He may also require them

[49] Regional Development Agencies Act 1998 following a White Paper, *Building Partnerships for Prosperity*, Cm. 3814 (1997). The regions are: East Midlands, Eastern, London, North East, North West, South East, South West, West Midlands and Yorkshire and Humber (1st sched.). They are bodies corporate (s. 1(2)).

[50] s. 4(1). A failure to observe its purposes by an agency or to heed a direction from the Secretary of State does not lead to invalidity of any transaction (s. 30). See below, p. 796 for the similar provisions of the Local Government (Contracts) Act 1997.

[51] s. 5.

[52] s. 2 and 2nd sched.

[53] s. 6; but delegation must take place to all agencies and may not include legislative functions.

[54] ss. 10–13.

[55] s. 7. The Secretary of State has a general power to give directions or guidance.

to consult 'regional chambers', i.e. existing representative bodies designated by him as suitable for association with an agency.[56]

The agencies are intended by the government to lead to a significant devolution of administrative powers away from Whitehall and to the regions. The government is also committed to elected Regional Assemblies in England where there is popular demand for this. Legislation has been enacted to enable referendums to be held in the regions to test whether local opinion favours a regional assembly.[57] Informal, or non-statutory, 'regional assemblies' consisting of persons appointed by local authorities and other 'stakeholders' have already been set up in some regions.[58] These bodies use the device of incorporation as a private company to clothe themselves with legal identity.[59]

DEVOLUTION—SCOTLAND AND WALES

Aspirations to self-government in Scotland and Wales, and a growing sense of their national identities, have brought about a new constitutional settlement and a radical redistribution of power. The Scotland Act 1998 and the Government of Wales Act 1998 have created the Scottish Parliament and the Welsh Assembly, with ministerial and administrative systems to match, though more liberally for Scotland than for Wales. The Scottish Parliament (the first such body since 1707) has been endowed with powers of primary legislation, in the sense that it can itself choose the subjects of its enactments, whereas the Welsh Assembly (a wholly new body) can make only secondary legislation within the existing framework of powers delegated by Acts of the Westminster Parliament. Technically speaking, all such Scottish and Welsh legislation is delegated under the Acts of 1998, and there has been no transfer of Parliamentary sovereignty. Parliament could at any time repeal or amend these Acts without special formality and they do not therefore constitute a federal system. The full power of the Westminster Parliament to make laws for Scotland is expressly reserved,[60] and it is reserved automatically for Wales.

Proposals for devolution have a long history, but the chain of recent events began with the Royal Commission on the Constitution (1969–73), which suggested various options, by no means unanimously.[61] Devolution statutes for both countries were enacted in 1978, but, after failing to attract sufficient support in

[56] s. 8.
[57] Regional Assemblies (Preparations) Act 2003.
[58] See *Sunday Telegraph*, 18 October 2003.
[59] See *Sunday Telegraph*, as above.
[60] Scotland Act 1998, s. 28(7).
[61] Cmnd. 5460 (1973).

referendums, were duly repealed. Twenty years later, in a more favourable atmosphere, devolution was once again proposed as part of the government's scheme of constitutional reform, and this time the referendum votes were positive, though only marginally in Wales. The two constituent Acts were passed in 1998 and the two new legislatures were inaugurated in 1999.

These Acts are basic constitutional instruments and a full account of them belongs to constitutional law. But they form essential background for administrative law and there is a wide overlap, especially in the area of dispute resolution. There are likely to be many legalistic contests about the division of powers and much of the material of judicial review, as discussed in this book, will be relevant:[62] The Privy Council, acting judicially, will be the key player, with a role like that of a supreme court. A brief account of the new legal machinery, which now follows, is therefore necessary.

Devolution to Northern Ireland is omitted from this account. The Northern Ireland Act 1998, brought into force in 1999, follows the pattern of the Scotland Act 1998 by empowering the Northern Ireland Assembly to pass Acts in any field not specifically excepted or reserved. The Assembly's competence includes health and social services, education, finance (but not taxation), agriculture, environment and economic development. The administration consists of the first minister and other ministers, and there is a committee system resembling that for Wales. There are special provisions for power-sharing and for giving effect to the Belfast Agreement of 1998.[63] But political disputes and disorders and terrorist violence have several times caused the devolved constitution to be suspended, as it is at present.

SCOTLAND

The Scottish Parliament and Executive

The Scottish Parliament consists of a single chamber of 129 members, elected partly (seventy-three) by simple majority vote and partly (fifty-six) by proportional representation under the additional member system. Electors have two votes, one in each category. A Parliament is to last for four years, but in two cases it must be dissolved earlier: first, if two-thirds of the total membership so resolve; and secondly, if Parliament fails to nominate one of its members as First Minister

[62] For a survey of provisions and interpretative possibilities see [1999] *PL* 274 (P. Craig and M. Walters).

[63] Cm 3883 (1998). See B. Hadfield in *Constitutional Reform in the United Kingdom* (Cambridge Centre for Public Law, 1998), ch. 5 and in [1998] *PL* 599.

within the statutory period of (basically) twenty-eight days.[64] Peers are eligible for membership. One member is appointed the Presiding Officer, taking the place of Speaker. Standing orders regulate procedure, the committee system, and so forth. The Presiding Officer and four members form a corporate body holding property and providing services on behalf of Parliament.[65]

The Scottish Executive consists of the First Minister, nominated by the Parliament but appointed by the Queen, together with such ministers as he may appoint (and whom he may remove) and the two law officers, the Lord Advocate and the Solicitor General for Scotland.[66] Ministerial appointments must be approved both by Parliament and by the Queen. Ministers hold office at Her Majesty's pleasure[67] and exercise their functions on her behalf.[68] They must resign, as also must the two law officers, if the Parliament resolves that the Scottish Executive no longer enjoys its confidence.

A new law officer, the Advocate General for Scotland, has come into being, not created by the Act but endowed with certain powers under it.[69] He (in fact, she)[70] is a minister of the Crown and advises the central government on Scottish constitutional and legal affairs, particularly in cases where the division of powers is in question. He therefore stands outside the Scottish Parliament and Executive, being Westminster's agent and watchdog, replacing for those purposes the former Scottish law officers, who are now Scottish ministers.

Legislative powers

Acts of the Scottish Parliament become law when they receive the royal assent and their validity is not affected by any invalidity in the parliamentary proceedings.[71] Their scope is however severely restricted by the limits which the Act sets to their competence. By contrast with the abortive Act of 1978, which devolved only specified powers leaving the remainder with the central government, the Act of 1998 devolves legislative power generally, subject to specific reservations. Specific powers are also granted, notably the tax-varying power, under which the Parliament may increase or reduce the basic rate of income tax by not more than 3 per cent. Despite the massive list of reservations (see below) there is a wide area of competence remaining to the Parliament, including education, health, economic development, environment, local government, law, housing, planning, agriculture, forestry, police, fire services, heritage and tourism.

[64] Scotland Act 1998, s. 3. The Scottish Parliament is subject to the jurisdiction of the courts like other statutory bodies: *Whalley* v. *Watson*, 2000 SLT 475.
[65] s. 21.
[66] ss. 46–48.
[67] s. 47(3).
[68] s. 52(2).
[69] s. 87.
[70] Presently Lynda Clark MP.
[71] s. 28.

The limits to the powers of the Parliament must be found in the lengthy and intricate catalogue of the 'protected provisions' and 'reserved matters' which are beyond its competence, most of which are contained in the fourth and fifth schedules. It is important to note, however, that those schedules may be modified, as may be considered necessary or expedient, by Order in Council, so that the central government may at any time and in any way adjust them to meet difficulties such as conflicts of competence.[72] This power may prove to be a valuable safety-valve.

An Act of the Scottish Parliament 'is not law so far as any provision of the Act is outside the legislative competence of the Parliament'.[73] An element of ultra vires, therefore, will invalidate the offending provision but not the whole Act. Moreover, a doubtful provision is to be read 'as narrowly as is required for it to be within competence if such a reading is possible',[74] and problems caused by ultra vires Acts may be remediable by subordinate legislation or by reconsideration in the Parliament.[75]

Legislation incompatible with Convention [sc. human] rights or with Community law is outside the Parliament's competence.[76] The fourth schedule of the Act prevents the Parliament from modifying certain legislation, including the provisions for freedom of trade in the Acts of Union of 1706 and 1707, the Human Rights Act 1998, the Scotland Act 1998 itself and provisions about judicial salaries and the Advocate General. The fifth schedule contains the long list of 'reserved matters' which are beyond the Parliament's competence so far as its legislation 'relates' to them, thus giving them wide effect. This schedule occupies more than twenty pages in the printed statute and only a selective description of its first two parts can be given here.

Part I (general reservations) includes the Crown, the royal prerogative, the Union with Scotland, 'any office in the Scottish Administration', the superior Scottish courts, the civil service, foreign affairs and defence. Part II (specific reservations) includes, under numerous heads and sub-heads, financial policy and services, taxation (other than local taxes), data protection, immigration, nationality and extradition, national security, official secrets and terrorism, emergency powers; consumer protection, telecommunications, postal services; electricity, oil and gas, nuclear energy; road, rail, marine and air transport; social security schemes and pensions; regulation of professions (architects, health professions and auditors); employment, industrial relations, health and safety, medicines; broadcasting; judicial remuneration; equal opportunities. Some of these items are described in general terms. Others are minutely defined by reference to sections or subsections

[72] s. 30.
[73] s. 29.
[74] s. 101.
[75] ss. 107, 34.
[76] s. 29(2). See *Petition of Trevor Adams* [2002] SCCR 881 (unsuccessful challenge to validity of the Protection of Wild Mammals (Scotland) Act 2002 on human rights grounds.

of specified Acts. Many are accompanied by exceptions or qualifications. It is a formidable list and a likely source of much contention.

Executive functions

The Act makes a general transfer of functions to Scottish ministers in respect of the Crown's prerogative and executive functions and of ministerial powers conferred by pre-devolution statutes, 'so far as they are exercisable within devolved competence'.[77] These will often be powers of making subordinate legislation, with varying arrangements for laying before Parliament, etc. The seventh schedule to the Act specifies eleven varieties of procedure and the powers of the Act to which they are to apply, requiring in some cases approval by the Westminster Parliament and in others by the Scottish Parliament, and in others by both. The power to modify the fourth and fifth schedules by Order in Council, for example, requires positive resolutions of both Parliaments. There is also a list of 'shared powers' which may be exercised by a minister of the Crown as well as by a Scottish minister.[78] Additional powers may be transferred by Order in Council.[79]

The central government has a power of veto over proposed action of the Scottish Parliament or of the Scottish Executive which the Secretary of State reasonably believes would be incompatible with international obligations, including presumably the Human Rights Convention and European Union law; and there is a corresponding power to compel necessary action to be taken.[80] In these cases the order is subject to annulment by either House of the Westminster Parliament.

As in the case of the Parliament, already mentioned, members of the Scottish Executive have no power to act in any way so far as the act is incompatible with Convention rights (i.e. statutory human rights) or with Community law.[81] The Convention rights set out in the Human Rights Act 1998, like the rules of Community law, operate as jurisdictional barriers: any legislation or executive action under devolved power which infringes them is ultra vires. Criminal trials were invalidated for this reason because they were held before temporary sheriffs whose tenure was at the pleasure of the executive and who were therefore not independent under Article 6.[82]

Even though, as already mentioned, Scottish ministers 'hold office at Her Majesty's pleasure' and their statutory functions 'are exercisable on behalf of Her

[77] s. 53.
[78] s. 56.
[79] s. 63.
[80] s. 58.
[81] s. 57(2).
[82] *Millar v. Dickson* [2002] 1 WLR 1615 (PC).

Majesty', it seems that they are not 'ministers of the Crown' within the meaning of the Act, since many of its provisions make a contrast between them.[83] This question is important for purposes of subordinate legislation, since where the Act provides, as it often does, for subordinate legislation without saying who is to make it, it may be made only by Order in Council or by a Minister of the Crown, i.e. by the central government.[84]

The Crown may have different capacities for different purposes. The Act provides that rights and liabilities may arise between the Crown in right of the United Kingdom government and the Crown in right of the Scottish administration; that property and liabilities may be transferred between them; and that the Crown may bring proceedings in either capacity and be a party to them in the other capacity.[85]

The Scottish Parliament is required by the Act to make provision (as it has since done)[86] for the investigation of complaints of maladministration by or on behalf of Scottish ministers or other office-holders in the Scottish administration and the arrangements may be extended to certain other bodies.[87] A Scottish Parliamentary Commissioner for Administration has been appointed, being the same person as the English Parliamentary Commissioner.

The appointment of judges of the Court of Session and sheriffs is a matter for the First Minister, whose recommendation, after prescribed consultations, is passed via the Prime Minister to the Queen. Judges of the Court of Session are removable by the Queen on a resolution of the Parliament after a motion by the First Minister, and only if a tribunal constituted by the First Minister and chaired by a member of the Judicial Committee of the Privy Council has so recommended on account of inability, neglect of duty or misbehaviour.

Disputed competence and 'devolution issues'

The potential competence or otherwise of a Bill, or any provision in it, may be referred to the Judicial Committee of the Privy Council by the Advocate General, the Lord Advocate or the Attorney General within four weeks from the passing of the Bill, and meanwhile it may not be presented for the royal assent.[88] The question whether any legislation or function is, or would be, within competence is a 'devolution issue' governed by the detailed provisions of the sixth schedule. If

[83] See s. 52(6) (Lord Advocate 'ceases to be a Minister of the Crown'), s. 112(5) ('a Minister of the Crown or a member of the Scottish Executive') and likewise ss. 53(1), 60(1), 108(1). The lack of a definition is a defect of the Act.

[84] s. 112.

[85] s. 99.

[86] The Scottish Public Services Ombudsman Act 2000 (asp 11).

[87] s. 91.

[88] s. 33.

the issue arises in proceedings in Scotland, proceedings for its determination may be instituted by the Advocate General or the Lord Advocate, to whom intimation of the issue must be given. A court or tribunal may refer a devolution issue to the Court of Session (if civil) and the Court of Justiciary (if criminal) and from their decision an appeal lies (with leave) to the Judicial Committee. Proceedings for the determination of an issue arising in England or Wales may be instituted by the Attorney General and the court or tribunal must give notice of it to him and the Lord Advocate. The issue may then be referred to the High Court or the Court of Appeal as the Act prescribes, with a right of appeal (with leave) to the Judicial Committee. There are corresponding provisions for Northern Ireland. Furthermore, the relevant law officers may refer an issue directly to the Judicial Committee, and the House of Lords may do the same, unless it prefers otherwise.[89]

A court or tribunal which finds an excess of competence in Scottish legislation, whether primary or subordinate, is empowered to make an order 'removing or limiting any retrospective effect of the decision' or 'suspending the effect of the decision for any period and on any conditions to allow the defect to be corrected'.[90] The first limb of this clause is designed to mitigate the problems of the doctrine of retrospectivity discussed later in this book, under which situations accepted as legal in the past may be reopened if the law under which they were determined is later held to have been wrong.[91] It may not prove easy to exercise this new discretion. The second limb of the clause makes way for the power already mentioned which allows excesses of competence to be remedied by subordinate legislation.

Executive or administrative action by Scottish ministers can likewise raise a devolution issue if it is alleged to be beyond devolved competence or incompatible with any of the Convention rights or with Community law. Every human rights claim against the Scottish government may thus raise a devolution issue. So where, as related above, the precarious tenure of temporary sheriffs was held to violate Article 6 of the Convention, the Judicial Committee held on a devolution issue that by continuing prosecutions before them the Lord Advocate was infringing the Convention rights of the defendants and acting unlawfully.[92] The Judicial Committee has, however, rejected a number of other claims alleged to raise devolution issues but where no breach of Convention rights was shown.[93]

[89] 6th sched., Pt. V.

[90] s. 102.

[91] See below, p. 304.

[92] *Miller* v. *Dickson* [2002] 1 WLR 1615 (PC), holding also that the defendants had not waived their rights by not objecting earlier.

[93] See, e.g., *Brown* v. *Stott* [2001] 2 WLR 817; *Montgomery* v. *HM Advocate* [2001] 2 WLR 779.

WALES

The Welsh Assembly and administration

Devolved power in Wales is exercised by the Welsh Assembly created by the Government of Wales Act 1998 and entitled the National Assembly for Wales. The Assembly consists of sixty members, elected partly (forty) by simple majority vote and partly (twenty) by proportional representation under the additional member system, using party lists. Electors have two votes, one for a candidate and one for a party. The life of the Assembly is four years. It is a body corporate and exercises its functions on behalf of the Crown.[94]

The Assembly elects one of its members to be Assembly First Secretary, who in turn appoints (and may dismiss) other members as Assembly secretaries, their number being fixed by standing orders.[95] These secretaries form the executive committee, which is as it were the cabinet of the devolved administration. The First Secretary has to 'allocate accountability' to individual members of this committee in a specified field, thus distributing portfolios, and he himself is accountable for the activity of the committee as a whole.[96] Each Assembly secretary works with a 'subject committee' in his field of accountability, which is chaired by a member of an elected panel composed so as to reflect the balance of the political parties, and which includes the Assembly secretary responsible.[97] The Assembly has also to establish a subordinate legislation scrutiny committee, an audit committee and regional committees, and in addition may establish other committees at its discretion and delegate its functions to them; and committees may form sub-committees and delegate likewise.[98] The Secretary of State has the right to attend, but not to vote, in any proceedings of the Assembly, but not of its committees.[99]

The Assembly's powers

In contrast with the Scottish Parliament, the Assembly has neither powers of primary legislation nor has it any legislative power outside specific delegation from the central government. The scheme of the Government of Wales Act is that the Assembly shall take over the powers of the Secretary of State for Wales and exercise his powers of making regulations, orders, etc., which are then to be approved in

[94] s. 1. See *Constitutional Reform in The United Kingdom* (Cambridge Centre for Public Law, 1998), ch. 4 (Sir D. Williams).

[95] s. 53.

[96] s. 56.

[97] s. 57.

[98] ss. 58–62.

[99] s. 76.

draft by the Assembly, rather than laid before Parliament. Before approving a draft order, the Assembly must consider the report of the subordinate legislation scrutiny committee and any 'regulatory appraisal'. The scrutiny committee has to report whether the Assembly's attention should be drawn to any particular feature of the draft order.[1] Regulatory appraisal means a cost–benefit analysis and is required only where suitable and practicable.[2]

The fields in which functions are transferred to the Assembly are listed alphabetically (from agriculture to the Welsh language) under eighteen heads in the second schedule to the Act, and include also education, the environment, health and health services, highways, housing, local government, planning, social services and transport. But the definitive provisions about the Assembly's powers are to be found in the Order in Council made before the Act came into force.[3] This Order, running to over fifty pages, lists a large number of statutes or parts of statutes under which functions of a minister of the Crown are transferred to the Assembly so far as exercisable in relation to Wales. In some cases functions are exercisable by the Assembly concurrently with the minister and in others some ministerial function is exercisable only with the agreement or after consultation with the Assembly. No functions of the Lord Chancellor or of the Attorney General are transferred.

The Assembly may make regulations needed for compliance with Community law.[4] It may also by order reform other Welsh public bodies by transferring their statutory functions to itself or to a local authority or to some other body designated in the Act.[5] At the beginning of each Parliament the Secretary of State must consult the Assembly about the government's legislative programme for the session.[6]

The Assembly has no taxing power, but it may allocate the annual block grant which the Secretary of State has to make to the Assembly.[7] It has no power to legislate or act in any way which is incompatible with Community law or with the Convention rights of the Human Rights Act 1998.[8]

The Welsh Administration Ombudsman, appointed by the Crown, is established by the Act with the duty to investigate and report on complaints of injustice caused by maladministration on the part of the Assembly or its members or officers and certain other public bodies such as the Arts Council and the Sports Council for Wales and the Forestry Commissioners.[9]

[1] s. 58.
[2] s. 65.
[3] National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999 No. 672), supplemented by SI 1999 No. 2787.
[4] s. 29.
[5] Pt. VI.
[6] s. 31.
[7] ss. 85, 86.
[8] ss. 106, 107.
[9] s. 111 and 9th sched.

Disputed competence and 'devolution issues'

The Act provides for the resolution of 'devolution issues' in a manner like that already described for Scotland.[10] Any question whether a function, or any proposed action, of the Assembly is within its powers, and any question of default of duty on its part, may be determined in proceedings brought by the Attorney General.[11] Any such question arising in the course of litigation may be referred by the court or tribunal, after notice to the Attorney General and the Assembly, to the appropriate superior court, with a right of appeal to the Judicial Committee of the Privy Council. There is the same provision as in the case of Scotland, noted above, for allowing a court or tribunal to regulate the retrospective effect of its decision.[12]

[10] s. 109 and 8th sched.
[11] 8th sched., para. 4.
[12] s. 110.

5

PUBLIC CORPORATIONS, PRIVATISATION AND REGULATION

PUBLIC CORPORATIONS

The uses of corporate personality

Throughout the government system it has often been found convenient to confer corporate personality on a particular body that performs public functions.[1] But there is no set pattern. Sometimes central government departments (such as the Department of the Environment) are incorporated by making the Secretary of State a corporation sole[2]—thus the department can own property and contract in its own name. But other departments are not incorporated (such as the Foreign Office). All local authorities, however, have separate legal personality;[3] and may be seen as a particular form of public corporation. As explained above, executive agencies do not have separate legal personality and are not part of this discussion.[4]

Particular use has been made since the nineteenth century of public corporations, set up at arm's length from central government, to carry out specific administrative functions which needed to be 'taken out of politics'. The Poor Law Commissioners established in 1834 may serve as an early example while the Civil Aviation Authority,[5] the Independent Television Commission,[6] the Radio Authority[7] and police authorities are more recent examples.[8] Health authorities and NHS Trusts are public corporations. The membership of such bodies is as varied as their functions. Sometimes members are elected, sometimes they are nominated (by the appropriate minister) and sometimes a mixture of election and nomination is adopted.[9]

[1] Bradley and Ewing, *Constitutional and Administrative Law*, 13th edn. (2002), ch. 14.
[2] The corporation is composed of the minister and his successors in office. Above, p. 47.
[3] Above, p. 111.
[4] Above, p. 47.
[5] Civil Aviation Act 1971.
[6] Broadcasting Act 1990, s. 1 and 1st sched., para. 1.
[7] Broadcasting Act 1990, s. 83 and 8th sched., para. 1.
[8] Police Act 1996, ss. 1–4.
[9] Under the Public Appointments Order in Council 1995 such appointments should be made 'on merit'. There is a Commissioner for Public Appointments to whom complaints may be made and who publishes a Code of Practice for Public Appointments and an Annual Report. The Commissioner's jurisdiction is limited to the bodies listed in an annex to the Order in Council.

There is no need here to catalogue the numerous different types of public corporation, many of which have too little in common to illustrate any legal principle.[10] Whenever Parliament is willing to grant a sufficient measure of autonomy, the public corporation is commonly employed. It has a legal existence of its own, and can be given statutory functions which can operate outside the normal organisation of the service of the Crown. It offers scope for many kinds of governmental experiment, under which central control, local control, particular expertise and independence can be blended in the desired proportions.

After 1945 corporations were much used as the vehicle for the nationalisation of industry with legislation vesting the assets of the industry in a corporate body, such as the National Coal Board. An alternative technique—adopted in the case of the nationalisation of steel—was for the government compulsorily to acquire the shares in the relevant commercial companies and to vest those shares in a public corporation—or, in some cases (e.g. the Bank of England), simply to hold those shares itself. There was normally provision for the minister to give 'directions of a general character' to the corporation, to appoint its chairmen and members and to control its borrowing. Ministers thus had a great deal of power, formal and informal, over the affairs of a nationalised industry. The theory that they would give only general directions and refrain from interference in day-to-day management was falsified by their frequent interference behind the scenes. Nationalised industries did thus not enjoy sufficient independence for them to adopt consistent long-term policies. Since the widespread privatisation during the 1980s and 1990s these issues are of only historical interest.

Degrees of control

Corporations which form part of the administrative structure of social services (such as health authorities) are subject to ministerial directions in all respects. And, as pointed out above, corporations whose primary business, prior to privatisation, was running a nationalised industry did not, in fact, enjoy the freedom from government control that might have been expected.

On the other hand there are corporations which enjoy a very substantial degree of autonomy. The British Broadcasting Corporation, first constituted by royal charter in 1926 and at present chartered until 2006, operates under a statutory licence granted by the Home Secretary under the Wireless Telegraphy Act 1949. The licence contains numerous restrictive conditions, both technical and political. In particular, the Corporation's members are appointed by the Crown; it may be

[10] For a synoptic (and selective) account which attempts a classification see Garner, *Administrative Law*, 8th edn., 347–54.

required to transmit government announcements; and it may be required by the Home Secretary to refrain from transmitting any specified matter or class of matter. The corporation is given standing directions forbidding it to give its own comments on current affairs and restricting party political broadcasts. From 1988 to 1996 restrictions were imposed on the publication of the words of members and supporters of certain terrorist organisations.[11] Similarly the Office of Communications[12] may be required by the Home Secretary to transmit or refrain from transmitting particular items, and is subject to directions as to various matters;[13] but otherwise it is independent.

There is a wide range of other public corporations of a governmental character, mostly with regulatory functions, which operate independently. These include the Civil Aviation Authority,[14] the Health and Safety Executive[15] and the Gaming Board,[16] which all have licensing and controlling powers. An Office of Communications (OFCOM) has been established as a unified regulator for broadcasting and telecommunications.[17] This body takes the place of the several regulators that used to operate in the area.[18] OFCOM has very wide powers to set conditions for the provision of telecommunications services and to license independent broadcasters.[19] The National Lottery Commission is similarly independent; it licenses the lottery operator.[20] The public corporations responsible for the regulation of the privatised utilities, financial services and commerce are discussed below.[21]

The Post Office

The Post Office has a special position, having been a government department in the full sense until turned into a public corporation by the Post Office Act 1969. Here, in contrast with the nationalised industries, the device of a public corporation

[11] These restrictions were challenged but upheld in *R. v. Home Secretary ex p. Brind* [1991] 1 AC 696; below, p. 37.

[12] Established under the Office of Communications Act 2002, s. 1.

[13] Communications Act 2003, s. 5(2), (3).

[14] Civil Aviation Acts 1971, 1980.

[15] Health and Safety at Work etc. Act 1974.

[16] Gaming Act 1968.

[17] Office of Communications Act 2002, s. 1. OFCOM's substantial powers have been transferred to it under the Communications Act 2003, s. 2. This was proposed in a White Paper (Cm. 5010, 12 December 2000).

[18] The bodies replaced are: the Independent Television Commision, the Radio Authority, the Broadcasting Standards Commission and the Director General of Telecommunications. The Secretary of State also loses his regulatory functions over non-military telecommunications. See the 2003 Act, Schedule 1 and Part 1.

[19] 2003 Act, Part 3, Chapter 2.

[20] National Lottery Act 1998, s. 1. There are also the independent distribution bodies that distribute the money raised; they are subject to general directions by the Secretary of State (e.g., s. 13 (duty to draw up strategic plans on Secretary of State's direction)).

[21] Below, p. 153.

was employed to increase rather than reduce the independence of a major industry. In order further to enhance its commercial freedom and to lead to increased competitiveness and efficiency, the Post Office has now become a public limited company.[22] All its shares are owned by the Crown and no further shares may be issued or disposed of without a prior resolution of each House of Parliament.[23]

The Post Office thus now operates as an ordinary commercial company under the control of its Board of Directors.

The Post Office no longer enjoys a formal statutory monopoly on the carriage of letters. But, subject to a range of exemptions,[24] letters may only be carried under licence issued by the Postal Service Commission,[25] and the Commission has not yet licensed other operators to compete generally with the Post Office.[26] The Commission (whose members are appointed by the Secretary of State)[27] has, in addition to its licensing functions, statutory duties such as to 'exercise its functions in the manner which it considers is best calculated to ensure the provision of a universal postal service'.[28] There is also a Consumer Council for Postal Service.[29]

The Secretary of State retains the power to give directions to the Commission in the interests of national security or in the interests of encouraging or maintaining the United Kingdom's relations with other countries.[30]

The Post Office (or any other provider of a universal postal service) is immune from liability in tort for what happens to anything in the post.[31] This immunity extends to any of its officers, servants, agents or sub-contractors.[32]

This is a breach of the principle that a public official is personally liable for wrongful injury.[33] A person who delivers a parcel to the Post Office and sees it damaged or destroyed before his eyes has, it seems, no civil remedy—though

[22] Postal Services Act 2000, s. 62. The nominated company is Royal Mail Group plc.

[23] Act of 2000, s. 67.

[24] For instance, when payment of more than £1 is made for carriage of a letter or where the letter is carried personally by the sender. The full range of exemptions is set out in s. 7 of the Act of 2000.

[25] Act of 2000, s. 6 (licence required), s. 12 (power to grant).

[26] The restrictions of s. 6 may be suspended by the Secretary of State generally (on the recommendation of the Commission) (s. 9) or in an emergency by the Secretary of State alone (s. 10).

[27] Schedule 1 to the Act of 2000.

[28] s. 3(1). A universal postal service is defined in s. 4; it must include a daily delivery to every home (except in exceptional circumstances). The Commission must also exercise its functions so as 'to further the interests of users of postal services, wherever appropriate by promoting effective competition between postal operators' (s. 5(1)).

[29] Act of 2000, s. 2 and Schedule 2.

[30] Act of 2000, s. 101. The Secretary of State also has power to ensure compliance with the European Postal Service Directive: s. 102.

[31] Act of 2000, s. 90(1).

[32] Act of 2000, s. 90(2). *American Express Co.* v. *British Airways Board* [1983] 1 WLR 701 (airport authority claimed immunity as a sub-contractor when travellers cheques stolen by its employee; breach of bailment (not a tort) covered by immunity).

[33] Below, p. 819.

criminal proceedings will lie, and even carelessness is a statutory offence in such a case.[34] There is, however, a scheme of limited liability for the loss of inland registered packets;[35] and the Post Office has power to make a scheme in respect of inland packets in respect of which it accepts liability but the amount recoverable is still meagre.[36] It is surprising that the wide immunity of Post Office employees is still tolerated.

Legal status and liability

Public corporations are as subject to the ordinary law, e.g. as to corporate powers, taxation and liability in tort as are other corporate bodies, unless they enjoy some statutory exemption. Contracts made outside their powers are null and void.[37] Public corporations do not generally enjoy any of the immunities of the Crown. 'In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property'.[38] Thus the British Transport Commission in ejecting a tenant was unable to rely upon the Crown's immunity from legislation protecting tenants.[39] Similarly, the BBC is not entitled to the Crown's immunity from taxation.[40] The NHS, however, enjoys the Crown's right to use patents.[41] Its other immunities have been largely removed by the National Health Service and Community Care Act 1990.

Public corporations have no direct responsibility to Parliament.

Relevance in administrative law

The actions of public corporations are judicially reviewable in the same way as those of other bodies, where they have powers of a public law character.[42] Thus the Independent Television Commission's licensing decisions are subject to judicial review,[43] and a decision of British Coal, before privatisation, to close certain coal

[34] Act of 2000, ss. 83 and 84. See also *Gouriet* v. *Union of Post Office Workers* [1978] AC 435 (offence of detaining or delaying postal packet).

[35] Act of 2000, s. 91. The action has to be brought within 12 months (instead of the usual six years) and does not extend to overseas packets even if lost or damaged locally.

[36] Act of 2000, s. 89.

[37] The clearest examples are from the field of local government. See below, p. 796.

[38] *Per* Denning LJ in *Tamlin* v. *Hannaford* [1950] 1 KB 18.

[39] *Tamlin* v. *Hannaford* (as above).

[40] *British Broadcasting Corporation* v. *Johns* [1965] Ch. 32.

[41] *Pfizer Corporation* v. *Minister of Health* [1965] AC 512.

[42] See below, p. 605.

[43] *R.* v. *Independent Television Commission ex p. TSW Ltd*, The Times, 30 March 1992 [1996] EMLR 291 (application unsuccessful). See [1992] *PL* 372 (T. Jones).

mines was successfully challenged.[44] On the other hand, the decision of a public corporation to dismiss an employee is no more subject to judicial review than a similar decision by a private corporation.[45] The modern law of judicial review is, in this regard, guided by function rather than form.

THE MECHANISMS OF PRIVATISATION

As adumbrated, since 1980 practically all of the previously nationalised industries have been privatised. The usual statutory pattern was to provide that on an appointed day the assets of the public corporation should vest in a successor company nominated by the Secretary of State.[46] This company was to take the form of a normal commercial company limited by shares. In the first instance the shares would all be held by the government, but they would proceed to sell part or all of them to private investors. The government might or might not then retain a majority shareholding and might or might not take special powers to appoint directors.[47] But it would have no power to give directions, control capital investment, etc., otherwise than as a shareholder under normal company law. Where the concern to be privatised was already an ordinary company, all that was necessary was to authorise the government to put part or all of its shareholding on the market.[48] One further form of privatisation is to provide simply that the Secretary of State may order a corporation to discontinue any activity and to dispose of any part of its undertaking or assets as directed by him.[49]

In the background, however, there is an ultimate measure of government control. The constitutions of the new companies frequently provide that the government retains a special share (commonly known as the 'golden share') which gives it paramount rights, e.g. to appoint directors and outvote all others, either at any time or for a certain term of years. The purpose is to protect the independence of the company so that it may not, for example, come under foreign control. Golden shares, however, restrict the free movement of capital contrary to article 56 EC and will be struck down by the ECJ unless justified on public policy or security

[44] *R. v. British Coal Cpn ex p. Vardy* [1993] ICR 720; contrast *R. v. National Coal Board ex p. National Union of Mineworkers* [1986] ICR 791.

[45] *R. v. East Berkshire Health Authority ex p. Walsh* [1985] QB 152 (below, p. 670).

[46] This was the model adopted in the privatisation of British Petroleum.

[47] Although there were many differences of detail this was the basic mechanism adopted for most privatisations. But, particularly in the case of the utilities, the nationalised industry was first re-organised before sale on either a regional or functional basis into several enterprises.

[48] The government's shares in Cable & Wireless, British Petroleum, Jaguar Motors and Rolls-Royce were all sold in this way.

[49] Such powers were exercised under the Oil and Gas (Enterprise) Act 1982 for disposing of the British Oil Corporation's assets to Britoil and Enterprise Oil, whose shares were then sold to the public.

grounds: *Case C-98/01 Commission* v. *UK* (13 May 2003) (Golden share in British Airports Authority held a breach). The government has dispensed with its 'golden share' in many cases.

REGULATION

The changing nature of regulation

Privatisation necessitated radical changes in the technique of regulation. The bane of the nationalised industries had been ministerial interference, often politically motivated, which frustrated the operation of market forces.[50] Shareholder control, in so far as it worked at all, would work to maximise profits rather than to protect the consumer. The solution found was to establish independent regulators armed with strong statutory powers and given the statutory duty of safeguarding consumers' interests and preventing the abuse of monopoly.[51] Control by government command (or, more often, by surreptitious pressure) was replaced by independent regulation. This was a new constitutional experiment, being a sharp departure from the principle of ministerial responsibility.[52] It poses important issues of public policy.

The regulatory machinery might take various forms. Since 1948 the Monopolies Commission, now replaced by the Competition Commission, had had powers of investigation over monopolies and restrictive practices, as noted below. When the denationalised industries were privatised a new pattern emerged for the control of utilities such as telecommunications, gas, electricity and water. For each industry there was established a government-appointed but otherwise independent regulator who could grant, revoke and modify their statutory licences and penalise infringements. Sometimes there was non-statutory regulation, as in the case of the Takeover Panel of the Stock Exchange, which could enforce its rulings by excluding an offending trader from the market.[53] Nor were these the only forms of regulation. The only common element throughout was the sharply reduced role of government policy, once the regulatory regime was established. Regulation was to be done

[50] See above, p. 30.

[51] For a general account and comment see Prosser, *Law and the Regulators* (1997). See also [1995] *PL* 94 (J. M. Black) for discussion on types of rules and regulatory policy and [1998] *PL* 77 (J. M. Black) for the formation of rules through discussion between regulator and the regulated. For comment on regulatory procedures and decisions see Ogus, *Regulation, Legal Forms and Economic Theory.*

[52] 'On one view, to the classical question "quis custodiet ipsos custodes?"—who regulates the regulator?—the truthful answer is "no one"' (Harlow and Rawlings, *Law and Administration*, 2nd edn., 329.

[53] See below, p. 640. See similarly the Press Complaints Commission, below, p. 643.

by regulators, not by ministers, although ministers had important powers over the conditions within which regulation was done (such as the number of telecommunications licences to be granted) and in some cases were empowered to give directions or guidance.[54] Sometimes, also, ministers were given important reserve powers.[55]

The regulators have been given social as well as economic duties. In the case of gas, for example, the first of the listed duties of the Secretary of State and the Director is to protect the interests of consumers and they are required also to take account, in particular, of the interests of the chronically sick, the disabled and pensioners.[56] There is a 'gas care register' to ensure special consideration for the handicapped. In granting licences the Director is prohibited from including discriminatory conditions of certain kinds, and he must impose standard conditions to the same effect on licensees. Disconnections are controlled and have been reduced, as also in the case of electricity. The regulator's general duty to promote efficiency and economy in the industry is therefore qualified substantially by his social obligations.

SOME REGULATORY MECHANISMS

The regulation of commerce

For many years[57] there has been statutory law regulating competition in trade in the UK and this is a specialised area of law in its own right. The bulk of the relevant law is now to be found in the Competition Act 1998 which is designed to ensure that UK competition law is consistent with European Community law.[58] The 1998 Act deals in the main with trade practices as explained below. The Enterprise Act 2002[59] establishes the current control regime for mergers and inquiries into monopolies (the latter now called 'market investigations').

Subject to widespread exemptions, both particular and general, agreements between undertakings (i.e. companies, partnerships, or individuals), decisions by associations of undertakings and concerted practices which affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited (Chapter One prohibitions)[60] and

[54] See below, p. 156.

[55] As in the Electricity Act 1989, ss. 11, 12, 34.

[56] Gas Acts, 1986, s. 4, 1995, s. 1. See Prosser (as above), 106.

[57] There has been relevant statutory law governing competition and restrictive trade practices since the Monopolies and Restrictive Trade Practices (Inquiry and Control) Act 1948.

[58] Articles 81 and 82 EC Treaty.

[59] Replacing the regime established in the Fair Trading Act 1973.

[60] Act of 1998, s. 2. Section 3 providing that this prohibition does not apply to the bodies and agreements listed in four schedules (two of which can be amended by the Secretary of State). Individual exemption may be granted by the Director-General of Fair Trading (s. 4).

void.[61] The fixing of prices, the limitation of supply, the sharing of markets (or sources of supply), discrimination against trading parties and making contracts conditional upon conditions unconnected to the subject of the contract are all prohibited.[62] These prohibitions are intended to mirror Article 81 of the Treaty of Rome.

In a similar way, the abuse of a dominant position in a market which may affect trade in the UK is also prohibited (Chapter Two prohibitions).[63] Such abuse includes, but is not limited to, the imposition of unfair prices or other trading conditions, the limitation of production, or markets, or technical developments to the detriment of the consumer as well as discrimination against trading parties and making contracts conditional upon conditions unconnected to the subject of the contract.[64] These prohibitions are intended to mirror Article 86 (now 82) of the Treaty of Rome.

Of particular importance to administrative law is the procedure for enforcement of these prohibitions.[65] The Director General of Fair Trading has power to investigate if there are reasonable grounds for suspicion that there has been an infringement of either Chapter One or Chapter Two.[66] If he concludes that there has been an infringement he may issue directions to bring the infringement to an end,[67] and he may impose penalties.[68] If a person fails without reasonable excuse to comply, the Director may apply to the court for an order requiring the default to be made good.[69] The Director may also give guidance whether particular agreements or conduct are infringements;[70] and he may take interim measures before he has completed an investigation where there would otherwise be irreparable damage to a particular person or groups.[71]

[61] s. 2(4).

[62] s. 2(2). Decisions prior to the Act of 1998 were *Garden Cottage Foods Ltd.* v. *Milk Marketing Board* [1984] AC 130 and *An Bord Bainne Co-operative Ltd.* v. *Milk Marketing Board* [1984] 2 CMLR 584 for which see below, p. 668.

[63] s. 18. Once more provision is made for exclusion from the reach of s. 18 by schedule (generally liable to be altered by the Secretary of State): s. 19.

[64] s. 18(2).

[65] In addition to enforcement by the Director, enforcement by private law action may be possible. This seems to have been the government's intention (HL Deb., Vol. 582, col. 1148, 30 October 1997) but the Act does not directly grant such a right to individuals and the existence of a statutory enforcement procedure may preclude this. See [1998] 7 ECLR 443 (Kon and Maxwell).

[66] s. 25. The Director may require the production of documents or information from 'any person' (s. 26(1) and may enter premises under a warrant without notice (s. 28) or without a warrant but with notice (s. 27)).

[67] ss. 32 and 33.

[68] ss. 36–38.

[69] s. 34.

[70] s. 12. Where the Director has given guidance that a particular agreement does not infringe Chapter One, then no further action will be taken and no penalty imposed unless there has been a material change of circumstances (or like development) (s. 16).

[71] s. 35.

Any decision of the Director in respect of an agreement, or in respect of some person's conduct, may be appealed to the Competition Tribunal.[72] Moreover, third parties with sufficient interest may apply in writing to the Director asking that a particular decision be withdrawn or varied. If the Director rejects such an application, the applicant may appeal to the Competition Tribunal.[73] There is a further right of appeal, with leave, to the Court of Appeal on a point of law or on any penalty.[74]

As adumbrated the Enterprise Act 2002 establishes a new control regime governing the approval of mergers and market investigations (previously monopoly inquiries).[75] The broad test of 'public interest' used in the past has been replaced by much narrower tests. The Office of Fair Trading may make a reference to the Competition Commission when it concludes, following a market investigation, that there are 'reasonable grounds' for suspecting that a feature of a market 'restricts or distorts competition'.[76] And proposed mergers are assessed by a text of whether they may expect to result in 'substantial lessening of competition'.[77]

In the past a report preceded by an investigation by the Competition Commission following a reference by the Office of Fair Trading went to the appropriate minister who had wide powers exercisable by order to remedy the deficiencies found.[78] Under the 2002 Act, save in a small number of 'public interest' cases,[79] ministers are no longer involved. The Competition Commission itself decides on the appropriate action and has powers to that end.[80] Its decision, however, as well as the original decision to make a reference is subject to appeal to the Competition Appeal Tribunal[81] which, however, applies judicial review principles.[82] There is a further appeal on a point of law to the Court of Appeal.[83] Although many applica-

[72] See Enterprise Act 2002, ss. 12, 21 and Sched. 5 read with s. 46 of the 1998 Act.

[73] s. 47. of the 1998 Act, read with Sched. 5 of the 2002 Act.

[74] s. 49.

[75] Discussed [2003] *Judicial Review* 41 (Rayment).

[76] Act of 2002, s. 131(1).

[77] Act of 2002, s. 22. In addition there must be a 'relevant merger situation' which requires in broad terms that 'two or more enterprises have ceased to be distinct enterprises' and the 'turnover in the United Kingdom of the enterprise being taken over exceeds £70 million' (s. 23). Similar rules apply where the merger is simply anticipated (s. 33).

[78] See the discussion in the 8th edn. at 151.

[79] Act of 2002, Part Three, Chapter 2, ss. 45–55 (mergers). The minister's power is a default power—to act when the matter would not otherwise reach the Competition Commission. See also Chapter 3 dealing with special public interest cases (government contractors involved). There are similar powers for market investigations (Part Four, Chapter Two).

[80] Act 2002, Schedule 8. The normal method in the case of mergers is to seek an undertaking that an enterprise divest itself of certain assets, etc. But if undertakings are not given orders may be made. The OFT has the duty of enforcing the orders made (s. 162).

[81] For the structure of the Tribunal see Act of 2002, Part Two and Schedule 4.

[82] Act of 2002, s. 120(4).

[83] Act of 2002, s. 120(6).

tions for judicial review have been made against the Competition Commission or its predecessor, few have been successful.[84] The courts show understandable reluctance to intervene in questions of economic and competition policy. But where the Commission follows an unfair procedure the judicial review court will be alert to remedy that.[85]

The regulation of financial services[86]

Financial services is an area where regulation is clearly needed. The Financial Services and Markets Act 2000[87] brings together the many bodies[88] that previously regulated various forms of financial services; its remit extends beyond simple consumer protection. Instead there is established a Financial Services Authority[89] which has power to regulate banks, building societies, insurance companies, friendly societies, Lloyd's, investment and pensions advisers, stockbrokers, fund managers and derivative traders. The Act specifies the FSA's regulatory objectives and the authority must 'so far as reasonably possible' discharge its functions in a way that is compatible with these objectives.[90] These are: market confidence, public awareness, the protection of consumers and the reduction of financial crime.[91] The Authority is placed under a general duty to consult both practitioners in the market and consumers.[92] The Treasury has power to appoint an independent person to carry out a review of the economy,

[84] See [2001] *Judicial Review* 84 (Robertson) showing that there had been no successful judicial reviews against the authorities at that time.

[85] *Interbrew v. Competition Commission and Department of Trade and Industry* [2001] EWHC Admin 367; [2001] UKCLR 954 (failure by Commission to consult over alternative remedy (divestment of Whitbread); decision to ask Director-General of Fair Trading to negotiate undertakings that Interbrew divest itself of Bass quashed). Discussed [2002] *Judicial Review* 88 (Robertson).

[86] See Ferran and Goodhart (eds.) *Regulating Financial Services and Markets in the Twenty First Century* (2001, Hart) and [2003] *PL* 63 (J. M. Black).

[87] The Act is very complex and no more than a sketch of its provisions may be given here. For discussion of judicial review and the 2000 Act see [2001] *JR* 255 (A. Henderson). For discussion of financial regulation prior to the 2000 Act see Hopper, 'Financial Services Regulation and Judicial Review: the Fault Lines' in Black, Muchlinski and Walker (eds.) *Commercial Regulation and Judicial Review* (1998), 63–95.

[88] These include the Self-Regulating Organisations (SROs) (such as the Personal Investment Authority (PIA), the Investment Management Regulatory Organisation (IMRO) and the Securities and Futures Authority (SFA)), the Supervision and Surveillance Branch of the Bank of England, the Building Societies Commission, the Insurance Directorate of the Treasury and the Friendly Societies Commission. The Authority takes the place of the former Securities and Investments Board.

[89] Financial Services and Markets Act 2000, s. 1, 1st sched. sets out the requirements of the FSA's constitution. Its executive members and chairman are appointed by the Treasury.

[90] Act of 2000, s. 2(1).

[91] Act of 2000, s. 2(2). The objectives are defined in detail in ss. 3–6.

[92] Act of 2000, s. 8. To this end there must be maintained a standing 'Practitioner Panel' and a 'Consumer Panel' for consultation purposes: ss. 9 and 10.

efficiency and effectiveness with which the Authority uses its resources; and to appoint such a person to carry out an inquiry where events have occurred which pose or could have posed 'a grave risk' to the financial system or the interests of consumers;[93] or where through the failure of the regulatory system 'significant damage' has been or could have been caused to the holders of listed securities.[94]

The basic mechanism for regulation is that, subject to exemptions,[95] the permission of the Authority is required[96] before any person can undertake regulated activities[97] as an 'authorised person'.[98] In addition employees and office-holders of authorised persons must be approved by the Authority and comply with its requirements.[99] The Authority may impose financial penalties (without limit of amount) on authorised persons who contravene any requirement imposed by or under the Act.[1] It may also withdraw permissions granted.[2] A Financial Services and Markets Tribunal is established[3] to which adverse decisions of the Authority may be referred by the party affected. The Act provides no procedural safeguards before adverse decisions other than 'warning notices' which must give reasons and against which representations may be made. But the Authority must determine and publish its own procedural rules,[4] which must provide that the decision is taken by a person not directly involved in establishing the evidence, and which will doubtless be subject to judicial review. Where the Authority determines that an individual is not a fit and proper person to perform a particular function it may make a 'prohibition order';[5] and such orders may be referred to the tribunal.[6] There is an appeal from the decisions of the tribunal to the Court of Appeal on a point of law.[7]

The Authority also has power to make general rules applying to the carrying on

[93] s. 14(2).
[94] s. 14(3).
[95] The Treasury may exempt specified persons or classes of person (s. 38).
[96] s. 20. A breach of this section is a crime (up to two years' imprisonment on indictment) but it is a defence for a defendant to show that he took 'all reasonable precautions and exercised all due diligence' (s. 23). Elsewhere in the Act there are many criminal sanctions, e.g. s. 346.
[97] Regulated activities are defined in s. 22 and 2nd sched. and include the provision of most forms of financial service.
[98] A person is 'authorised' if he has been given permission to carry on a regulated activity by the Authority (s. 31). The procedure for obtaining permission is set out in Pt. IV of the Act. The 3rd sched. and 4th sched. contain special provisions for the authorisation of firms situated in European Economic Area states and authorised by their home states to carry on the activity in question.
[99] Pt. V.
[1] ss. 91, 100, 206. A penalty is recoverable as a debt (s. 180).
[2] s. 45 and s. 33.
[3] s. 132. The members are appointed by the Lord Chancellor and the President (and chairmen of panels) must be legally qualified (11th sched.).
[4] s. 395.
[5] s. 56.
[6] s. 57(5).
[7] s. 137.

of regulated activities as appear to it to be 'necessary or expedient'.[8] And it may make 'endorsing rules' approving the City Code on Takeovers and Mergers (issued by the Takeover Panel).[9] Rules may also be made governing price stabilisation, financial promotion and money laundering.[10] Contravention of a rule does not render a transaction void[11] and does not necessarily entail disciplinary action.[12] But, unless the rules provide otherwise,[13] a private person who has suffered loss as a result of a contravention has an action for damages 'subject to the defences and other incidents applying to actions for breach of statutory duty'.[14] Proposed rules must be published in draft (accompanied by a cost benefit analysis, an explanation of their purpose and the Authority's reasons). The Authority must consider representations made to it about the draft rules.[15] The Authority may also give guidance on the operation of the Act and of the rules made under it.[16]

The Authority must establish a compensation scheme for the benefit of investors and others where authorised persons are unable to satisfy the claims against them, and there is power to impose a levy on authorised persons for the funding of the scheme.[17]

The regulation of public utilities[18]

Notwithstanding significant increases in competition,[19] the denationalised public utilities remain monopoly or near monopoly providers of important services.[20] Some mechanism is necessary in order to prevent them exploiting their position to the detriment of the public. Regulation here also has an important social dimension, in ensuring that the service in question is available to all, is not arbitrarily denied or restricted, and is not over-priced.[21]

[8] s. 138. Rules can also be made about non-regulated activities by authorised persons to ensure that there is no adverse effect on regulated activity (s. 138(1)(b)).

[9] s. 143.

[10] ss. 144–46.

[11] s. 151(2); and a breach of a rule is not an offence (s. 151(1)).

[12] s. 149.

[13] s. 150(2).

[14] s. 150(1). For such actions see below, p. 773.

[15] s. 155(4).

[16] s. 157.

[17] s. 213.

[18] See Cosmo Graham, *Regulating Public Utilities: A Constitutional Approach* (Hart Publishing, Oxford, 2000).

[19] OFGEM reports that about 40 per cent of domestic consumers of gas and electricity have changed their supplier.

[20] See generally, 'The Juridification of Regulatory Relations in the UK Utilities Sectors' in Black, Muchlinski and Walker (eds.) (as above), 16.

[21] The Utilities Act 2000, for instance, imposes specific obligations upon the Secretary of State and OFGEM to 'have regard to the interests of the disabled, pensioners and the poor' (s. 9, s. 13).

The regulation of utilities has principally[22] taken the form of a regulator—either a Director-General or a Regulatory Authority—appointed by the Secretary of State, who wields important powers in the interests of consumers, and whose duty it is to promote efficiency and economy and to promote competition.[23] The offices of the regulators have become known by their acronyms. Thus there is OFTEL (Office of Telecommunications), OFGEM (Office of Gas and Electricity Markets),[24] OFWAT (Office of Water Services), and ORR (Office of the Rail Regulator). The same person may regulate more than one utility (as is in fact the case with gas and electricity).

Under the statutory scheme each supplier must hold a licence from the Secretary of State or the regulator (most frequently the regulator) which is subject to conditions. The regulator can enforce conditions by making orders, either provisional or final, which have no criminal sanction but allow the consumer to recover the loss resulting from a violation. The regulator can refer a practice to the Competition Commission; and if the Commission reports on it adversely the regulator may prohibit or regulate it by varying the conditions of the supplier's licence. The threat of a reference to the Commission is a powerful lever in the regulators' hands. In imposing sanctions the regulator must take account of any representations by the supplier. He may also generally set the price of the service in question. The similarity in these formal arrangements for the regulation of the several public utilities should not conceal the important functional differences between them and the different challenges that they face. Thus the regulation of telecommunications takes place in circumstances of growing competition while there is little possibility of competition in the water industry. Effective competition has been introduced into the supply of gas and electricity.[25]

The regulation of the railways does not follow this pattern, reflecting the fact that British Rail was divided into many different parts before sale to the private sector. The track and other infrastructure (including signalling) is owned by a not for profit company, Network Rail.[26] The Strategic Rail

[22] Other forms of regulatory bodies are the Civil Aviation Authority (Civil Aviation Act 1982), and OFCOM (constituted by the Office of Communications Act 2000 (above, p. 143). For the Press Complaints Commission and the Advertising Standards Authority see below, p. 642. The British Airports Authority, now a commercial company, is regulated by the Civil Aviation Authority in conjunction with the Competition Commission under the Airports Act 1986.

[23] Telecommunications Act 1984, s. 1 (Director-General of Telecommunications); Utilities Act 2000, s. 1 (establishing OFGEM); Water Industry Act 1991, s. 1 (Director-General of Water Services).

[24] Created by the merger of OFGAS (Office of Gas Supply) and OFFER (Office of Electricity Regulation) by the Utilities Act 2000. The full name is the Gas and Electricity Markets Authority.

[25] The Utilities Act 2000, Part II sets the objectives for OFGEM which include promoting competition.

[26] The track and other assets were transferred to Railtrack, whose shares were owned by the Secretary of State, by orders made under the Railways Act 1993, ss. 84, 85. The shares were thereafter sold to the public. After Railtrack went into administration, it was taken over by Network Rail, a company limited by guarantee.

Authority[27] has broad strategic purposes to promote and develop the use of the railway network and to contribute to an integrated system of transport; and to this end, subject to 'directions and guidance' from the Secretary of State,[28] develops strategies to further these purposes.[29] The SRA has a range of functions. Most prominently, it grants franchises to operate trains on the track to private rail companies. The SRA determines the Passenger Service Requirement (PSR), i.e. the standard of service required to be provided on any particular route, and is also responsible for the distribution of public subsidy to the rail companies. The tender process whereby the franchises (and the subsidy that comes with them) are allocated is largely secret.[30] The SRA also funds rail consultative committees,[31] and may provide grants in support of railway services.[32] As a last resort it may provide rail services itself.[33]

A franchised rail company, however, requires a licence[34] from the Office of Rail Regulation[35] (ORR)—which has many other functions: the promotion of the use of railways, as well as efficiency, economy and competition[36]—and will need to pay an access charge to Network Rail. The Office of Rail Regulation ensures that the track is accessible to those operators needing access;[37] it enforces the conditions in the licences and may make orders to that effect.[38] Previously the Rail Regulator decided on the closure of passenger services (subject to appeal to the Secretary of State) but since 1999 this has been the task of the Secretary of State.[39] The

[27] Established by the Transport Act 2000, s. 202. The SRA takes the place of the Director of Rail Franchising (established by the Railways Act 1993, s. 1) and assumes the residual functions of the British Railways Board which is abolished. See s. 215 of the 2000 Act.

[28] Act of 2000, s. 206(3). The courts insisted that the SRA's predecessor comply with such instructions in *R. v. Director of Passenger Rail Franchising ex p. Save Our Railways* [1996] CLC 596 (instruction that PSR be based on that provided by BR justified quashing of PSR that fell below that standard). Scottish Ministers may give the SRA directions and guidance in respect of franchised services that start and end in Scotland provided the guidance is not inconsistent with the Secretary of State's guidance and does not require expenditure other than that provided out of the Scottish Consolidated Fund (Act of 2000, s. 208).

[29] Act of 2000, s. 206(1).

[30] Harlow and Rawlings, *Law and Administration*, 2nd edn. (1997), 286–7.

[31] Act of 1993, ss. 2 and 3 and Sched. 2 and 3 as amended by the Act of 2000, s. 229 and Sched. 23.

[32] Act of 2000, s. 211.

[33] Act of 2000, s. 213.

[34] Act of 1993, s. 8.

[35] Act of 1993, s. 1(1)(a) as amended by Sched. 2 to the Railways and Transport Safety Act 2003. The latter Act transferred the functions of the Rail Regulator to the newly created office of Rail Regulation (ss. 15 and 16).

[36] Act of 1993, s. 4, as amended.

[37] Act of 1993, ss. 17, 18, as amended. ORR may require owners of railway facilities to grant access on terms determined by it and its approval is required for such contracts voluntarily concluded. See *Winsor* v. *Bloom* [2002] 1 WLR 3002 (CA).

[38] Act of 1993, ss. 54, 57, as amended.

[39] Act of 1993, s. 43 as amended by the Act of 2000, s. 227(2) and Sched. 22. This procedure requires widespread consultation (Act of 1993, ss. 37–50).

Secretary of State has powers to modify the conditions of licences to prevent the development of monopolies.[40] Rail operators are responsible for safety and undergo a validation process by making a safety case to Network Rail which itself is subject to the safety requirements of the Health and Safety Executive.[41] The Secretary of State, the SRA and ORR must take safety (including the advice of the HSE) into account in exercising their functions.[42]

The powers of the utility regulators have been strengthened by the Competition and Service (Utilities) Act 1992, which empowers them to set standards of performance by regulations, with enforcement by the same system as for breaches of conditions in licences. They are empowered also to determine disputes over charges made to customers under regulations made by the Secretary of State, and for their determinations must give reasons. The Act requires each supplier to establish a complaints procedure.

REGULATION AND JUDICIAL REVIEW

The new emphasis on regulation illustrates the changing style of governmental organisation. In the most obvious case of the privatisation of previously nationalised industries the effect has been to shift power from the hands of a minister, accountable to Parliament, into the hands of an independent regulator.[43] Although the regulator is generally appointed by, and may be dismissed by, the relevant minister, accountability to Parliament for the regulation of the activity in question has generally been confined to appearances before Select Committees.[44] That there are important issues of public policy has already been pointed out and the primary concern here must be with the impact of regulatory regimes in administrative law.

The drastic powers of the regulators to investigate, to make rules, to impute fault and to impose penalties involve a mixture of legislative, administrative and judicial functions and pose obvious problems of administrative justice. As we have seen, a person aggrieved by the actions of a regulator sometimes has a right of appeal to a tribunal and thereafter to a court. On other occasions that person will have little

[40] Act of 1993, ss. 13, 14, 15. This will typically follow a reference to the Competition Commission by ORR.

[41] Health and Safety Executive, *Ensuring Safety on Britain's Railways* (1993), paras. 5–6.

[42] Act of 1993, s. 4(3) (Secretary of State and Regulator); Act of 2000, s. 207(3) (SRA).

[43] Sometimes, however, a minister may give directions to a regulator. See Fair Trading Act 1973, s. 12 (general directions in regard to priorities); Railways Act 1993, s. 5 (instructions and guidance).

[44] See Prosser, *Law and the Regulators*, 295 making proposals to improve accountability.

choice but to seek judicial review of the regulator's decision. There is no difficulty over the principle that such decisions are subject to judicial review.[45] Applications for judicial review have been brought against many regulators including the Monopolies and Mergers Commission, the Office of Fair Trading, the Director-Generals of Water, Electricity, Telecommunications, many financial services regulators, the Takeover Panel, the Stock Exchange, the Bank of England, the Independent Television Commission and the Director of Passenger Rail Franchising.[46] It is thus clear that regulators have no immunity from the rule of law. But the success rate of their antagonists has generally been low. One case of success was where a directorgeneral's refusal to modify a power generating licence in a complex situation was quashed by the Court of Appeal on grounds of irrationality and unfairness.[47] Another was where the Director-General of Water Services was required by the court to use enforcement powers in the interests of consumers.[48] A third was where one of the railway regulators exceeded his powers in specifying minimum service levels.[49] A fourth was where the National Lottery Commission allowed one bidder for the licence to run the national lottery to improve its bid, but not the other.[50]

But the Court of Appeal has held that in reviewing a regulatory body the courts should allow a margin of appreciation and intervene only in case of a manifest breach of principle.[51] It has been recognised that 'the [judicial review] courts [can] play a role in overseeing the decision-making process [of regulators] from the perspective of rationality and legality, and ensuring that decisions are made which are not simply pandering to special interests at the expense of wider public policy goals'.[52] It may be expected, however, that the courts will recognise the expertise of the regulators and be cautious before quashing their decisions,[53] and that they will view sympathetically the dilemmas faced by regulators such as the FSA who may destroy a viable business if they intervene too soon but may hasten disaster if they

[45] See below, p. 640. Cf. Hopper (as above) 72–3, pointing to the difficulties in regard to judicial review of bodies that owe their jurisdiction to contract. See, for instance, *R. v. Insurance Ombudman Bureau, ex p. Aegon Life*, *The Times*, 7 January 1994. Many of the difficulties over the review of self-regulatory organisations such as IMRO (as above) have been resolved by the Financial Services and Markets Act 2000. In appropriate circumstances private law actions may be brought against regulators: [1995] *PL* 539 (A. McHarg) and see below, p. 773 (breach of statutory duty and misfeasance).

[46] See Black, Muchlinski and Walker (eds.) (as above), 4 (Black, Muchlinski). It has been suggested that sometimes this is 'vanity' judicial review, i.e. it is sought simply as a way of publicising the applicant's case ((1996) *Nottingham LJ* 86 (Marsden)).

[47] *R. v. Director General of Electricity Supply ex p. Scottish Power* (unrep., February 1997) for which see [1997] *PL* 400 (C. Scott), discussing regulatory licensing and judicial review.

[48] *R. v. Director General of Water Services ex p. Oldham MBC* (unrep., 20 February 1998) (pre-payment system evading statutory safeguards against disconnection).

[49] *ex p. Save our Railways* (as above).

[50] *R. v. National Lottery Commission ex p. Camelot Group plc* [2001] EMLR 3.

[51] *R. v. Radio Authority ex p. Bull* [1997] EMLR 201.

[52] Black and Muchlinski (as above), 14.

[53] There has been some criticism of the courts for misunderstanding the system that is being reviewed (Black and Muchlinski (as above), 16).

delay.[54] Challenges based upon the irrationality of regulators' decisions have generally failed.[55] And the courts have not allowed challenges based upon the Human Rights Act 1998 to undermine the autonomy of regulators.[56] But the challenges have thus far not revealed grave infringements of human rights.

Although the usual grounds of judicial review will doubtless be brought to bear in this area, one issue is distinct: as observed above, regulators in performing their tasks will often interpret rules which they have made themselves. This has led to suggestions that the courts should only intervene where the interpretation of the rule by the regulator is irrational.[57] The courts, however, have dealt with such rules as if there was a single correct answer to every question of interpretation and from which the regulator could not lawfully deviate.[58] After all, even if the regulator had the power to make a rule in the terms desired, those affected are surely entitled to the application of the rule as it stands. If the regulator's interpretation were only reviewable on the ground of irrationality, the temptation to interpret the rule in the way that the regulator favours rather than in the actual sense of the words would be irresistible. The regulator is invested with legislative power[59] and his rules should be interpreted accordingly.

Regulators will continue to be prominent respondents in the judicial review courts. Their decisions have impact in many markets and it is right that they should be open to challenge to ensure their legality. The classic principles of administrative law are sufficiently flexible to carry out this task. Judicial review, however, cannot be considered a suitable substitute for Parliamentary accountability and debate on that issue will doubtless continue.[60] At least it can be said of the directors-general that the vacuum of accountability in which they operate is an improvement on the highly politicised environment which made such difficulties for the old nationalised industries.

[54] For judicial comments on this dilemma see below, p. 752. The Barlow Clowes affair (above, p. 97) was a classic example.

[55] *R. (London and Continental Stations and Property Ltd)* v. *The Rail Regulator* [2003] EWHC 2607 (Rail Regulator's scheme for calculating compensation to rail service operators for disruption held reasonable and not a breach of HRA 1998 Sch. 1 Part II Art. 1); *R (Hunt)* v. *Independent Television Commission* [2003] EWCA Civ. 81 (decision that television company had not breached the code of practice by failing to broadcast freelance journalist findings on controversial issue held rational). But requirement of regulator to comply with the principle of proportionality recognised by Moses LJ in *British Telecommunications plc* v. *Director General of Telecommunications* (4 August 2000) (European law context).

[56] See *R. (London and Continental Stations and Property Ltd)* v. *The Rail Regulator* (above) and *Bertrand Fleurose* v. *The Securities & Futures Authority Ltd* [2001] EWCA Civ. 2015 (claim by city trader that enforcement action taken against him by the Securities and Futures Authority was in breach of European Convention (allegedly vague charges and absence of equality of arms) rejected by the Court of Appeal. Applicability of Article 6(1) accepted but not Article 6(2)).

[57] Black, Muchlinski and Walker (eds.) (as above), 156 (Black).

[58] Black (as above), 138–42 but pointing out that the courts have adopted purposive approaches in such interpretation (relying primarily on *R.* v. *Investor Compensation Scheme, ex p. Weyell* [1994] QB 749 and *R.* v. *Investor Compensation Scheme, ex p. Bowden* [1995] 3 All ER 605 (HL)).

[59] See below, p. 639.

[60] [1990] *PL* 329 (J. F. Garner); [1991] *PL* 15 (C. Graham).