FREEDOM OF EXPRESSION[1]

Introduction

25–001 Freedom of expression is generally recognised as having particular importance, but what is meant by such freedom? It must no doubt include writings and words meant to influence political views, for example, the desirability of proportional representation as a method of electing members of the House of Commons. But does freedom of expression include symbolic gestures intended to convey a political message: the wearing of a particular coloured shirt to indicate support for a political party; the vulgar sign in the presence of royalty intended to indicate a profound conviction of the need for a republican form of government? There may be doubts too about whether the right is confined to communicating political ideas, and what is meant by communication? Does the freedom to publish books criticising Marxism extend to the freedom to publish books criticising conventional views on matrimony or sexual mores in general? Are collections of pornographic photographs (assuming agreement could be reached on the meaning of pornographic) also expressions of views about morality which are therefore entitled to claim the protection of the law?

While agreeing on the importance of the freedom of expression there may be doubts about the propriety of limiting that freedom to achieve other ends, for example to protect the young from corruption or to prevent public disorder. The extent to which such limitations are thought appropriate is likely to depend on why freedom of expression is believed to be important. Some may wish to argue that restrictions on free expression may prevent society from ascertaining the truth on matters of debate.[2] Others may see freedom to speak, write and read as an aspect of each individual's right to moral independence.[3]

In many countries freedom of expression is constitutionally guaranteed,[4] but until the enactment of the Human Rights Act 1998, in the United Kingdom freedom of expression was, like other freedoms, residual and subject to limitation by common law and statute. The United Kingdom Parliament and the courts had no constitutional rights to concern them when dealing with issues of freedom of expression. Several decision by the House of Lords illustrate the lack of influence of the principle of freedom of expression. In *Attorney-General v. The Guardian* Lord Bridge in his dissent stated that the majority opinion had undermined his

[1] Dicey, *Law of the Constitution* (10th ed. 1959), Chap. 6; E. Barendt, *Freedom of Speech* (1985); D. G. T. Williams, *Not in the Public Interest*; A. Boyle, "Freedom of Expression as a Public Interest in English Law" [1982] P.L. 574; Beatson and Cripps (eds), *Freedom of Expression and Freedom of Information* (2000); David Feldman *Civil Liberties and Human Rights in England and Wales* 2nd ed., (2001).

[2] "The ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market": *per* Mr Justice Holmes (dissenting) *Abrams v. U.S.*, 250 U.S. 616, 630 (1919); J.S. Mill, *On Liberty*, Chap. 2.

[3] "Our society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that makes the individual, not government the keeper of his tastes beliefs and ideas": *per* Mr Justice Douglas (dissenting) *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 73 (1973). R. Dworkin, "Is there a right to pornography," (1981) O.J.L.S. 177.

[4] For *e.g.*, the First Amendment to the Constitution of the United States provides that no law shall be made "abridging the freedom of speech or of the press".

confidence in the capacity of the common law to safeguard freedom of speech.[5] A difference in view can also be seen in comparing the majority and minority opinions in *Home Office v. Harman* where the majority held it to be contempt for a solicitor to allow a journalist to have access to documents which had been produced on discovery and read out in court. Lord Diplock for the majority said that the case was "*not* about freedom of speech, freedom of the press, openness of justice or documents coming into the public domain . . . (it) *is* about an aspect of the law of discovery of documents."[6] In *R. v. Secretary of State for the Home Office, ex p. Brind*[7] where, although the statutory authority under which the Minister acted was in very general terms, the House of Lords found the legislation to be unambiguous and refused to have regard to the general principle of freedom of speech.[8] However, in more recent cases there has been a greater willing by the Lords to recognise the importance of freedom of expression, but often as an aspect of the common law rather than by virtue of the E.C.H.R. In *Derbyshire County Council v. Times Newspapers*[9] there was specific reference to freedom of expression as an important legal principle which was vital to a democratic system of government,[10] and in *R. v. Secretary of State for the Home Department, ex p. Simms*[11] Lord Steyn said of the wish of a prisoner to challenge his conviction that it was "not easy to conceive of a more important function which free speech might fulfil."

25–002 Parliament, as will be obvious in this and succeeding chapters placed no particular value on free speech in competition with the claims, real or alleged, of public order, or national security. In the area of censorship on grounds of obscenity it was willing to legislate hastily and with little thought, at the instigation of the latest pressure groups.

Parliament, the courts and all public authorities will now have to take account of Article 10 of the European Convention, and various restrictions on freedom of expression may require reinterpretation in the light of that article. Article 10(1) recognises the right to freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference by public authority. It goes on to state:

> "This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> (2) The exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[5] [1987] 1 W.L.R. 1248 at 1286, *cf.* Lord Brandon (in the majority) at p. 1287–8 and see *post* para. 25–020.
[6] [1983] 1 A.C. 280 at 299; *cf.* Lord Scarman (dissenting) at p. 311.
[7] [1991] 1 A.C. 696.
[8] See also *Attorney-General v. Jonathan Cape Ltd* [1976] Q.B. 752 and *post* para. 25–020; *Whitehouse v. Gay News Ltd and Lemon* [1979] A.C. 617 and *post* para. 25–007.
[9] [1993] A.C. 534, and see Barendt, "Libel and Freedom of Speech in English Law", [1993] P.L. 449; see also *Reynolds v. Times Newspapers* [1999] 4 All E.R. 609, [2000] 2 A.C. 127.
[10] See also *Verrall v. Great Yarmouth B.C.* [1981] Q.B. 202.
[11] [2000] A.C. 115.

The approach of the E.C.H.R. to this article is to regard the right to freedom of expression as a right that is subject to a number of exceptions which must be narrowly interpreted and the necessity for the restrictions must be convincingly established. Unlike British courts it does not decide cases by trying to balance freedom of expression against other "rights": freedom of expression takes priority.[12] The Court has accepted that Member States have a margin of appreciation in assessing whether restrictions are "necessary".[13] This has been used to give stronger protection to political and journalist expression than to blasphemy[14] or obscenity.[15] The Court has stated that freedom of expression is "one of the essential foundations of a democratic society",[16] which entails giving discussion of political and governmental affairs particularly protection, an important aspect of which is the freedom of the press. The principle of freedom of expression has been said by the Court to apply as much to "'information' or 'ideals' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."[17]

This chapter will consider a series of limitations on freedom of expression, and examine freedom of expression in the context of the media. The following chapter will consider freedom of expression as an aspect of the right to know, and will look at the ways in which a variety of statutes, mostly passed since 1997, regulate both the State's right to know and the individual's right to privacy. It will also consider ways in which the State guards its secrets, and provides for freedom of information for the citizen.

I. Defamation, Libel and Blasphemy

Defamation

25–003 Unlike most of the restrictions on free speech considered later in this chapter which are concerned with conflicts between the citizen and the state, defamation is concerned with a conflict between citizens or between a citizen and a private organisation such as a newspaper.[18] In this area there may be conflicts between the rights of the person allegedly defamed and that of free speech or press freedom on the part of the alleged defamer. Although the E.C.H.R. does not recognise a right to a reputation, Article 10(2) recognises that there may be restrictions on freedom of expression "for the protection of the reputation or rights of others".

[12] *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245 at 281.

[13] Although the Court has indicated that the Convention organs can give a final ruling on whether a restriction is compatible with freedom of expression as protected by Art. 10: *Sunday Times v. United Kingdom (No. 2)* (1992) 14 E.H.R.R. 229, para. 50, and cited by the European Commission in its opinion in *Goodwin v. United Kingdom* (1996) 22 E.H.R.R. 123.

[14] *Lemon v. United Kingdom* (1982) 24 E.H.R.R. C.D. 75.

[15] *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737; see also *Wingrove v. United Kingdom* (1996) 24 E.H.R.R. 1.

[16] *Lingen v. Austria* (1986) 8 E.H.R.R. 407.

[17] *Handyside v. United Kingdom* [1976] 1 E.H.R.R. 737, para. 49.

[18] In *Derbyshire C.C. v. Times Newspapers Ltd* [1993] A.C. 543, HL it was unanimously held that to allow civil actions for defamation by the *institutions* of central or local government would be an undesirable fetter on the freedom of expression; individual members of such institutions are entitled to sue.

Defamatory matter is matter which exposes the person about whom it is published to hatred, ridicule or contempt, or which causes him to be shunned or avoided.[19] Such matter if in writing, printing or some other permanent medium,[20] is a libel, if in spoken words or significant gestures, a slander. Where the defendant had no intention of referring to the plaintiff, he may make an offer of amends involving the publication of a correction and apology, which (if accepted) stays the action.[21]

Communications made on certain occasions enjoy *absolute privilege*, either at common law or by statute, that is to say, no proceedings can be brought in respect of them. These occasions include: judicial proceedings and statements made in the course of litigation by judges, counsel and witnesses[22]; words uttered in the course of debates or proceedings in Parliament[23]; state communications, which include communications about state business made by persons in government service[24]; proceedings at a court-martial, and reports made in pursuance of military duty[25]; fair, accurate and contemporaneous reports (which are neither blasphamous nor indecent) in newspapers, or broadcasts from the United Kingdom of proceedings publicly heard before a court in the United Kingdom exercising judicial authority,[26] and certain other supra-national tribunals[27]; reports and other documents published by order of either House of Parliament,[28] the Parliamentary Commissioner's report to Parliament, communications by the Commissioner and M.P.s, and communications by the Commissioner or M.P.s to complainants.[29]

Communications on certain other occasions enjoy *qualified privilege*, that is to say, they are protected in the absence of actual malice or "malice in fact," *i.e.* spite, fraud or some other indirect motive of which the law disapproves.

25–004 Schedule 1 to the Defamation Act 1996 confers the protection of qualified privilege upon a wide range of reports. The 1996 Act is based on the structure of the previous law, but it expands the range of protected reports and makes some changes of detail. In particular, the privilege afforded by the law is no longer confined to reports in the news media. The reports and other statements privileged by Schedule 1 are divided into two categories: Part I covers those categories which are privileged "without explanation or contradiction". Part II applies to those which are privileged "subject to explanation or contradiction." With respect to those matters which fall into Part II, the defence of qualified

[19] *Capital and Counties Bank v. Henry* (1882) 7 App.Cas. 741, 771, *per* Lord Blackburn; *cf. Sim v. Stretch* (1936) 53 T.L.R. 669.

[20] A defamatory talking film is libel: *Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 T.L.R. 581; so is a defamatory radio or television broadcast: Broadcasting Act 1990, s.166. Similarly public theatrical performances: Theatres Act 1968, s.4.

[21] Defamation Act, 1996, s.4. This had its origin in the Defamation Act 1952, the 1996 Act extends and simplifies the circumstances in which an offer of amends may be made

[22] *Royal Aquarium Society v. Parkinson* [1892] 1 Q.B. 431. The exception extends to certain tribunals possessing similar attributes to a court: *Trapp v. Mackie* [1979] 1 W.L.R. 177, HL. *cf. Hasselblad (G.B.) Ltd v. Orbinson* [1985] Q.B. 475, CA.

[23] Article 9 of the Bill of Rights 1688, but see s.13 of the Defamation Act 1996 for the possibility of waiving this privilege: see *ante*, para. 13–015.

[24] *Isaacs & Sons v. Cook* [1952] 2 K.B. 391; but see *Szalatnay-Stacho v. Fink* [1947] K.B. 1.

[25] *Dawkins v. Lord Rokeby* (1875) L.R. 7 H.L. 744.

[26] *cf.* an administrative tribunal, *Collins v. H. Whiteway & Co* [1927] 2 K.B. 378.

[27] Defamation Act 1996, s.14 replacing a similar provision in the Law of Libel Amendment Act 1888. The previous law on the meaning of "fair and accurate" is likely to continue to apply: *Kimber v. Press Association* (1893) 62 L.J.Q.B. 152; *McCarey v. Associated Newspapers Ltd* [1964] 1 W.L.R. 855.

[28] Parliamentary Papers Act 1840, ss.1, 2.

[29] Parliamentary Commissioner Act 1967, s.10.

privilege is lost if, in effect, the defendant has not allowed the claimant a right of reply (section 15(2)).

The occasions covered by Part I include the following: fair and accurate reports of proceedings in public of a legislature[30] anywhere in the world (para. 1)[31]; fair and accurate reports, contemporaneous or not, of proceedings in public before a court anywhere in the world (para. 2)[32]; fair and accurate reports of proceedings in public of a person appointed to hold a public inquiry by a government or legislature anywhere in the world (para. 3); fair and accurate reports of proceedings anywhere in the world of an international organisation or conference (para. 4); a fair and accurate copy of, or extract from, any register or other document required by law to be open to public inspection (para. 5)[33]; a notice or advertisement published by or on authority of a court or judge or officer of a court, anywhere in the world (para. 6); a fair and accurate copy of, or extract from, matter published by or on the authority of a government or legislature anywhere in the world (para. 7).[34]

25–005 The statements privileged subject to explanation or contradiction provided by Part II include the following: a fair and accurate copy of, or extract from, a notice or other matter issued for the information of the public by or on behalf of a legislature in any Member State of the European Union, the European Parliament, the government of a Member State, the European Commission, an international organisation or conference (para. 9); a fair and accurate report of proceedings at any public meeting held in a Member State (para. 12)[35]; a fair and accurate report of proceedings at a general meeting of a United Kingdom public company (para. 13); a fair and accurate report of the findings or decisions of any of a variety of arts, trade sport or charitable associations (para. 14).

Qualified privilege at common law confers protection on statements made by one person about a third party, where the person making the statement has a duty to communicate the matter and the recipient has an interest in receiving the information. The common law was concerned with providing protection with respect to specific communications to specific people. In *Reynolds v. Times Newspapers*[36] the House of Lords was invited to create a new category of qualified privilege: political information: Mr Reynolds, a former Prime Minister of Ireland sued the *Sunday Times* in respect of an article in which it suggested that he had misled the Irish Parliament and lied to Cabinet colleagues. The jury found that although the statements were defamatory and untrue, the paper had not acted maliciously in publishing them. The House of Lords refused to create a new category of qualified privilege, but recognised that the existing law on

[30] The European Parliament is expressly included.

[31] The protection recognised to exist at common law in *Wason v. Walter* (1868) L.R. 4 Q.B. 73, is in consequence practically redundant; it is arguable that the common law is wider than the Defamation Act, in that the latter does not apply to the publication of any matter which is not of public concern and is not for the public benefit (s.15(3)).

[32] This appears to make the common law protection of qualified privilege for non-contemporaneous reports and reports of foreign proceedings, redundant.

[33] Previously covered by the common law.

[34] This is also covered by s.3 of the Parliamentary Papers Act 1840, but s.3 is not redundant as it applies more widely than with respect to defamatory words.

[35] A public meeting is defined in para. 12(2). It is a question of law for the judge whether or not a meeting is a public meeting, see *McCartan Turkington Breen v. Times Newspapers Ltd* [2000] 4 All E.R. 913, [2001] 2 A.C. 277 (a meeting was public not private if the organisers opened it to the public, or by issuing a general invitation to the press manifested an intention that the proceedings of the meeting would be communicated to a wider public).

[36] *op. cit.* note 9.

qualified privilege applied to "matters of serious public concern", and laid down a non-exhaustive list of factors which would be relevant in deciding whether a particular communication would attract this type of qualified privilege. Applying these factors it did not accept that the *Sunday Times* could rely on the defence. It is probable that this decision gives adequate protection to freedom of expression as recognised by Article 10 and the E.Ct.H.R. case law; but *Reynolds* is much more restrictive and uncertain in its development of the law than is the position in other countries where politicians will only succeed in actions for defamation where malice can be established.

Libel

Criminal libel

25–006 Defamation is usually treated as a civil wrong, and as such it belongs to the law of tort. Slander is not a crime merely as defamation, but is only a crime if the words are also treasonable or seditious, etc. Libel may be a crime if it is likely to cause a breach of the peace or would seriously affect the reputation of the person defamed.[37] No prosecution for criminal libel against the proprietor, publisher or editor of a newspaper may be brought without the leave of a judge in chambers.[38] Leave was given by Wien J. in *Goldsmith v. Pressdram Ltd*[39] where a magazine had, in the view of the judge, engaged in a campaign of vilification for month after month against a person occupying a position of considerable public importance.[40]

Truth is normally a defence to a civil action for libel, for a person cannot lose a reputation which he has not got or does not deserve. In criminal libel truth is not a defence at common law. By section 6 of the Libel Act 1843 ("Lord Campbell's Act"), however, it is a defence to a prosecution for criminal libel if the accused can prove not only that the matter published was true in substance but also that the publication was for the public good. Truth, of course, is no defence if the matter is also seditious, etc.[41] Prosecutions for criminal libel are rare.

Blasphemy

25–007 "Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not as to the substance of the doctrines themselves."[42] The

[37] *R. v. Wicks* [1936] 1 All E.R. 384, 386, *per* du Parcq. J.; *Goldsmith v. Pressdram Ltd* [1977] Q.B. 83; *R. v. Wells St. Stipendiary Magistrate, ex p. Deakin* [1980] A.C. 477 (HL); *Desmond v. Thorne* [1983] 1 W.L.R. 163.

[38] Law of Libel Amendment Act 1888, s.8. In *R. v. Wells St. Stipendiary Magistrate, ex. p. Deakin* [1980] A.C. 477, HL the House of Lords expressed concern at this involvement of judges, and suggested that the bringing of proceedings should in require the leave of the Attorney-General or the Director of Public Prosecutions.

[39] [1977] Q.B. 83. The action was subsequently settled.

[40] *cf. Desmond v. Thorne* [1983] 1 W.L.R. 163 where leave was refused as a prosecution would not be in the public interest.

[41] See Law Comm. No. 149 (1985) Cmnd. 9618, for proposals for reform.

[42] Sir J. F. Stephen, *Digest of Criminal Law* (9th ed.), p. 163.

common law misdemeanour of blasphemous words or writing seems to have been first recognised by the King's Bench in *R. v. Attwood*.[43] In the earlier cases blasphemy was virtually equivalent to a kind of seditious libel. After the decision of the House of Lords in *Bowman v. Secular Society*[44] that an attack on or denial of the truth of Christianity, unaccompanied by vilification, ridicule or irrelevance, was not contrary to the law, it came to be assumed that the gist of the offence of blasphemy lay in a tendency to cause a breach of the peace and prosecutions were rare.[45] In *R. v. Lemon*,[46] the question directly before the House of Lords was the *mens rea* requisite to establish liability for blasphemy. A majority of the House held that it was sufficient for the prosecution to prove that publication was intended and that the matter published was blasphemous, that is calculated to shock or outrage the feelings of ordinary Christians. Lord Scarman, one of the majority, and Lord Edmund Davies, one of the dissentients, expressly said that they did not regard the likelihood of a breach of the peace as being of the essence of the offence. The true test was the likelihood of outrage and insult.

Lord Scarman suggested that the offence of blasphemy ought to be extended to protect all religious beliefs. The Law Commission, on the other hand, came to the conclusion that the crime of blasphemy should be abolished, and that a new offence which extended to religions other than Christianity should not be enacted.[47] In *R. v. Chief Metropolitan Magistrate, ex p. Choudhury*[48] the Divisional Court upheld the decision of the Magistrate that the law of blasphemy only applied to attacks on Christianity, and that the religion of Islam was not protected.[49]

25–008 The E.Ct.H.R. has considered the relationship between freedom of expression (Article 10) and protection of religion (Article 9), and has accepted that a state may repress certain types of conduct incompatible with respect for the freedom of thought, conscience and religion of others.[50] It accepted in *Wingrove v. United Kingdom*[51] that there was no breach of Article 10 by the refusal to award the applicant's video work a classification certificate on the ground that it was blasphemous. The court accepted that: "English law of blasphemy does not prohibit the expression, in any form, of views hostile to the Christian religion. Nor can it be said that opinions which are offensive to Christians necessarily fall within its ambit . . . it is the manner in which the views are advocated rather than the views themselves which the law seeks to control."[52] The E.Ct.H.R. was not prepared to accept that restrictions on the propagation of material on the ground that it is blasphemous was unnecessary in a democratic society, but it indicated that it could revisit this matter in the light of future developments on the law of blasphemy in member states.

[43] (1617) Cro.Jac.421. See G. D. Nokes, *History of the Crime of Blasphemy* (1928), pp. 21 *et seq.*
[44] [1917] A.C. 406, HL.
[45] *R. v. Gott* (1922) 16 Cr.App.R. 87, CA.
[46] [1979] A.C. 617, a private prosecution brought against the editor and publishers of *Gay News*. An application to the European Commission of Human Rights was rejected as manifestly ill-founded: (1983) 5 E.H.R.R. 123.
[47] *Offences against Religion and Public Worship* Law Commission Report No. 145 (1985).
[48] [1991] 1 Q.B. 429.
[49] In *Choudhury v. United Kingdom*, application 17439/90, the European Commission rejected a complaint by the plaintiff on the failure of the law of blasphemy to protect Muslims, on the basis that Art. 9 could not be used to create positive obligations on States to protect religious sensibilities.
[50] In *Lemon v. United Kingdom* (1982) 24 E.H.R.R. C.D. 75, the Commission accepted that the law of blasphemy was an acceptable means of protecting the Art.9 rights of Christians.
[51] (1997) 24 E.H.R.R. 1.
[52] *ibid.* at para. 60.

II. Offences against the State. Public Order[53]

Sedition

25–009 The law of sedition is largely an historic survival, except in its more precise, statutory forms. The word "sedition" covers three indictable but non-arrestable common law offences: the publication of a seditious libel,[54] the uttering of seditious words, and conspiracy to do an act in furtherance of a seditious intention.[55] A seditious intention is necessary for all three offences. It is an intention to bring into hatred or contempt, or to excite disaffection against, the person of the Sovereign, or the government and Constitution of the United Kingdom as by law established, or either House of Parliament or the administration of justice, or to excite Her Majesty's subjects or attempt, otherwise than by lawful means, the alteration of any matter in Church or state by law established, or to raise discontent or disaffection among Her Majesty's subjects, or to promote feelings of ill will or hostility between different classes of her subjects (*R. v. Burns, per* Cave J.[56]). A qualification to the potential width of this definition was provided in *R. v. Chief Metropolitan Magistrate, ex p. Choudhury*,[57] where it was held that there had to be an intention to incite violence or create public disturbance or disorder against His Majesty or the institutions of government. Proof of an intention to promote feelings of ill-will or hostility between different classes of subjects was not sufficient.[58] It is not seditious to show the government has been mistaken, or to point out defects in the Constitution, or to excite people to attempt by lawful means the alteration of the law relating to Church or state, or to point out (with a view to their removal) matters which produce feelings of hatred or ill will between classes of Her Majesty's subjects.

In addition to a seditious intent, it must be established that the words have a tendency to incite public disorder. The truth of a statement is no defence to a criminal charge if it is seditious.[59]

It is doubtful if any useful purpose is served by the retention of a crime of sedition, for few if any acts which might be regarded as constituting sedition do not also fall within the scope of other common law or statutory offences.[60]

Incitement to mutiny or disaffection. By the Incitement to Mutiny Act 1797, passed after the naval mutiny at the Nore, persons maliciously endeavouring to seduce British soldiers or sailors from their duty and allegiance, or to commit an act of mutiny or traitorous practice, are to be guilty of an offence, and may receive a maximum punishment of imprisonment for life.

[53] See *post*, Chap. 26 for Official Secrets Act, and Chap. 27 for public order offences.

[54] Prosecutions for seditious libel were frequent during the late eighteenth century, at the instance either of the government or the House of Commons: *Wilkes v. Wood* (1763) 19 St. Tr. 1153, *Leach v. Money* (1765) 3 Burr. 1692, 1742, 19 St. Tr. 1001. Until Fox's Libel Act 1792, it was for the judge, not the jury to decide whether a libel was seditious; see Stephen *History of the Criminal Law*, Vol II.

[55] Stephen, *History of the Criminal Law*, Vol. II, Chap. 24.

[56] 16 Cox. 355; approving Stephen, *Digest of the Criminal Law* (see 8th ed., art. 114).

[57] [1991] 1 Q.B. 429.

[58] The Divisional Court upheld the decision of the magistrate that Salman Rushdie's Book, *Satanic Verses*, was not a seditious libel.

[59] *R. v. Burdett* (1821) 4 B. & Ald. 314.

[60] See the Law Commission Working Paper No. 74 (1977), which was never implemented.

The Aliens Restriction (Amendment) Act 1919, s.3 creates an offence of causing or attempting to cause sedition or disaffection.

The Incitement to Disaffection Act 1934 makes it an offence for any person maliciously and advisedly to endeavour to seduce any member of Her Majesty's forces from his duty or allegiance[61] to Her Majesty (section 1): or to be in possession, with intent to commit, abet, counsel or procure the commission of an offence under section 1, of any document such that dissemination of copies among members of the forces would be an offence against section 1 (section 2). The Act enables a Judge of the High Court, if satisfied by sworn information that an offence has been committed, and that evidence thereof is to be found on premises named in the information, to grant a search warrant to the police on their application therefor. A prosecution under this Act requires the consent of the Director of Public Prosecutions.[62]

Incitement to racial hatred[63]

25–010 Until 1965 those who incited racial hatred could only be prosecuted for common law offences, such as sedition. The inadequacy of this situation resulted in the introduction of a specific offence of incitement to racial hatred in the Race Relation Act 1965. A variety of offences connected with incitement to racial hatred are now contained in Part III of the Public Order Act 1986. Section 17 defines "racial hatred"[64] as hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origin.[65] Section 18 makes it an offence to use threatening, abusive or insulting words or behaviour, or to display written material possessing those characteristics with intent to stir up racial hatred or in circumstances where racial hatred is likely to be stirred up. An offence under the section can be committed in public or private but in the latter case there is no offence where the words were used or the material displayed in a dwelling house and were not heard or seen by anyone outside the dwelling. It is a defence to show that the accused was inside a dwelling at the time of an alleged offence and that he had no reason to believe that persons outside the dwelling would hear or see the words or material. A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under the section if he did not intend his words or behaviour to be, and was not aware that it might be, threatening, abusive or insulting (section 18(5)). Section 19 creates an offence of publishing and distributing written material which is threatening, abusive or insulting.[66] Sections 20, 21 and 22 make similar provisions in the case of the public performance of plays, the distributing or showing or playing of recordings of visual images or sounds and the broadcasting of threatening, abusive or insulting[67] visual images or sounds. The possession of threatening, abusive or insulting written material or records with a view to

[61] *R. v. Arrowsmith* [1975] Q.B. 678.

[62] A similar offence with respect to the police is found in the Police Act 1997, s.91.

[63] R. Cotterell, "Prosecuting Incitement to Racial Hatred", [1982] P.L. 378; Wolffe "Value in Conflict: Incitement to Racial Hatred and the Public Order Act 1986," [1987] P.L. 85.

[64] Only in Northern Ireland is there an offence of incitement to religious hatred.

[65] Incitement to religious hatred is not covered by Part III, but in *Mandla v. Lee* [1983] 2 A.C. 548, it was held that the word "ethnic" was to be interpreted relatively widely, and in consequence Sikhs, although originally a religious community, now constituted an ethnic group.

[66] Now an arrestable offence in s.24(2) PACE Act 1984, as inserted by s.155 Criminal Justice and Public Order Act 1994.

[67] For a discussion of the meaning of these words see *post*, para. 27–023.

distribution is made an offence by section 23. Nothing in Part III of the Act applies to fair and accurate reports of proceedings in Parliament (section 26(1)) or to fair and accurate reports of judicial proceedings, if published contemporaneously or as soon as reasonably practicable and lawful (section 26(2)).

The 1986 Act extended the law on incitement to racial hatred to cover offences by corporations (section 28); provide entry and search powers in respect of a contravention of section 23 (section 24) and a power to order forfeiture of written matter after a conviction (section 25). Prosecutions in England and Wales may only be instituted by or with the consent of the Attorney-General (section 27(1)).

Restrictions on the expression of racist ideas are legitimate under Article 10(2) of the E.C.H.R. as being for the protection of the rights of others. In addition, Article 17 provides that the Convention does not imply "for any State, group or person any right to engage in any activity aimed at the destruction of any of the rights and freedoms (set out in the Convention)".

Terrorism[68]

25–011 The Terrorism Act 2000 has the potential to restrict the freedom of expression of a wide variety of groups. Section 1 of 2000 Act defines terrorism extremely widely with the potential to cover the criminal activities of for example, animal and environmental groups.[69] The Secretary of State has power by order to proscribe any organisation that he believes to be concerned in terrorism (section 3(4)(5) and Schedule 2). A proscribed organisation is subject to a range of proscription-related offences. If animal rights and environmental groups that could fall under the new definition of terrorism are proscribed, this would limit the activities of such groups, and in particular limit their right to free expression. The Secretary of State in deciding whether to proscribe such groups should take account of Articles 10 and 11 of the E.C.H.R.

Journalists investigating the activities of groups concerned with terrorism as defined by the Act could be at risk of prosecution under section 19. This section makes it an offence not to disclose information where someone knows or believes that a person has committed a range of offences such as fund-raising for the purposes of terrorism and using money for the purposes of terrorism. The defence in section 19(3)—of having a reasonable excuse for not making the disclosure—should be interpreted in the context of E.C.H.R. rights, particularly where the investigation is into the activities of, for *e.g.*, animal rights groups.

III. Contempt of Court[70]

25–012 The law on contempt of court can conflict with freedom of expression, and in particular with the requirement of a free press.[71] The reform of the aspects of the common law on contempt of court by the Contempt of Court Act 1981, was in response to the decision of the E.C.H.R. in *Sunday Times v. United Kingdom*.[72]

[68] See para. 19–050 and para. 27–039.

[69] See para. 27–039.

[70] C. J. Miller, *Contempt of Court* (3rd ed., 2000); Arlidge, Eady and Smith, *Contempt of Court* (2nd ed., 1999).

[71] *post*, para. 25–018.

[72] [1979] 2 E.H.R.R. 245.

which had found the law on contempt to be in breach of Article 10. The case arose out of a campaign by the *Sunday Times* on behalf of the victims of Thalidomide in connection with their action against the manufacturers of the drug. The *Sunday Times* was prevented by an injunction from publishing an article at a time when writs had been issued and the parties were attempting to reach a settlement. The speeches in the House of Lords upholding the injunction had suggested that any public comment directed to a litigant would constitute contempt, irrespective of the intentions of the publisher[73]: the strict liability rule.

Unintentional interference by prejudicial publications

25–013 The Contempt of Court Act 1981 attempts in a number of sections to clarify and limit the rule of strict liability exemplified in the *Sunday Times* case, so far as that rule relates to "particular proceedings" (section 1). The rule is to apply only to a publication which creates a substantial risk that the course of justice will be seriously impeded or prejudiced (section 2) and at the time of the publication proceedings are "active", a term which is defined with particularity in Schedule 1. Substantial has been explained by the Court of Appeal as meaning "not insubstantial" or "not minimal": it does not mean "weighty"[74]; this interpretation may require reconsideration in the light of Article 10 E.C.H.R.[75] The requirement that there is a serious impedement or prejudice to the course of justice indicates that a publication should only be regarded as contempt where the outcome of a legal action is likely to be affected. Where there is a series of articles—even in the same newspaper—each publication must be considered in its own right when determining whether section 2 has been satisfied: *Attorney-General v. M.G.N. Ltd.*[76] In this case Schiemann L.J. set out 10 principles to further explain the application of the strict liability rule in section 2. Section 3 provides a defence where the publisher, having taken all reasonable care, did not know proceedings were active.

Section 5 exempts from the strict liability rule a publication which discusses, or is part of a discussion, in good faith of public affairs or other matters of general interest if the risk of prejudice to particular legal proceedings is merely incidental. Once the defence has raised the issue of public interest, it is for the prosecution to prove that the risk of prejudice to the proceedings resulting from a discussion in good faith of matters of general public interest was not merely incidental to the discussion. Section 7 requires the consent of the Attorney-General or the motion of a court having the appropriate jurisdiction for the institution of proceedings under the strict liability rule. In *Peacock v. London Weekend Television Ltd*[77] the Court of Appeal held that section 7 did not prevent interested parties from applying for an interlocutory injunction to restrain a *threatened* contempt. Section 7 merely relates to the punishment of a contempt which has been committed.

[73] *Attorney-General v. Times Newspapers* [1974] A.C. 273.

[74] *Att.-Gen. v. News Group Newspapers Ltd* [1986] 3 W.L.R. 365, CA. Publication repeating materials the subject of pending libel proceedings which were unlikely to come to trial for a further 10 months: risk of prejudice not sufficiently serious to oust rule that injunction not normally available to restrain publication of libellous material before trial where defendant intends to plead justification. See also *Att.-Gen. v. ITN* [1995] 2 All E.R. 370.

[75] But see *Attorney-General v. Guardian Newspapers Ltd* [1999] E.M.L.R. 904; *Attorney-General v. Unger* [1998] 1 Cr.App. R. 308. Arlidge, Eady and Smith, *op. cit.* (1999), Chap. 4.

[76] [1997] 1 All E.R. 456.

[77] (1985) 150 J.P. 71.

The effect of section 2 and section 5 were considered by the House of Lords in *Attorney-General v. English*.[78] A doctor had been charged with murdering a handicapped baby, by directing a course of treatment which inevitably resulted in the baby's death. After the trial had begun a newspaper published an article in support of a "pro-life" candidate in a Parliamentary by-election. The article discussed in general terms the sanctity of life and the morality of attempting to ensure that only healthy babies survived birth. The House of Lords took the view that the article did create a substantial risk of seriously prejudicing the criminal trial within section 2(2) but was not a contempt of court because it clearly fell within section 5 as a comment in good faith on a matter of public interest.[79] To ensure compliance with the E.C.H.R. section 5 should be interpreted in a liberal way, giving proper regard to freedom of expression and the importance of the press in a democracy.

Deliberate interference with particular proceedings

25–014 Any act intended to interfere with the outcome of particular proceedings, such as attempts to bribe or intimidate judges, jurors or witnesses, or in any other way to impede or prejudice the administration of justice, may constitute common law contempt which was preserved by section 6(c) of the 1981 Act. This type of contempt extends also to attempting to deter litigants from exercising their legal rights or impeding their access to the courts. To hold a litigant up to public obloquy, for example, with the object of coercing him into compromising an action is a contempt of court: *Attorney-General v. Times Newspapers*.[80] Since the 1981 Act the common law has been used even where there were no active proceedings, as in *Attorney-General v. News Group Newspapers*[81] where the *Sun* newspaper supported financially and in its publications the private prosecution of a doctor for the rape of an eight year old girl. Articles published before the prosecution had become active were found to have incurred a real risk of prejudicing the trial of the doctor. In some cases either common law intentional contempt or strict liability contempt could apply[82]; if the former is used then the statutory defences available under the 1981 Act are not available. In *Attorney-General v. Punch Ltd*[83] the Court of Appeal held that where a court restrained by injunction the publication of specified material, a third party who with knowledge of the order, published the specified material, only committed a common law contempt if he thereby knowingly defeated the purpose for which the order was made.

Reporting of Judicial Proceedings

25–015 Section 4 of the Contempt of Court Act provides that a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public[84] published contemporaneously and in

[78] [1983] 1 A.C. 116.

[79] See also *Att.-Gen. v. Times Newspapers Ltd*, *The Times*, February 12, 1983, DC (Newspaper articles relating to Fagan, the intruder in the Queen's bedroom).

[80] [1974] A.C. 273.

[81] [1988] 2 All E.R. 906.

[82] *Att.-Gen. v. Hislop* [1991] 1 Q.B. 514.

[83] *The Times*, March 30, 2001, [2001] 2 All E.R. 655.

[84] *R. v. Rhuddlan Justices, ex p. H.T.V. Ltd* [1986] Crim.L.R. 329. (Arrest not within "legal proceedings held in public" and justices could not prohibit the publication of a film of a prisoner's arrest until the completion of his trial. Appropriate remedy for prisoner, if he objected to the film being shown was to apply to the High Court for an injunction).

good faith. To avoid a substantial risk of prejudice to the administration of justice in proceedings before it or other proceedings, pending or imminent, the Court may restrain the publication of any report of the proceedings or of any part of them for such period as it thinks necessary for that purpose.[85] The press and other news media should normally be allowed to make representations to the court before such an order is made.[86] Such orders should not be made lightly.[87] To breach such an order is civil contempt of court: there is no need to show a risk of prejudice to proceedings. It is questionable whether such an approach is proportionate to the legitimate aim of an order, or takes adequate account of the free press requirements of the E.C.H.R.[88]

Contempt and refusal to reveal sources of information

25–016 Section 10 of the Contempt of Court Act recognises the need to give journalists some protection from revealing in judicial proceedings the sources of their information.[89] It provides that no court may require a person to disclose the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime. Several cases have interpreted this section, mainly in a restrictive way and in favour of the disclosure of sources. This is an example of a situation where the courts, in the light of the Human Rights Act 1998 and E.Ct.H.R. cases on freedom of expression, may have to reconsider the interpretation of a section of a statute. There are important differences in the approach of the E.Ct.H.R. and British courts: the latter sees the need to establish a balance between freedom of expression and justice or national security etc., and decides accordingly. The former places freedom of expression above the other considerations which are not rights, but exceptions to the right to freedom of expression which have to be interpreted narrowly.[90] In addition the E.Ct.H.R. regards a free press as such an important part of the democratic process that it is unwilling to give much weight to the margin of appreciation doctrine in cases involving press freedom.[91]

In *Secretary of State for Defence v. Guardian Newspapers*[92] the House of Lords held that the protection given by section 10 existed even where delivery was sought of a document which was the property of the plaintiff; and that the word "necessary" imposed a strict test which was not to be equated with convenient or expedient. However, the majority of the House accepted that an affidavit sworn by the respondent civil servant was sufficient to establish that it was necessary in the interests of national security to identify the person who copied the document and sent it to the *Guardian*. Subsequent cases have also indicated a willingness by the courts to be satisfied on the facts that disclosure was necessary for one of the reasons set out in the section without taking adequate account of the importance of a free press as an aspect of freedom of

[85] *Practice Direction (Contempt: Reporting Restrictions)* [1982] 1 W.L.R. 1475, CA.

[86] *R. v. Clerkenwell Magistrates' Court, ex p. Telegraph plc* [1993] 2 All E.R. 183.

[87] *Re Central Independent Television plc* [1991] 1 All E.R. 347; *cf. R. v. Beck, ex p. Daily Telegraph* [1993] 2 All E.R. 177.

[88] There are a variety of other provisions which restrict the reporting of court proceedings, see C. J. Miller *op. cit.* Chap. 10.

[89] There was no such privilege at common law: *Att.-General v. Clough* [1963] 1 Q.B. 773; *British Steel Corp. v. Granada Television Ltd* [1981] A.C. 1096.

[90] See *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245, at p. 281.

[91] See A. T. H. Smith, "The Press, the Courts and the Constitution," (1999) 52 C.L.P. 126.

[92] [1985] A.C. 339.

expression.[93] In *X Ltd v. Morgan Grampian (Publishers) Ltd*[94] a journalist had obtained from an informant confidential and sensitive information about the financial position of X Ltd which he had planned to use in a publication. X Ltd, having become aware of the planned publication, obtained an injunction restraining it, and an order that, in the interests of justice, the journalist should disclose his notes to enable them to identify the source of the information. The House of Lords upheld the order on the basis that it was necessary in the interests of justice for a company to be able to take remedial action against the source of a leaked document, for example by terminating his employment.

25–017 The journalist brought an action in the E.Ct.H.R. on the basis that the order to disclose his source was a breach of Article 10. The Court concluded that although the court order was in pursuit of the legitimate aim of protecting the rights of X Ltd, the order was not necessary in a democratic society, as the likely damage to X's interests did not outweigh the need to protect the press as the guardian of the public interest.[95] It was influenced in this decision by the fact that the injunction prohibiting publication of the information achieved X Ltd's objective of preserving its confidentiality. This decision appears to require courts in the application of section 10, to give precedence to the protection of sources and to be satisfied that to require a journalist to reveal his sources is proportionate to the ends being pursued, no matter how legitimate these ends may be. Although there are subsequent cases where the courts have refused to order disclosure, this has been on the basis of English cases, and not in consequence of an application of Article 10 as applied in *Goodwin*.[96] In *Camelot Group plc v. Centaur Ltd*[97] the Court of Appeal strangely concluded that the tests applied by the E.Ct.H.R. and the House of Lords were substantially the same, the only difference was in their assessments of the facts. In deciding to order the return of documents which would enable Camelot to identify the person who had leaked them, the court held that the interest of justice prevailed over the protection of sources. It distinguished *Goodwin* on the facts, and failed adequately to consider whether the disclosure of such documents would have a "chilling effect on the free flow of information."[98]

IV. Liberty of the Press

25–018 "The Press" generally covers printed matter of all kinds, and not merely newspapers and periodicals. "The liberty of the press," says Blackstone,[99] "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." This liberty, said Lord Mansfield in *Dean of St Asaph's Case*,[1] consists in "printing without any

[93] *Re an Inquiry under the Company Securities (Insider Dealings) Act 1985* [1988] 1 A.C. 660.
[94] [1991] 1 A.C. 1. See, T. R. S. Allan, "Disclosure of Journalists' Sources, Civil Disobedience and the Rule of Law", [1991] C.L.J. 131.
[95] *Goodwin v. United Kingdom* (1996) 22 E.H.R.R. 123.
[96] See *Sanders v. Punch* [1998] 1 W.L.R. 986; *John v. Express Newspapers* [2000] 3 All E.R. 257.
[97] [1999] Q.B. 124, CA.
[98] *Goodwin v. United Kingdom* at para. 39.
[99] Bl.Comm. IV, 151. He adds that "to censure the licentiousness, is to maintain the liberty, of the press": ibid. p. 153. And see *R. v. Burdett* (1820) 4 B. & Ald. 95, *per* Best J.: "Where vituperation begins, the liberty of the press ends."
[1] *R. v. Shipley* (1783) 21 St.Tr. 847, 1040; *ante*, p. 535. *Cf. British Steel Corporation v. Granada Television* [1981] A.C. 1096, 1168 *per* Lord Wilberforce.

previous licence, subject to the consequences of law." "The liberty of the press," said Alexander Hamilton,[2] "is the right to publish with impunity, truth, with good motives, for justifiable ends though reflecting on government, magistracy, or individuals." It has existed in this country since the end of the seventeenth century.

Soon after the introduction of the art of printing in the fifteenth century, a series of proclamations began to be issued to restrict and control printing, in addition to the law of treason, sedition, heresy and blasphemy. In England the printing of books in the early period was confined to the members of the Stationers' Company in London and to the Universities of Oxford and Cambridge.[3] Throughout most of the sixteenth and seventeenth centuries all printing required a licence. By an assumption of the prerogative of the Crown as *custos morum* in the late Tudor and early Stuart periods, secular printing was controlled by the Star Chamber and theological printing by the High Commission. Soon after the abolition of these bodies in 1641, a licence to print was required by the Licensing Act 1662. Several Licensing Acts followed, but the last expired in 1695. The Commons refused to renew it, not so much out of respect for freedom of expression but rather because experience showed that licensing did not succeed in its object. Since 1695, then, the press has been governed by the ordinary law of sedition and libel. No prosecution for criminal libel against the proprietor, publisher or editor of a newspaper may be brought without the order of a judge in chambers.[4] A curious survival from the time of the Napoleonic Wars is the requirement that every newspaper (and other printed object) shall bear the name and address on it of the printer concerned.[5] The Newspaper Libel and Registration Act 1881 establishes a register of proprietors of newspapers (section 8) and requires printers to make annual returns of the titles and proprietors of newspapers which they have printed.

The previous section on contempt of court considered a particular aspect of a free press, the following paragraphs will consider two other aspects of a free press that also require reconsideration in the light of the E.C.H.R: privacy and breach of confidence.

Privacy and the press

25–019 Press invasion of privacy has been of concern for some years, and the system of press self-regulation has been inadequate to protect the privacy of members of the public.[6] The lack of a right to privacy in English law[7] and the potential for the development of such a right as a consequence of the Human Rights Act 1998, have implications for press freedom. A balance will have to be found between Article 8 of the E.C.H.R. which protects the right to private and family life, home and correspondence, and freedom of expression as provided by Article 10. It remains to be seen how the British courts will respond to new opportunities for protecting privacy provided by the HRA, but in doing so they are required by section 12 to have particular regard to the importance of the E.C.H.R. right to

[2] In *People v. Croswell* (1804) 3 Johns (N.Y.) 337.

[3] For the history of the law of the Press, see Holdsworth, *History of English Law*, Vol. VI, pp. 360–378.

[4] Law of Libel Amendment Act 1888, s.8; *ante*, para. 25–006.

[5] Newspapers, Printers and Reading Rooms Repeal Act 1869 is the current legislation: see C. Manchester, (1982) 2 Leg.Stud. 180.

[6] See *post* para. 25–023 for discussion of the Press Complaints Commission.

[7] *Kaye v. Robertson* [1991] F.S.R. 62.

freedom of expression. Early cases indicate that in cases concerning the press and the publication of information, the courts are expanding the breach of confidence doctrine to accommodate the protection of privacy.[8] However, this development will not assist with physical intrusion and the acquisition of information such as occurred in *Kaye v. Robinson*[9] where a journalist and a photographer entered the hospital room of the claimant, a well known actor recovering from an accident, interviewed and photographed him when he was in no position to give his consent.

Confidentiality and public interest

25–020 The law of confidential information originally provided a protection for aspects of family life and for commercial secrets, but has been extended to apply also to protect government secrets. The principle was recognised, although held not to be applicable on the facts, in relation to the confidentiality of cabinet discussions in *Attorney-General v. Jonathan Cape Ltd.*[10] This opened the way for governments to seek injunctions to prevent the publication of government secrets, reaching a climax with the *Spycatcher* cases. *Spycatcher* was the title of a book written by Peter Wright to be published in Australia about his experiences as a former member of M.I.5. The Attorney-General sought an injunction in Australia to prevent its publication on the basis of that Mr Wright had obtained his information in confidence as a member of M.I.5, and that the public interest was in the protection of the secrecy of the Security Services. Pending a full hearing undertakings were given not to publish extracts from the book.[11] Several English papers reported the Australian legal proceedings including in their accounts allegations made in the book by Mr Wright, and the *Sunday Times* started a serialisation of the book, which by then was about to be published in the United States. These publications led to a series of actions both against the newspapers for contempt of court,[12] and by the Attorney-General seeking interlocutory injunctions to restrain further publication of extracts from *Spycatcher*. Although by 1987 the book had been published in the United States and was available in the United Kingdom, interlocutory injunctions against several newspapers were upheld by the House of Lords pending a full trial. The majority opinion of the House of Lords in *Attorney-General v. Guardian Newspapers Ltd*[13] was on the ground that wider dissemination of the *Spycatcher* revelations could do further harm.[14] When the case came to full trial the Attorney-General's claim for permanent injunctions was refused. The case went to the House of Lords which held that since the contents of the book were in the public domain, no further damage could be done to the public interest.[15] The decision of the House of Lords confirmed that the press could be restrained by injunction from

[8] *Douglas and Others v. Hello! Ltd*, *The Times*, January 16, 2001, [2001] 2 All E.R 289; *Venables and Another v. News Group Newspapers and Others* [2001] 1 All E.R. 908. This development was suggested *obiter* by Laws J. in *Helliewell v. Chief Constable of Derbyshire* [1995] 1 W.L.R. 804.
[9] [1991] F.S.R. 62.
[10] [1976] Q.B. 752.
[11] The Australian courts eventually refused to restrain publication.
[12] *Attorney-General v. Newspaper Publishing plc* [1988] Ch. 333; *Attorney-General v. Times Newspapers Ltd* [1992] 1 A.C. 191.
[13] [1987] 1 W.L.R. 1248.
[14] See the powerful dissenting opinion of Lord Bridge.
[15] *A-G v. Guardian Newspapers Ltd (No. 2)* [1990] 1 A.C. 109. Lord Griffith dissenting; the *Sunday Times* was liable for breach of confidence for its initial attempt to serialise the book, and was required to make an account of profits to the Crown.

publishing government secrets, provided that newspaper knew that the information was confidential and that some harm to the public interest would result from the publication.

In deciding whether to grant an injunction to restrain a breach of confidence, the courts have to consider where the public interest lies: it may lie in the publication of the information obtained in breach of confidence.[16] In *Lion Laboratories Ltd v. Evans*[17] disclosure of a confidential memorandum relating to the efficiency of a computerised instrument for measuring the level of alcohol in blood was held to be justified because of the public's entitlement to information which raised doubts about a device which was providing the evidence on which people were being convicted. The Court of Appeal, therefore, discharged the injunction granted at first instance against the *Daily Express*. In this case the defence of public interest was allowed even though there was no "iniquity" revealed by the confidential information. However, if there are other more beneficial ways to disclose confidential information which it may be in the public interest to disclose, other than the media, this could influence the court in its decision to grant an injunction.[18] In *X v. Y*[19] it was held that the public interest in allowing a newspaper to publish the names of practising doctors who were suffering from AIDs did not take precedence over the public interest in the confidentiality of medical records.

25–021 The use of injunctions to restrain a breach of confidence must now be in accordance with the E.C.H.R. Some guidance on the approach to take is provided by the E.Ct.H.R. decision in the action brought against the United Kingdom by the newspapers involved in the *Spycatcher* litigation.[20] The Court started from the basis that the injunctions were a restriction of free speech under Article 10, the main questions were therefore whether the restriction of freedom of expression imposed by the injunction had a legitimate aim under Article 10(2) and if so whether it was necessary in a democratic society. It accepted that an injunction was justified in the interests of national security and to maintain the judicial process by protecting confidential information pending trial of the full action. However, with respect to whether the injunctions were necessary, the Court distinguished between the period until July 1987 and subsequently. In the first period the reasons for the restriction on freedom of speech were sufficient to justify the restriction and proportionate to the aims. However, once the book was published in the United States, its confidential nature was destroyed, and the previous objectives were no longer sufficient to justify continuing the restrictions, to do so would prevent the press from informing the public about matters of legitimate public concern.

Section 12 of the Human Rights Act also provides guidance. Except in exceptional circumstances interlocutory injunctions are not to be granted without notice to the other side, and they should not be granted unless the court is satisfied that the applicant is likely to succeed on the merits at the trial. In deciding whether to grant relief, a court has to have special regard to the

[16] There is a distinction between what is interesting to the public and what is in the public interest, see *British Steel Corporation v. Granada Television Ltd* [1981] A.C. 1096 at p. 1168.

[17] [1985] Q.B. 526, CA.

[18] *Francome v. Mirror Group Newspapers* [1984] 2 All E.R. 408.

[19] [1988] 2 All E.R. 648.

[20] *Observer and Guardian v. United Kingdom* (1992) 14 E.H.R.R. 153, *Sunday Times v. United Kingdom* (1992) 14 E.H.R.R. 229.

E.C.H.R. right to freedom of expression. Where proceedings relate to journalistic, literary or artistic material, particular regard must be had to the extent to which the material is, or is about to become available to the public; the extent to which publication would be in the public interest; and any relevant privacy code (section 12(4)).

Disclosure of sources of information

25–022 The effect of section 10 of the Contempt of Court Act 1981 was discussed above.[21] Protection is given by the provisions of the Police and Criminal Evidence Act 1984 to journalistic material in relation to police powers to search premises and seize evidence found there.[22] The offence in section 19 of the Terrorism Act 2000[23] could be used to prosecute journalists who fail to report to the police matters concerning terrorism obtained by them in an interview. Assurances were given that the protection of sources was likely to fall within the defence of "reasonable excuse" in section 19(3).[24]

Press Complaints Commission

25–023 Unlike television and radio, the press is supervised through self-regulation, by the Press Complaints Commission (PCC). This is a non-statutory body established in 1991 to replace the Press Council, which had been widely criticised as slow, bureaucratic and partisan. It had also failed to prevent press intrusion into peoples' private lives, and failed to improve public recourse against the press.[25] The Press Complaints Commission was said to be a last chance for the press to prove that voluntary self regulation could work.[26] The PCC has an independent chairman and 15 other members, 10 of whom are from the newspaper industry. It publishes, monitors and implements a Code of Practice for the guidance of the press and the public. A review of the first two years of the new body was unenthusiastic, and recommended the establishment of a statutory body with powers to fine newspapers for breaches of the Code of Practice and to award compensation to aggrieved parties, it also proposed some new criminal offences and a new tort of infringement of privacy.[27] No changes were made in the law, but there is some evidence that the PCC has taken it role more seriously. However, it has limited powers, and no legal powers to enforce its adjudications. Self-regulation of the press has persisted because of the reluctance of governments to be seen to be interfering with free speech.

The PCC is a public authority under section 6 of the Human Rights Act 1998, and as such could be subject to litigation if it fails to properly protect private and family life as required by Article 8 of the E.C.H.R. Press concern that Article 8 could endanger freedom of the press and that the judges could use it to create a right to privacy,[28] lead to the inclusion of section 12 in the HRA.[29] It is arguable

[21] *ante*, para. 25–016.

[22] *ante*, para. 24–047.

[23] *ante*, para. 25–011.

[24] H.L. Deb., Vol. 613, col. 653; Vol. 614, col. 187. To provided reasonable excuse as a *defence* to revealing a source is not necessarily in accordance with the E.Ct.H.R. decision in *Goodwin v. United Kingdom* (1996) 22 E.H.R.R. 123, see *ante*, para. 25–017.

[25] *Report of the Committee on Privacy and Related Matters*, Cm. 1102, 1990 (Calcutt Report).

[26] Calcutt Report para. 14.38.

[27] Sir David Calcutt, *Review of Press Self-Regulation*, Cm. 2135 (1993). See also *Privacy and Media Intrusion*, H.C. 291 (1992–93).

[28] See *Spencer v. United Kingdom* [1998] 25 E.H.R.R. C.D. 105.

[29] *ante*, para. 22–018.

that the failure of the common law to recognise a right to privacy has been responsible for the pusillanimous attitude taken by the PCC and its predecessor to invasions of privacy.

V. Obscenity, Indecency and Censorship

Obscene publications

25–024 In early times, jurisdiction over obscenity was exercised by the ecclesiastical courts as a matter of morals; but this jurisdiction was taken over by the common law courts in *Curl's Case*,[30] where the misdemeanour of obscene libel was recognised. The Obscene Publications Act 1857 also empowered magistrates to authorise the seizure and destruction of obscene articles kept for sale or other purpose of gain. The test of obscenity for the purpose of both the misdemeanour and a destruction order was that laid down by Cockburn C.J. in *R. v. Hicklin*[31]:

> "... I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

In the following paragraphs a variety of statutes concerned with obscenity and indecency will be considered. These by their very nature restrict freedom of expression, and will now have to be interpreted so far as it is possible, in accordance with E.C.H.R. rights. However, the E.C.H.R. allows for restraint on freedom of speech on the grounds of the protection of morality (Article 10(2)). In *Handyside v. United Kingdom*[32] the E.Ct.H.R. accepted that the Obscene Publications Act 1959 Act was within the Convention, and that in this area domestic legislators have a wide margin of appreciation in securing the freedoms guaranteed under the E.C.H.R.

The Obscene Publications Act 1959

25–025 This Act created the statutory offence of publishing[33] obscene matter,[34] which superseded the common law misdemeanour, and repealed and replaced the Act of 1857 as regards the seizure and forfeiture of obscene matter. The test of obscenity for the purposes of the Act is whether the effect "is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." The tendency to deprave and corrupt, instead of being a presumed consequence of obscenity, has become the test of obscenity and what has to be

[30] (1727) Stra. 788.
[31] (1868) L.R. 3 Q.B. 360, 371.
[32] (1976) 1 E.H.R.R. 737.
[33] As amended by the Broadcasting Act 1990, s.162(1)(b) and by the Criminal Justice and Public Order Act 1994, sched. 9, to include broadcasting and electronic transmission within the term "publication".
[34] The Criminal Justice and Public Order Act 1994 made the offences in s.1 of the 1959 Act arrestable offences, and classified them as serious arrestable offences.

proved.[35] The question is not whether an item can be described by terms regarded as synonyms of obscene, for example, filthy, shocking, repulsive, lewd, but whether it has a tendency to deprave and corrupt: *R. v. Anderson; R. v. Oz Publications Ltd.*[36] Thus it could be argued that the very degree of lewdness of a book might be such that, far from depraving it would produce feelings of horror and revulsion and so morally improve the reader: *R. v. Calder and Boyars Ltd.*[37] The depraving and corruption to which the statute refers has been held to extend beyond the sexual sphere to, for example, corrupting by advocating the illicit use of drugs: *Calder (John) Publications Ltd v. Powell.*[38] Whether an item is obscene is a question of fact for the jury on which expert evidence is inadmissible except in the case of material aimed at young children where the jury may require the help of psychiatric experts.[39]

An item is not obscene for the purposes of the 1959 Act if it is likely to corrupt only a minute number of people exposed to its influence, a "lunatic fringe of readers." On the other hand an item likely to corrupt a significant proportion of people exposed to it would be obscene.[40] Where it can be established that the particular persons to whom an item has been published (for example by sale) are not capable of being depraved by the item, it cannot be obscene under the 1959 Act.[41] That absurdity in the earlier legislation was remedied by creating a new offence of having an obscene article for publication for gain: Obscene Publications Act 1964, s.1 which provides that the question whether the article is obscene shall be determined by reference to such publication for gain of the article as in the circumstances it may reasonably be inferred the person charged had in contemplation and to any further publication that could reasonably be expected to follow from it.

25–026 It is a defence under Section 4 of the 1959 Act[42] to prove that publication "is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning,[43] or of other objects of general concern." The Act of 1959 also declares that, contrary to the former practice, the opinion of experts may be admitted either to establish or to negative this defence.[44]

For the purposes of the Act an "article" includes matter to be read or looked at, a sound record, film, or thing intended to be used for the reproduction or manufacture of obscene articles, *e.g.* a photographic negative, or cinematograph exhibition. A video cassette[45] and a computer disc[46] have been held to be within the Act.

[35] *D.P.P. v. Whyte* [1972] A.C. 849, in which the House of Lords held that middle-aged men who are already addicts of pornography are capable of being further depraved and corrupted.

[36] [1972] 1 Q.B. 304, CA.

[37] [1969] 1 Q.B. 151, CA.

[38] [1965] 1 Q.B. 509.

[39] *D.P.P. v. A. and B.C. Chewing Gum Ltd* [1968] 1 Q.B. 159, DC. Similarly in cases of obscenity involving drug use: jury not qualified to assess effect of drugs and of methods of using them recommended in book: *R. v. Skirving; R. v. Grossman* [1985] Q.B. 819, CA.

[40] *R. v. Calders and Boyars Ltd, supra.*

[41] *R. v. Clayton and Halsey* [1963] 1 Q.B. 163 (the case of the incorruptible police officers).

[42] As amended by the Criminal Law Act 1977, s.53.

[43] "Learning" is a noun, meaning "product of scholarship"; it is not a verb meaning teaching or educating: *Att.-Gen.'s Reference (No. 3 of 1977)* [1978] 1 W.L.R. 1123, CA.

[44] But evidence of supposed therapeutic benefit is inadmissible: *R. v. Staniforth; R. v. Jordan* [1977] A.C. 699, HL.

[45] *A.-G's Reference (No. 5 of 1980)*, [1980] 3 All E.R. 816.

[46] *R. v. Fellows and Arnold* [1997] 1 Cr. App. Rep. 244.

As will be seen later in this chapter, films are to some extent treated differently from items such as books and magazines.

Forfeiture

25–027 Where a person has been convicted of publishing (or having for gain for publication) obscene articles, the court shall order the forfeiture of these articles. In addition when criminal proceedings have not been started, the police may take legal action against obscene articles by way of forfeiture. Under section 3 of the Obscene Publications Act 1959 a justice of the peace may issue a warrant empowering a constable to enter and search any premises, stall or vehicle, and to seize and remove any articles which he has reason to believe to be obscene articles kept for publication for gain. When the owner of the premises or user of the stall or vehicle has been summoned to appear to show cause why the articles should not be forfeited, the magistrates' court may order the articles to be forfeited if it is satisfied that they were obscene articles kept for publication for gain. The owner, author or maker may also appear to show cause against forfeiture. The defence of "public good" may be set up, and the opinion of experts may be admitted on either side. Appeal against a forfeiture order lies to the Crown Court or by case stated to the High Court.

Obscene Libel

25–028 The Obscene Publications Act 1959 does not expressly abolish the common law misdemeanour of obscene libel but provides in section 2(4) that a person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene. In *Shaw v. Director of Public Prosecutions*[47] the House of Lords held that the section did not prevent the bringing of proceedings for a common law conspiracy to corrupt public morals or outrage public decency by the publication of an obscene article since the essence of the offence was the agreement not the publication.

Indecency

25–029 A number of statutes refer to "indecency" by which is meant a lower degree of moral depravity than connoted by obscenity. From the point of view of the prosecutor this renders his task easier, particularly because the evidence of experts is not relevant. The Post Office Act 1953 section 11 makes it an offence to ". . . send or attempt to send or procure to be sent a postal packet which: (b) encloses any indecent or obscene print, painting, photograph, lithograph, engraving, cinematograph film, book, card or written communication, or any indecent or obscene article whether similar to the above or not . . . ."

In *R. v. Anderson; R. v. Oz Publications Ltd*[48] the defendants, although acquitted under the 1959 Act were convicted under the Post Office Act. Articles imported into the country are liable to be forfeited if they are "indecent or obscene." Thus books which, if published in England and prosecuted under the

[47] [1962] A.C. 220. See too *Knuller Publishing Printing and Promotions v. D.P.P.* [1973] A.C. 435. The conspiracies recognised by the House of Lords in these decisions are preserved in existence by the Criminal Law Act 1977, s.5(3). These offences would be unlikely to survive challenges under the E.C.H.R.

[48] [1972] 1 Q.B. 304, CA.

1959 Act, might be shown to be works of art or literature by expert evidence, are liable if published abroad to be seized by zealous customs officers.[49]

The Telecommunications Act 1984, s.43(1)(a) provides the offence of grossly offensive, indecent or obscene telephone calls. This offence is capable of applying to the sending of indecent matter in digital format from one computer to another over public telephone lines.[50]

25–030 The taking, distributing, publishing or possessing of indecent photographs or pseudo-photographs of children under the age of 16 is prohibited by the Protection of Children Act 1978. This statute is not aimed, as is much of the law considered in this section, at censorship because of the supposed deleterious effect on the users of obscene materials but at the easily identifiable harm to children who are involved in the taking of indecent photographs. The problems caused by digital technology have been addressed in the 1994 amendments to this Act.[51]

A further means of restricting access to indecent materials is by imposing controls. The public display of indecent matter is prohibited by the Indecent Displays (Control) Act 1981, an Act which is designed to prevent people from being brought into unwelcome proximity with indecent matter. The Act does not attempt to define indecent. Matter is defined as "anything capable of being displayed, except that it does not include an actual human body or any part thereof" (section 1(5)). The Act does not apply to television broadcasts, displays inside art galleries or museums, displays inside buildings owned by the Crown or local authorities, theatrical performances or cinematograph exhibitions. The effect of the exemption in the cases other than that of television broadcasts, is that the buildings concerned do not have to carry a statutory warning that indecent matter may be exhibited inside—as would a shop displaying such matter.

Section 3 of the Local Government (Miscellaneous Provisions) Act 1982 empowers a local authority to establish a licensing scheme for sex establishments in its area. This has been used particularly in respect of "sex shops": the law is not concerned with the effect of the material sold, but on whether material is sold that falls within the definition of a "sex article" (Sched. 3). If a licence is granted, the shop will be subjected to conditions on displays, opening hours etc.

Reform

25–031 Attempts to reform the law relating to obscene publications raise difficult questions about what the purpose of the law is and what the justifications are for the criminal law interfering with the freedom of rational adults.

At present the law is explicable only on the basis that censorship is aimed at the minds of the people reading the books or viewing the films. There may be an argument that pornography ultimately leads to criminal acts against others but that is not the justification for the law at present.[52] Should the law concern itself with whether someone wishes to read Shakespeare or pornography?[53] To some

[49] Customs Consolidation Act 1876 s.42; Customs and Excise Management Act 1979, s.49. C. Manchester, "Customs Control of Obscene Literature" [1981] Crim.L.Rev. 531. Such control in the case of books is not contrary to E.C. law: *ante*, para. 6–036.

[50] The penalties for this offence were increased by s.92 of the Criminal Justice and Public Order Act 1994.

[51] As amended by s.84 of the Criminal Justice and Public Order Act 1994; see *R. v. Bowden* [2000] 2 All E.R. 418; *R. v. Atkins* [2000] 2 All E.R. 425.

[52] As shown by *D.P.P. v. Whyte* [1972] A.C. 849.

[53] Assuming pornography can be identified. Are the novels of Genet works of genius or the obscene products of a perverted mind, or both?

extent it seems that the law (or some law) against obscenity is justified on the ground that people are disgusted at the thought that other members of the community are reading pornography. But to base criminal laws on disgust alone is at best dangerous and at worst a denial of individuals' rights.

Comprehensive proposals for reform in this area of the law were made by the Williams Committee on Obscenity and Film Censorship,[54] but no action was taken on the report.

Regulating the media and entertainment

25–032 In addition to controlling the availability of obscene or indecent material by criminalisation, it is possible to control its availability by pre-censorship.

Broadcasting, cinema and videos

25–033 There is an extensive variation in the means whereby the different types of media are regulated. Broadcasters are subject to very little official censorship, reliance is made on self-regulation. Films and videos are subject to a variety of self-regulation but with increasing statutory involvement. All are subject to a system of licensing, which is permissable under Article 10(1) of the E.C.H.R. but only with respect to the technical means of broadcasting and not the content. If a licence imposes non-technical conditions on a broadcaster, these are permissable only if they can be justified under Article 10(2).[55] Legislation such as the Obscene Publications Act 1959 now applies to all types of the media, though it was not always the case.[56]

Broadcasting[57]

25–034 It is, perhaps, not surprising that the content of programmes broadcast by radio and television can generate particularly heated controversies about freedom of expression. A visit to a theatre is a deliberate choice; radio and television are already in the house. To the person who objects to a film it can be said that it is not necessary to go to the cinema to see it. The person who objects to a television programme is entitled on the contrary, to argue that he has to pay a licence to have a set; his views on what is suitable for showing have therefore, some weight.

Licensing and regulation of all television services, except for those run by the BBC, are the responsibility of the Independent Television Commission (ITC). The Radio Authority (RA) has a similar role with respect to radio. The legal restrictions relating to the contents of programmes is broadly similar in the case of the BBC, the ITC and the RA.[58] In the case of the BBC they are to be found in current BBC agreement[59] and in the case of the ITC and the RA in the

[54] Cmnd. 7772 (1979).

[55] *Brind v. United Kingdom* (1994) 77-A D.R. 42, where restrictions on the reporting of terrorists were held to be legitimate and proportionate.

[56] It was not until 1977 that it was applied to films, and 1990 when it was applied to broadcasting.

[57] T. Gibbons, *Regulating The Media* (1998).

[58] The ITC was established by s.1 of the Broadcasting Act 1990 (replacing the Independent Broadcasting Commission and the Cable Authority) to licence and regulate non BBC television services, including all satellite and cable services. The Broadcasting Act 1996 extends its functions to licensing multiplex and digital programme services. The R.A. was established to supervise sound programmes.

[59] Cm. 3152 (1996); revised BBC Charter Cm. 3248 (1996).

Broadcasting Act 1990.[60] Programmes must not offend against good taste or decency or be likely to encourage or incite to crime or to lead to disorder or to be offensive to public feeling. Codes must regulate the showing of violence. The use of subliminal images (those shown for so brief a period of time that the brain is influenced without the person concerned realising the fact) is specifically forbidden by section 6(1)(e) of the 1990 Act.[61] Other requirements relate to the provision of accurate and impartial news features and due impartiality on the part of persons providing programmes on matters of political or industrial controversy or current public policy.[62] The ITC is also required to draw up a code providing guidance with respect to the showing of violence, and the control of advertising, particularly with respect to the avoidance of advertisements directed towards a political end.

25–035 The courts regard the duty relating to the type of programmes which may not be broadcast as ultimately, enforceable by judicial action but they have also made it equally clear that they would not attempt to substitute their aesthetic judgments for those of the properly constituted broadcasting authorities: *Attorney-General, ex rel. McWhirter v. I.B.A.*[63]; *R. v. I.B.A., ex p. Whitehouse.*[64]

There is provision in both the BBC's Charter and Agreement and in the legislation governing commercial broadcasting, for direct interference by government.[65] Broadcasters can be required to refrain from broadcasting or transmitting any matter or matter of any class specified in a notice issued by the Secretary of State. In 1988 the Secretary of State issued a ban on the broadcasting of direct statements by members of terrorist organisations and other parties connected with Northern Ireland.[66] Ministers also have a power to require the broadcasting of any announcement.[67]

The Broadcasting Standards Commission

25–036 This was established by section 264 of the Broadcasting Act 1996 and constitutes a merger of the Broadcasting Standards Council (BSC) and the Broadcasting Complaints Commission.[68] The BSC consists of up to 15 members appointed by the Secretary of State: it is directed to make an annual report to the Secretary of State who shall, after considering it, lay it before both Houses of Parliament.

The legislation maintains a distinction between the BSC's complaints functions relating to privacy and fairness,[69] and its complaints functions with respect to standards of decency. With respect to the first of these functions the BSC's jurisdiction is limited in several ways (section 111), including a limitation on

[60] ss.6 and 84 respectively in the 1990 Act.

[61] Breach of the prohibition is not a criminal offence: *R. v. Horseferry Road Justices, ex p. I.B.A.* [1986] 3 W.L.R. 132, DC.

[62] s.6(1)(b),(c) of the 1990 Act, BBC Agreement cl.5. See Gibbons *op. cit.* pp. 94–124.

[63] [1973] Q.B. 269, CA.

[64] *The Times*, April 14, 1984, DC.

[65] Clause 8.2 of the 1996 Agreement, and ss.10(3),(4), 94(3),(4) of the Broadcasting Act 1990.

[66] See H.C.Deb. Vol. 138, col. 885, October 19, 1988. The ban was unsuccessfully challenged by journalists (not the broadcasters) in *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C. 696.

[67] Clause 8.1 of the BBC agreement, and ss.10(1) and (2) and 94(1) and (2) of the 1990 Act.

[68] There had been confusion about the roles of the two bodies, and the Complaints Commission had been perceived as weak, see Cm. 2621 (1994) and H.C. 77 (1993–94). The first attempt to establish a statutory independent broadcasting body was in 1980.

[69] These will be personalised complaints and should be considered independently of considerations of programme-making.

those who have standing to complain.[70] However, in *R. v. Broadcasting Standards Commission, ex p. BBC*[71] the Court of Appeal agreed that the BSC was entitled to consider a complaint of unwarranted infringement of privacy by a company in connection with secret filming in a place to which the public had access. The sanctions available to the BSC are fairly ineffectual (sections 119 and 120).

The role of the BSC with respect to complaints on standards is connected with its duty to publish a code giving guidance on programme standards for the avoidance of "(a) unjust or unfair treatment in programmes . . . . or (b) unwarranted infringement of privacy in, or in connection with the obtaining of materials included in such programmes" (section 107). This section goes further than the previous law[72] in its requirement that the BSC articulates principles of fairness and decency. Section 108[73] requires a further code giving general guidance on the portrayal of violence and sexual conduct and on standards of taste and decency in programmes. The BSC is required to monitor and report on programmes to which section 108 applies. Where a complaint on standards is made to the BSC it does not have to hold a hearing: the adjudications that are made are concerned with the general issue of whether the broadcasters has complied with the BSC code and the broadcaster's own code. The only sanction is to require the broadcaster against whom the complaint was made to publish the complaint and the findings.

The theatre

25–037 Under the Theatres Act 1843 there was a censorship by the Lord Chamberlain of the public performance of stage plays written after 1843. The Theatres Act 1968 abolished this censorship and repealed the Act of 1843. The 1968 Act, in effect, applies to theatrical performances (other than those given on a domestic occasion in a private dwelling (section 7(1)). It is an offence to present or direct the performance of a play which is obscene, that is if taken as a whole its effect was such as to tend to deprave and corrupt persons who were likely, having regard to all relevant circumstances, to attend it (section 2).

Like the 1959 Act, a defence of justification on the ground of public good is recognised (section 3). Again, following the earlier precedent, section 1(4) provides that prosecutions cannot be brought in respect of a performance within the Act for any common law offence of indecency or for various statutory offences. The 1968 Act goes further than its predecessor and provides that no person shall be proceeded against for an offence at common law of conspiring to corrupt public morals, or to do any act contrary to public morals or decency, in respect of an agreement to present or give a performance of a play, or to cause anything to be said or done in the course of such a performance.

By section 8 proceedings in England may not be commenced under the Act without the leave of the Attorney-General.[74] Theatrical performances are subject to the law against incitement to racial hatred by virtue of the Public Order Act 1986, s.20).

[70] *R. v. Broadcasting Complaints Commission ex p. BBC* [1995] E.M.L.R. 241.
[71] [2000] 3 W.L.R. 1327.
[72] s.152 Broadcasting Act 1990.
[73] Re-enacting s.152 of the 1990 Act.
[74] But see *Whitehouse v. Bogdanov*, *The Times*, March 19, 1982, for a way round the intention of the Act.

The cinema

25–038 The Cinematograph Act 1909 required a licence from the county council or the county borough council for the exhibition of inflammable films.[75] This was a safety measure, but local authorities soon began to refuse to license films which they thought offended public morals, a practice that was declared to be lawful.[76] The film industry thereupon set up its own unofficial body, now known as the British Board of Film Classification,[77] to certify and classify films intended for public exhibition.

The Cinemas Act 1985[78] makes local authorities responsible for the licensing of premises in which films are to be shown to the public. Local authorities have no duty to censor films, except in the case of children (section 1(3)), although they have a power to impose conditions which relate to the admission of adults (section 2(2)). They may, however, be liable if the terms of a licence allows the showing of films which are contrary to the law. They cannot delegate their responsibilities to the Board of Film Classification[79] but they may properly rely on its advice and require cinemas to which they grant licences not to show films which have not been approved by the Board.[80] The Home Office issues model licensing conditions which are used by most local authorities.

The Obscene Publications Act 1959 did not originally apply to public exhibitions of films, which were thus left subject to common law offences relating to indecency.[81] The Criminal Law Act 1977 amended the 1959 Act to bring the showing of films within the protection of that Act and further provided that no prosecution can be brought without the consent of the Director of Public Prosecutions, where the article is a moving picture film not less than 16mm. wide and publication of it took place or could reasonably be expected to take place only in the course of a cinematograph exhibition. Nor can any prosecution be brought for any common law offence or any conspiracy to corrupt public morals.

It is clearly illogical that a system of censorship should evolve out of legislation concerned with public safety. Decisions of the Board of Censors in earlier years showed British prudery at its worst. If there is to be censorship it is arguable that the responsibility must be that of a state organisation.[82]

Video recordings

25–039 Video works and recordings[83] are subject to a scheme of statutory censorship, introduced by the Video Recordings Act 1984[84] which creates an offence of supplying an uncensored video unless the video or the supply fall within the exempting provisions of the Act. The penalties for offences under the Act were increased by section 88 of the CJPO Act 1994.

[75] Extended to non-inflammable films by the Cinematograph Act 1952. Exemption from licensing requirements on the part of private cinema clubs, run for profit, was removed by the Cinematograph (Amendment) Act 1982.
[76] *London County Council v. Bermondsey Bioscope Ltd* [1911] 1 K.B. 445.
[77] Formerly known as the British Board of Film Censors.
[78] Consolidating earlier legislation.
[79] *Ellis v. Dubowski* [1921] 3 K.B. 621.
[80] *R. v. Greater London Council, ex p. Blackburn* [1976] 1 W.L.R. 550.
[81] *R. v. Greater London Council, ex p. Blackburn, supra.*
[82] See the recommendations by the Williams' Committee (1979) Cmnd. 7772.
[83] As defined by s.1 of the Video Recording Act 1984, as amended by the Criminal Justice and Public Order Act 1994 (CJPO Act) to include "any other device capable of storing data electronically".
[84] For a criticism of the Act and its procedure through Parliament as a private member's bill, see Neville March Hunnings, "Video Censorship" [1985] P.L. 214.

Classification certificates indicate whether a video is suitable for general viewing or only by persons over the age (not being over 18) specified on the certificate. In the latter case a further restriction may require that supplies of the video may only take place in licensed sex shops (section 7).

Elaborate provisions deal with the definitions of "exempted works" and "exempted supplies:" these provisions were amended by the CJPO Act. Section 2(1) exempts from the necessity to be classified (i) videos which are designed to inform educate or instruct, concerned with sport, religion or music; and (ii) video games. But no video in these categories is exempt if to a significant extent it depicts human sexual activities, torture, human genital organs and other listed activities and functions. To this list was added "techniques likely to be useful in the commission of offences." The definition of exempted supply is even longer and, for example, includes supplying videos for medical training: thus non-exempt videos under section 2(2) may be the subject of exempt supplies.

The Secretary of State acting under section 4 designated the British Board of Film Classification (BBFC) as the "designated authority" to classify video recordings. The 1984 Act did not lay down any detailed criteria for the BBFC to apply, other than to have regard to the likelihood of the video being viewed in the home. Section 90 of the CJPO Act 1994 inserts section 4A which requires the "designated authority" when deciding on classifications of videos to have special regard to any harm that may be caused to potential viewers,[85] or through their behaviour, to society by the manner in which the work deals with: criminal behaviour, illegal drugs, violent behaviour or incidents, horrific behaviour or incidents, or human sexual behaviour.

[85] Which is defined in s.4A(2) as "any person (including a child or young person) who is likely to view the video in question if a (particular classification) . . . were issued."

CHAPTER 26

FREEDOM OF EXPRESSION: OFFICIAL SECRECY AND THE RIGHT TO KNOW

26–001 This chapter considers as an aspect of freedom of expression the right to seek and receive information and ideas: the right to know. Whereas Parliament and the courts operate openly, it is a characteristic of the third branch of government, the executive, that it operates in secret. The right to know has become more significant with the increase in government activities in the last 100 years. There are a variety of justifications for this right: it is an aspect of democracy that citizens should have information about the workings of government to enable them exercise their democratic responsibilities; the knowledge that information is liable to be made public should encourage a high standard of decision-making and discourage maladministration and fraud, and in consequence better government; some information is of personal concern to individuals who may wish to know of its existence and be satisfied of its accuracy. However, the right to know can never be absolute. It frequently has to be balanced against other public interests such as national security, the need to protect dealings with other countries and a desire for efficient government. Not only may the availability of information be restricted on these grounds, to reveal information that falls within them may be a criminal offence.

The first section of this chapter considers the ability of governments to prevent certain types of information being made available to citizens by the use of legislation and practice on official secrets.

The second section considers a different aspect of State interest, the interest of the State in the secret surveillance of the activities of individuals. Here it is the State which wants information and it is the individual who requires protection from such State interference. That is not to say that such activities should never be allowed, but they should only be permitted if conducted in clearly defined circumstances, for specific purposes and be independently regulated.

26–002 The final section considers how and when a citizen may have access to information held about himself by organisations such as banks, doctors, local authorities and government departments. It also looks more widely at something that the law and practice in both the above sections in effect prevent, namely the right to obtain information about the workings of government. The notion of open government has in the past been something that was available by consent of Ministers rather than by statutory right; this section will consider the extent to which this has changed under the Freedom of Information Act 2000. A final aspect of freedom of information is the Public Interest Disclosure Act 1998, which gives some protection to workers who, in the public interest, reveal information.

I. Official Secrets[1]

The Official Secrets Act 1911

26–003 The Bill that became the Official Secrets Act 1911 was introduced into the House of Lords after the Agadir crisis.[2] The Bill had been carefully considered for some time in the Department but passed through Parliament with scarcely any debate. Section 1(1) makes it an offence if any person "for any purpose prejudicial to the safety or interests of the State" (a) approaches or enters a prohibited place[3]; or (b) makes a sketch or plan, etc. calculated or intended to be, or which might be useful to an enemy; or (c) obtains, publishes or communicates to any other person any sketch, etc. document or information which is calculated to be or might be or is intended to be useful to an enemy.[4] Purpose prejudicial to the safety or interests of the State may be inferred from the circumstances; and if the accused acted without lawful authority in communicating information relating to a prohibited place[5] he is presumed to have acted for a prejudicial purpose (section 1(2)). The prejudicial purpose refers to the intention of the accused, not the actual or potential effect of his conduct. Section 1 is not limited to time of war: an enemy may be actual or potential.

In *Chandler v. Director of Public Prosecutions*[6] members of an anti-nuclear weapons group, the Committee of 100, were convicted under section 1 for entering a RAF station, which was a prohibited place. Their intention was to sit in front of aircraft so as to prevent them from taking off; their ultimate object being to bring about nuclear disarmament, which they considered would be beneficial to this country. The House of Lords, unanimously upholding their convictions, held: first, that the section (in spite of the marginal note: ("Penalties for spying") covered sabotage[7]; secondly, that the question whether the purpose of the accused was "prejudicial to the safety or interests of the State" was a question for the jury. "Purpose" meant direct purpose or object, not indirect purpose or motive, and the accused might not give evidence as to the latter. Ministers could not assert their opinion as to what was or was not prejudicial to the interests of the State, though an officer of the Crown could give evidence about what were the interests of the Crown and as to the airfield being part of the defence system maintained for the protection of the realm.

[1] See D. G. T. Williams, *Not in the Public Interest* (1965); K. Robertson, *Public Secrets: A Study in the Development of Governmental Secrecy* (1982).

[2] Germany's action in sending a gunboat to the port of Agadir, with a promise to assist the Moroccans against France, nearly precipitated a European war.

[3] As defined in s.3 to include any defence works, arsenal, naval or air force station, camp, ship or aircraft belonging to or occupied by the Crown.

[4] *R. v. Britten* [1969] 1 W.L.R. 151, CA: deterrent sentences may be appropriate.

[5] Which includes any defence works, arsenal, naval or air force station, camp, ship or aircraft belonging to or occupied by the Crown (s.3).

[6] [1964] A.C. 763.

[7] This part of the decision was right according to the method of interpretation used by the courts at the time, but it was inconsistent with statements made by Ministers in parliamentary debates on Official Secrets Bills to the effect that s.1 of the 1911 Act was intended to be restricted to espionage: Donald Thompson, "The Committee of 100 and the Official Secrets Act 1911", [1963] P.L. 201. In the light of *Pepper v. Hart* [1993] A.C. 593, it is likely that a court today would come to a different conclusion as to whether such activities came within s.1.

Their Lordships had difficulty with the meaning of "the State," an unusual expression in English law in relation to internal affairs.[8] Lord Reid said, "the State" did not mean the Government or the Executive, but meant perhaps the country, the realm or the organised community. Viscount Radcliffe in the context of this case spoke of the defence of the realm. According to Lord Hodson the organised State comprised those persons who dwelt therein and whose safety was to be considered. For Lord Devlin the State meant the organs of government of a national community, which in respect of the armed forces meant the Crown. It is suggested that the difficulty lies largely in the fact that the Government as the only agent legally capable of speaking for the Crown is liable to be confused, by itself and others, with the Government as a group of party politicians. The phrase "in the interests of the State" also occurred in section 2, where someone prosecuted for disclosing information contrary to that section, could attempt to prove that the disclosure was made on that basis. In *R. v. Ponting*[9] in directing the jury on the meaning of "the interest of the State", McCowan J. followed what had been suggested by Lord Pearce in *Chandler* and said that the expression meant the policies of the State laid down for it by the recognised organs of government and authority. This direction in effect neutralised Ponting's argument that he had acted in the interests of the State as an institution as distinct from the government of the day.[10]

Section 2 of the 1911 Act created what became known as a "catch all" provision. The wording created over 2000 different ways in which a person could face a prosecution under this section. The nub of the offence was the unauthorised communication to another of information gained in the service of the Crown or the receipt of such information. The information did not have to be important, harmful to the state or secret. No *mens rea* was required. Section 2 had long been widely criticised and several official reports had recommended its repeal and replacement[11]; this finally happened with the enactment of the Official Secrets Act 1989.[12]

The Official Secrets Act 1920

26–004 This was passed after experience of security problems during the First World War and was designed to enact for peace time the content of certain Defence of the Realm Regulations. Section 1(1) provides a variety of offences in connection with wearing an unauthorised uniform, impersonating a government official for the purpose of gaining admission to a prohibited place, and unlawfully retaining official documents for a purpose prejudicial to the safety or interests of the State. These and other offences such as obstructing or interfering with a military or police guard "in the vicinity of" a prohibited place are not ones that are of concern to freedom of expression. Section 7 provides that it is an offence to

[8] The term the State has been interpreted by the courts in different ways depending on the context, see, *e.g. Foster v. British Gas plc* [1991] 2 A.C. 306, with respect to the meaning of the state in E.C. law.

[9] [1985] Crim. L.R. 318.

[10] Ponting, a civil servant, had been charged with communicating confidential documents to another person contrary to s.2(1) of the 1911 Act (since repealed); despite the weight of the evidence against him and the nature of the direction to the jury, Ponting was acquitted.

[11] *Departmental Committee on Section 2 of the Official Secrets Act 1911* (1972) Cmnd. 5104; *Reform of Section 2 of the Official Secrets Act 1911* (1978) Cmnd. 7285; *Freedom of Information* (1979) Cmnd. 7520; *Reform of Section 2 of the Official Secrets Act 1911* (1988) Cm. 408.

[12] The failure of the prosecution of Clive Ponting, despite a clear indication by the trial judge to convict, probably spurred the government into reform.

attempt to commit any offence under the 1911 Act or the 1920 Act or[13] to do any act preparatory to the commission of an offence under either Act. Thus preparatory acts which are not even attempts may be punishable.[14] It suffices for a conviction, to show merely that the accused realised that a substantive offence might possibly follow the preparatory act, not that it must or probably would follow.[15] The effect of section 7 is to extend the scope of the 1911 and 1920 Acts and to make it easier to prove attempts to commit offences under these statutes, than elsewhere in the criminal law.

Prosecution under the Acts requires the consent of the Attorney-General or Lord Advocate.

The Official Secrets Act 1989[16]

26–005 This Act replaced the widely drawn section 2 of the 1911 Act by creating specific categories of official information, and providing offences in connection with disclosing information, documents or other articles in respect of each category. Although the 1989 Act decriminalised certain types of disclosure, it did not in fact radically change the scope of official secrecy, as these categories are themselves widely drawn. For virtually all the categories the prosecution has to prove that the disclosure was damaging, the definition of which differs for each category. In addition, for all the offences the disclosure has to be "without lawful authority." Section 7 provides circumstances when a disclosure may be authorised, which differ depending on the identity of the person making the disclosure. An authorised disclosure by a Crown servant is one "made in accordance with his official duty"; by a government contractor it is one made "in accordance with an official authorisation" or "for the purposes of the functions for which he is a government contractor and without contravening an official restriction"; for any other person it is one made to a Crown servant for the purposes of his functions as a Crown servant, or made with official authorisation. It is also a defence for the discloser to show that "he believed that he had lawful authority to make the disclosure in question and had no reasonable cause to believe otherwise" (section 7(4)). Where the offences apply to Crown servants, government contractors, or members of the security and intelligence services, as the case may be, they do so with respect to past and present members of those groups. Sections 2, 3 and 4 apply only to Crown servants and government contractors. No prosecutions under the Act may be brought without the consent of the Attorney-General (section 9).

Security and intelligence[17] (section 1)

26–006 Section 1(1) provides that it is an offence for any person who is or who has been a member of the security or intelligence services[18] to disclose, without lawful authority, any information, document or other article "relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work (having been notified that section 1(1) applies to him.)". There is no requirement for section

[13] *R. v. Oakes* [1959] 2 Q.B. 350.

[14] *cf.* s.1(1) of the Criminal Attempts Act 1981.

[15] *R. v. Bingham* [1973] Q.B. 870, CA.

[16] See S. Palmer, "The Government Proposals for Reforming s.2 of the Official Secrets Act 1911" [1988] P.L. 523; "Tightening Secrecy Law", [1990] P.L. 243.

[17] *i.e.* M.I.5, M.I.6, see s.1(9).

[18] Or someone notified by a Minister that because of his work he is subject to s.1(1) s.1(6).

1(1) that the disclosure should be damaging (*cf.* section 1(3) and ss.2–6), all information no matter how innocuous is covered. Section 1(3) creates a similar separate offence in respect of Crown servants or government contractors.[19] However, here the disclosure has to be damaging, which is defined as causing damage to any aspect of the work of the security and intelligence services (section 1(4)(a)); or, if it would be likely to cause such damage (section 1(4)(b)). It is not necessary to show that the actual document disclosed would cause damage provided the document is part of a class of information, document etc. the unauthorised disclosure of which is likely to cause damage as defined in section 1(4)(a). Section 1(5) provides defences of innocent disclosure. The person concerned has to prove that at the time of the alleged offence "he did not know, and had no reasonable cause to believe", that the unauthorised disclosure related to security or intelligence, or, in the case of an offence under section 1(3), that the disclosure would be damaging.

Defence[20] (section 2)

26–007 The meaning of defence includes defence policy and other matters relating in general to the armed forces such as weapons, stores and plans for supplies and services in time of war (section 2(4)). A disclosure is damaging under this section if the information either causes or is likely to cause any of the following results: "(a) it damages the capability of . . . the armed forces . . . to carry out their tasks or leads to loss of life or injury to members of those forces or serious damage to (their) equipment or installations; or (b) . . . it endangers the interests of the United Kingdom abroad, seriously obstructs the promotion or protection . . . of those interests or endangers the safety of British citizens abroad" (section 2(2)).[21] The definition of damaging in this section is clearly very wide, and it is questionable whether it is sufficiently precise to satisfy the requirements of the E.C.H.R.

International relations (section 3)

26–008 This section is concerned with (a) information relating to international relations or (b) confidential information which was obtained from a State (other than the United Kingdom) or an international organisation, and which the Crown servant or government contractor has obtained by virtue of his position as such. The test of damaging is the same as that in section 2(2)(b); but where the information was confidential, or obtained by virtue of the position of the discloser as a Crown servant or government contractor, then the fact that it was confidential or the nature of its contents may be sufficient in itself to show that it was damaging for the purpose of the section.[22]

Crime and special investigation powers (section 4)

26–009 This section applies to information the disclosure of which would, or would be likely to result in the commission of an offence; facilitate an escape from legal custody or prejudice the safekeeping of those in such custody; impede the prevention, detection, apprehension or prosecution of suspected offenders (section 4(2)). Section 4 also applies to information obtained by virtue of the

[19] Again, it imposes a lifetime obligation on these people to refrain from breaching s.1(3). Wide definitions of both terms are found in s.12.

[20] Defined in s.2(4).

[21] s.2(3) provides a similar defence to that provided in s.1(5).

[22] s.3(4) provides a similar defence to that provided in s.1(5).

authority of an interception warrant under section 5 of the Regulation of Investigatory Powers Act 2000. There is no requirement of damage in this section, the section penalises disclosures which have one of the above results.[23]

Additional provisions

26–010 The above offences are directed at a variety of public officials. Sections 5 and 6 are concerned with stopping other people, or organisations such as the press, from disclosing certain types of information. Although these sections were intended to apply to the press in the same way as to any individual, they should now be interpreted in the light of the E.C.H.R. and the recognition by the E.Ct.H.R. that the press has a special position as guardian of the public interest.[24]

Section 5 provides that it is an offence for the recipient of any information which falls within the categories outlined above, to further disclose that information. It will have to be proved that the discloser knew or had reasonable cause to believe that the information concerned was protected by the Act. In the case of information which falls under sections 1 to 3, it will have to be established that the disclosure was "damaging", a term that should now be interpreted narrowly by the courts in the light of Article 10 E.C.H.R. and section 12 of the Human Rights Act 1998, particularly where the disclosure is by the press.

Section 6 provides that it is an offence to disclose information relating to security, intelligence, defence or international relations which has been communicated in confidence to another State and has come into the discloser's possession without that State's authority. Unlike the previous sections of the Act, there is a defence of "prior disclosure" (section 6(3)). Section 8 imposes a duty on Crown servants and government contractors to safeguard any information etc. to which they have access where its disclosure would be contrary to the Act. It is an offence for example to retain such information contrary to his official duty or to fail to take such care as would prevent the unauthorised disclosure or such information (section 8(1)).

"D.A." Notices[25]

26–011 Closely connected with the topic of the scope of the Official Secrets Acts is that of "Defence Advisory" (DA) Notices, which may, according to taste, be represented as a further form of control over the publication of information which government departments do not wish to be publicised, as guide-lines for self-censorship or as a safety valve against the rigours of the Official Secrets Acts. Since 1912 there has been an official Defence, Press and Broadcasting Committee consisting of civil servants in defence departments and representatives of the press and broadcasting, whose purpose is to indicate to the press and broadcasting authorities when they may safely commit an offence against the Official Secrets Acts without risk of being prosecuted. A DA notice asks editors and publishers not to publish certain specified items of defence information, the publication of which would be prejudicial to the national interest. It is true that some of these items might not be covered by the Acts, but on the other hand much defence information that is strictly speaking secret is communicated to the

[23] Section 4(4) provides a similar defence to that provided in s.1(5).

[24] *Observer and Guardian v. United Kingdom* (1992) 14 E.H.R.R. 153, para. 59.

[25] Until 1992 known as "D" Notices, see J. Jaconelli, "The D Notice System", [1982] P.L. 37; H.C. 773 (1979–80); *The Protection of Military Information*, Cmnd. 9112 (1983). See D. Fairley, "D-Notices, Official Secrets and the Law", (1990) 10 O.J.L.S. 430.

press for background knowledge, and prosecution is unlikely if it was in a DA notice.[26]

Breach of Confidence

26–012 In addition to the use of the criminal law to protect state secrets, governments have also used the civil law to impose prior restraint on the disclosure of certain information, on the basis that to prosecute after the event is inadequate if secret information has already entered the public domain. This is done by attempting to obtain an injunction for breach of confidence and was discussed in Chapter 25.[27]

II. State Surveillance

26–013 States have been involved in the surveillance of their subjects and aliens for centuries. In the last 20 years the means to do this have become more sophisticated and more successful. In addition the police and other law enforcement agencies have been encouraged to move towards proactive, intelligence-led policing, both to discover potential criminal activity and as evidence in the prosecution of those involved in know criminal activity. There is also the ability to record and store for future use information obtained by, for, *e.g.* CCTV, much of which will include information about individuals and events that are not covered by the criminal law.

This is an area where a balance has to be found between State interest and individual privacy. It is concerned with the right to informational autonomy, the right to control what information is available about oneself. It is also concerned with the need of the State to protect itself and its citizens and by definition democracy. In this field the E.C.H.R. has been most influential and the E.Ct.H.R. in its jurisprudence has given extensive guidance on the balance between individual privacy and State interests. Interference by the State with a person's private life, home or correspondence must be justified by one of the exceptions in Article 8(2) and must be the minimum necessary to obtain one of the stated legitimate aims. In addition the legitimate aim must be adequately prescribed by law, and necessary in a democratic society—or proportional to the end to be achieved. This is an area where although the E.Ct.H.R. has accepted that states have a "margin of appreciation" in respect of the checks and balances in force to oversee and monitor such activities, it has laid down minimum requirements.

The need for the United Kingdom to comply with the E.C.H.R. has resulted in legislative reform. Until the enactment of a variety of statutes, surveillance was regulated by administrative guidelines, and relied on the common law approach that anything could be done that was not prohibited. Such an approach was clearly not in accordance with the rights based approach of the E.C.H.R. The bodies involved in such activities include the Security Services, that is M.I.5 and M.I.6, Government Communications Headquarters (GCHQ) and the various police forces. Until the enactment of the Security Services Act 1989, and the Intelligence Services Act 1994, M.I.5, M.I.6 and GCHQ were unregulated by

[26] However, "compliance with the DA Notice system does not relieve the editor of responsibilities under the Official Secrets Acts." para. 4 of the memorandum issued by the Defence Press and Broadcasting Advisory Committee (1993).
[27] *ante*, para. 25–020.

law. The law to be discussed below is mainly concerned with the regulation of surveillance by the police, although certain aspects of the regulation of the powers of MI5 and MI6 and GCHQ are also covered. These bodies still obtain many of their powers under the 1994 Act. Despite reform in 1997 and 2000, the law on surveillance remains confused.

Interception of Communications

26–014 Until 1985, the legal basis for the right to intercept communications, whether with or without warrant, could be found, if at all in the royal prerogative. In 1985 the Interception of Communications Act was enacted to provide a regulatory regime for the interception of communications in the course of their transmission by post or by means of a public telecommunications system.[28] The majority of this Act has been replaced by Part I of the Regulation of Investigatory Powers Act 2000 (RIP Act). There were several reasons for its replacement.[29] At the time of the 1985 Act there was only the public telecommunications system, to this there has been added a growing private communications system, which the 1985 Act failed to cover. This meant that to intercept such communications was "not in accordance with the law."[30] Advances in technology also meant that data held by communication service providers relating to the use of the communications service by customers could be of use for law enforcement purposes, but although there was statutory provision for the voluntary disclosure of such information, powers of compulsory disclosure were limited. Finally there was a general need to ensure compliance with the E.C.H.R. The scheme for interception of communications has been described as an improvement on the 1985 scheme, but as will be seen, defects remain.[31]

Section 1 of RIP Act, which virtually reproduces section 1 of the 1985 Act, creates an offence of unlawfully intercepting a communication sent by post or by a public or private telecommunications system[32] (*e.g.* a hotel network). Section 1(3) creates a tort of unlawful interception which applies to an interception expressly or impliedly permitted by the person with the right to control a private telecommunication system, but without being authorised under the RIP Act.[33] An interception has lawful authority if it falls within sections 3, 4, or 5; an interception which is lawful under these sections is lawful for all purposes, which means that it will be a defence to an action under the HRA Act 1998. Section 3 provides for a variety of consensual interceptions without a warrant *e.g.* the use of an answerphone to record a message, or where the communication is subject to surveillance under Part II of the RIP Act. Section 4 enables certain interceptions to be lawfully conducted without a warrant if they are carried out in accordance with regulations made under section 4 (*e.g.* to enable businesses to

[28] In 1957 a report by a Committee of Privy Councillors, Cmnd. 283, had recommended legislation to regulate and limit the interception of communications: Sir Robert Megarry V.-C. in *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, described it as a subject "which cries out for legislation." It was the decision of the E.Ct.H.R. in *Malone v. United Kingdom* (1985) 7 E.H.R.R. 14 that the lack of legal controls over the issuing of warrants to tap telephones amounted to a breach of Art. 8, which resulted in the 1985 Act.

[29] See Cm. 4368 (1999).

[30] See *Halford v. United Kingdom* (1997) 24 E.H.R.R. 523. In *R. v. Effick* [1995] 1 A.C. 309, it was held that since the calls taped were made on a cordless telephone s.1 did not apply.

[31] See Akdeniz, Taylor and Walker, "Regulation of Investigatory Powers Act 2000 (1): Big Brother.gov.uk: State surveillance in the age of information and rights", [2001] Crim.L.R. 73.

[32] See s.2 for the definition of these and other terms.

[33] Such conduct is not a criminal offence (s.1(6)).

monitor certain business communications),[34] or under other specified legislation which includes legislation relating to prisons and hospitals which provide high security psychiatric services.

26–015 Section 5 provides for interceptions under warrant issued by the Home Secretary[35] for a variety of purposes connected with the interception of postal or telecommunications, and it is very similar to section 2 of the 1985 Act. Section 6 lists those who can apply for such a warrant, which includes the Director-General of M.I.5, the Chief of M.I.6 and the chief constables of the Scottish and Northern Irish police forces. Chief Constables in England and Wales must make applications through the National Criminal Intelligence Service. Before the Home Secretary can issue a warrant he must be satisfied that it is necessary: in the interests of national security; for preventing or detecting serious crime[36]; to safeguard the economic well-being of the United Kingdom[37]; to give effect to any international mutual assistance agreement to prevent or detect serious crime. Although these grounds are similar to the exceptions to a right to private life found in Article 8 E.C.H.R., they may not be clearly enough defined to be "in accordance with the law". The Home Secretary must be satisfied that the conduct authorised by the warrant is proportionate to what is sought to be achieved by that conduct. The statutory requirements of "necessary" and "proportionate" were inserted to ensure that the powers under section 5 were exercised in accordance with the E.C.H.R. A warrant is valid for three months (subject to renewal); one issued in the interests of national security or to safeguard the economic well-being of the United Kingdom can be renewed for up to six months, other warrants can only be renewed for up to three months: in all cases warrants can be repeatedly renewed. Sections 11 and 12 enable communications service providers to be required to assist the interception process, with the prospect for additional requirements to provide technical assistance being imposed by further regulations—the State is to make a fair contribution to the costs involved (section 14). Sections 15–18 provide general safeguards for the use of interception material.[38]

The supervision of the new interceptions scheme is considered below.[39]

Acquisition and disclosure of communications data

26–016 Communications data, or "traffic" data is information that relates to the use that may be made of a communication; it exists independently of the content of the communication, *e.g.* the details of a telephone number dialled, the location of the person making a call by mobile telephone, the address on a postal item. Authorisation to obtain such data from postal or telecommunications operators can be given by a designated official within the police, the intelligences services, the Inland Revenue, etc. (section 25). The official concerned must be satisfied that it is necessary to obtain such data on grounds laid down in section 22(2). The

[34] The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, see H. Milgate, 150 N.L.J. 1862.

[35] In exceptional circumstances a senior official may sign a warrant (s.6), but such a warrant is only valid for a maximum of five working days, after which it must be renewed by the Home Secretary (s.9).

[36] See s.81.

[37] This will only apply if the information sought relates to the acts or intentions of those outside the British Isles (s.5(5)).

[38] See P. Mirfield, "Regulation of Investigatory Powers Act 2000 (2): Evidential Aspects", [2001] Crim. L.R. 91.

[39] *post*, para. 26–022.

grounds specified are wider than those provided in section 5, for *e.g.* they include: preventing or detecting crime or preventing disorder, in the interests of public safety or protecting public health, in connection with a variety of revenue matters. Before issuing a notice authorising the disclosure of such data, the official must be satisfied that obtaining the data in question by the conduct authorised is proportionate to what is sought to be achieved.[40] When an authorisation is given, the operator concerned can be compelled (if necessary by civil proceedings) to obtain or disclose the data.[41]

The controls over the acquisition and disclosure of communications data are less onerous than those for the interception of communications; this is on the basis that they involve a less serious invasion of privacy,[42] but it is possible that there are inadequate for E.C.H.R. purposes. In certain circumstances there will be recourse to the Interception of Communications Tribunal.

Surveillance by technical devises and covert human intelligence sources

26–017 Until the enactment of Part III of the Police Act 1997 the use or installation of bugging devises, video surveillance and vehicle tracking apparatus and the jamming of private communications systems was governed by a Home Office Circular sent to chief constables. In *R. v. Khan* Lord Nolan described the lack of a statutory regime for such operations as "astonishing".[43] In anticipation of an adverse ruling by the E.Ct.H.R.[44] Part III of the Police Act provided for surveillance conducted by entry onto, or interference with property which would otherwise amount to for *e.g.* trespass or criminal damage.[45] This still left several types of covert surveillance not subject to statutory authorisation *viz.*: directed surveillance, intrusive surveillance and the use and conduct of covert human intelligence sources. These are now regulated under Part II of the RIP Act. In consequence the law on surveillance is complicated and there are fine distinctions between the various types of surveillance and the ways of authorising them. It is arguable that the law on this area is not sufficiently ascertainable to satisfy the E.C.H.R.[46] Other general concerns are the wide use of executive decision-making to further implement the law, the lack of judicial supervision, and the fact that someone who has been subject to any of these types of surveillance is not entitled to be told this even after the event.

The placing of technical equipment in property

26–018 The legal framework to authorise covert entry upon and interference with property by the police and other law enforcement agencies[47] is in Part III of the Police Act 1997. Section 92 provides that no entry on, or interference with property or wireless telegraphy is unlawful if authorised under Part III of Act. Authorisation can be given by an authorising officer *viz.*: chief constables and the Commissioner of the Metropolitan Police; the Directors General of the National

[40] s.23 specifies the form the authorisation must take.

[41] There is provision for the payment of "appropriate contributions" to the operators as compensation for the cost involved in complying with notices (s.24).

[42] See *Malone v. United Kingdom* (1985) 7 E.H.R.R. 14.

[43] [1996] 3 W.L.R. 162 at p. 175; see also H.C. 18 (1994–95), where the Home Affairs Select Committee recommended a statutory basis for such activities.

[44] *Khan v. United Kingdom* [2000] Crim.L.R. where a breach of Art. 8 was found.

[45] In the case of, for example jamming communication systems or other unlawful interference with wireless telegraphy, it would be an offence under the Wireless Telegraphy Act 1949, 1967.

[46] See JUSTICE, *Under Surveillance* (1998), p. 19.

[47] *e.g.* National Criminal Intelligence Service, National Crime Squad, Customs and Excise.

Criminal Intelligence Service and the National Crime Squad, a designated customs officer (section 93(5)).[48] Before authorisation is given the authorising officer has to believe that the proposed action is necessary in that it is likely to be of substantial value in the prevention or detection of serious crime (defined in section 93(4)) and that it cannot be reasonably undertaken by other means (section 93(2)). The formalities for authorisation, and for renewal or cancellation, are similar to those for the interception of communications (sections 95 and 96). Under section 91, Commissioners—who must be judges of a degree of seniority as defined in the Act—are appointed for a variety of purposes.[49] One of these is to consider and, if appropriate, approve certain authorisations, *e.g.* in sensitive situations such as private residences, offices, hotel bedrooms; or where material would be found which is legally privileged, or is confidential, personal or journalistic information (sections 97 to 100). This limited involvement of the Commissioners provides an element of independent scrutiny with respect to matters where there is the potential for the greatest invasion of privacy[50]; however there is a potential conflict between this role of the Commissioners and their other role of hearing complaints.[51]

Further details on the implementation of Part III is provided in a Code of Practice issued by the Home Office, a quasi-legislative procedure which may not be sufficient for E.C.H.R. purposes. Originally this was issued under the 1997 Act, but it is now issued under section 71 of the RIP Act. The COP issued have all been extremely detailed and appear to limit the wide discretion allowed to the authorisation agents under the 1997 Act. In this way they appear to help ensure that the exercise of the powers under the 1997 Act are in accordance with the E.C.H.R. requirements such as proportionality and that account is taken of privacy requirements. However breach of the COP is only a disciplinary offence, and it is questionable how far such Codes can actually limit the wide discretionary powers provided in the Act.

An important exception to Part III is where the police or other agencies have the consent of *e.g.* the owner to place a devise on premises; this fails to have regard to the privacy rights of those who are subjected to surveillance. This type of surveillance is subject to a voluntary COP drawn up by the Association of Chief Police Officers (ACPO); it is doubtful if this procedure is compatible with the E.C.H.R.

Directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources

26–019 Not all listening devises require installation on property, some can operate at long distance or are operated on microwave technology. Such devises were not covered by the 1997 Act, nor were they regulated by any other law. A further area unregulated by law was the use of informers[52] and undercover police officers—human intelligence sources.[53] These are all forms of covert surveillance, and to leave them unregulated could have led to challenges under the HRA 1998, hence

[48] There are special provision for dealing with applications for authorisations when an authorisation officer is not available (s.94).

[49] See s.91 and *post* para. 26–022.

[50] This may be sufficient to satisfy the requirements laid down by the E.Ct.H.R. in *Funke v. France* (1993) 16 E.H.R.R. 297.

[51] *post* para. 26–023. In *Piersack v. Belgium* (1983) 5 E.H.R.R. it was stated that the same body should not both permit and sanction activities.

[52] There were ACPO guidelines.

[53] See *Texeira de Castro v. Portugal* (1999) 28 E.H.R.R. 101.

the provisions in the RIP Act. Section 27 provides that these types of activities, if authorised under the Act, will be lawful for all purposes. However, the RIP Act does not require the police, etc., to obtain authorisation before carrying out any of these activities, and since the very nature of these operations is secret and may never come to light, the authorisation procedure could be ignored—with the risk that if it did come to light it would be open to challenge.

Directed surveillance is defined as covert surveillance which is not intrusive, and is undertaken for the purpose of a specific investigation or operation, which is likely to result in the obtaining of private information about a person and is not an immediate response to events or circumstances (section 26(2)).

Intrusive surveillance is covert surveillance carried out by an individual on residential premises or in a private vehicle, or which involves the use of a surveillance devise in respect of such premises or vehicle (section 26(3)).[54] The fine distinctions which are drawn between the two types of surveillance are further explained in the COP issued under section 71. There is also the potential for overlap between intrusive surveillance and section 97 of the Police Act 1997. In consequence the law in this area may not be sufficiently "accessible" for E.C.H.R. purposes. Questionably, directed surveillance is regarded as less intrusive than intrusive surveillance, and there is a different authorisation procedure for the two types of surveillance.

The RIP Act provides a broadly similar scheme for the authorisation of directed surveillance (section 28) and the conduct and use of human intelligence sources (section 29). Authorisations for either of these activities can be given by persons designated by Order to do so: these are people within the relevant public authority, in other words only internal authorisation is required, and it is for a Government Minister to decide who is a designated person.[55] The relevant public authorities are listed in Schedule 1 and include the various police forces, the intelligence services, the armed forces, and a variety of government departments and other bodies: again these can be added to by the Home Secretary. The criteria for authorisation are similar to those for the acquisition of communication data[56] (section 28(3), section 29(3)), and can be added to by Order by the Home Secretary. Before authorising either of these activities the person designated must believe that the authorisation is necessary on one of the grounds specified and that the proposed activity is proportionate to what it seeks to achieve (section 28(2), section 29(2)).

The authorisation scheme for intrusive surveillance differs depending upon whether it is a police or customs authorisation or one concerning the intelligence services, Ministry of Defence or H.M.'s Forces. An application for authorisation for intrusive surveillance by the police and Customs and Excise is to be made to a *senior* authorising officer[57]: other authorities have to apply to the Home Secretary. As before those entitled to give authorisation have to be satisfied that the proposed activity is necessary and proportional. The criteria for necessary are

[54] The Home Secretary may by Order alter or add to the definitions of surveillance, subject to the affirmative procedure in Parliament (s.47).

[55] See ss.33, 34 for the rules for authorisation

[56] s.22(2), *ante* para. 26–015.

[57] As defined by s.32(6), which includes police chief constables and the equivalent in a variety of non-Home Office forces.

more limited than for directed surveillance, but similar to those for the interception of communications. They are: in the interests of national security, to prevent or detect serious crime; in the interests of the economic well-being of the United Kingdom (section 32(3)). Where it is the Ministry of Defence or a member of the forces who is seeking authorisation, only the first two criteria apply (section 41). Where an authorising officer grants a police or customs authorisation, he must give notice of this to a Surveillance Commissioner,[58] who must approve the authorisation before it can take effect (sections 35, 36 and 37). A decision by a Surveillance Commissioner not to approve intrusive surveillance may be appealed to the Chief Surveillance Commissioner. Where authorisation is given by the Home Secretary there is no need to have it approved by a Surveillance Commissioner. There are additional rules for authorisations granted by the Home Secretary to the intelligence services (sections 42 and 44).

Investigation of electronic data protected by encryption

26–020 This creates a power to demand that a person in possession of encrypted materials either disclose the information in an intelligible form or disclose the key to that material (sections 50 to 52). Refusal to do so is a criminal offence, and it is for the person to whom a notice is addressed to show that the key is not in their possession: a reverse onus requirement that may fall foul of Article 6 of the E.C.H.R. (section 53).

Scrutiny and supervision of the operation of the various Acts

26–021 The 1985 Act had established a Commissioner to keep the working of that Act under review, and a tribunal to act as a complaints mechanism for those who suspected that their telephones or mail were subject to unlawful interference: similar Commissioners and tribunals were statutorily established in 1989 and 1994 in respect of surveillance by M.I.5 and M.I.6 respectively, and in 1997 with respect to police surveillance. The RIP Act replaces the scheme established in 1985, and makes changes to the other schemes.

26–022 Section 57 of the RIP Act provides for the appointment by the Prime Minister of an *Interception of Communications Commissioner* (who must be a judge), and who has a duty to keep the warrant procedure under review[59] and assist the Tribunal. The powers of the Commissioner under the 1985 Act were limited, and continue to be limited under the RIP Act.[60] However, in common with the other Commissioners (below), he is a public authority for the purposes of the HRA 1998 and as such will have to ensure that in granting warrants proper account has been taken of the E.C.H.R. and in particular Article 8. As before a range of people involved with the interception of communications are required to disclose or provide him with information to enable him to carry out his duties. Previously the Commissioner had no staff, and section 58(7) provides for the Secretary of State to agree to the appointment of staff. The Commissioner makes an annual report to the Prime Minister which is to be laid before Parliament (section 58). In the past reports have been brief and there continues to be provision for them

[58] below, para. 26–023. Special provision is made for "urgent" situations.

[59] He receives a list of warrants; the previous Commissioner found no instances of a warrant being issued unjustifiably.

[60] It is made clear that it is not a function of the Commissioner (and the other Commissioners provided for in the Act) to keep under review the exercise by the Secretary of State of his power to make subordinate legislation.

to be censored by the Prime Minister in certain circumstances; there is no Select Committee to monitor surveillance, and it may be concluded that parliamentary scrutiny is minimal.

Section 59 establishes the *Intelligence Services Commissioner*, who replaces the Commissioners established under the 1989 Act and the 1994 Act. His function is to keep the warrant procedure and relevant activities (apart from interception of communications) of the security services, officials of the armed forces and of the Ministry of Defence[61] under review. This includes review of their powers and duties under Parts II and III of the RIP Act, that is surveillance and covert human intelligence sources and the investigation of electronic data protected by encryption. He also makes an annual report to Parliament. The Intelligence and Security Committee in the House of Commons oversees the expenditure, administration and policy of M.I.5, M.I.6 and GCHQ, but not operational matters.

26–023 *Surveillance Commissioners* including a Chief Surveillance Commissioner, were established by section 91 of the 1997 Act. Their functions are: to keep under review the scheme of authorisations for covert entry upon and interference with property by the police and others, to approve (or not) "sensitive" authorisations to enter property etc.[62] Section 62 of the RIP Act extends the function of the Chief Commissioner to enable him to review the use of Parts I and II of that Act. The appointment of Assistant Surveillance Commissioners is provided for by section 63, reflecting the increased oversight role for the Commissioners. The provisions relating to the appointment, etc. of these various Commissioners are broadly similar to the Interception of Communications Commissioner (RIP Act, ss.59, 60, Police Act, s.91).

A *Tribunal* is established by the RIP Act to hear complaints and other proceedings specified in the Act. This replaces the Tribunal set up under the 1985 Act and takes over the complaints jurisdiction of the Tribunals set up under the 1989 and 1994 Acts and the complaints function of the Surveillance Commissioners under the 1997 Act. The members of the Tribunal must have held high judicial office or similar. The Tribunal has three main functions.[63]

(i) It is the forum for dealing with actions which challenge the compatibility of the actions of the intelligence services and other agencies with the E.C.H.R. under section 7(1)(a) of the HRA 1998. This means that challenges to telephone tapping etc. which raise questions of, for example the right to privacy, can not be raised in a court. This procedure may not satisfy the fair trial requirements of Article 6 particularly if the Secretary of State in making rules for the Tribunal exercises some of the powers available to him. These powers include allowing it to sit in secret; prevent it from giving reasons for its decisions; take decisions in the absence of any person, including the complainant (sections 66 and 69). Where the Tribunal is exercising this first function, there is no provision for appeal, another possible breach of Article 6.

[61] Other than in Northern Ireland (s.59); s.61 provides for the appointment of a Investigatory Powers Commissioner for Northern Ireland.

[62] *ante* para. 26–018.

[63] The Home Secretary may allocate it additional functions (s.65(2)(d)).

(ii) It is the forum for complaints in connection with conduct in connection with for example interception warrants, entry or interference with property.

(iii) To consider and determine any reference to them by any person that he has suffered any detriment as a consequence of any prohibition or restriction under section 17. Section 17 excludes from legal proceedings the use of materials intercepted by virtue of telephone tapping etc.

The Tribunal, like its predecessor, is to exercise a form of judicial review (section 67). Whether it will exercise its jurisdiction in a manner sufficient to satisfy Article 6 will depend in part on its procedural rules. The Tribunal may only state that a determination has or has not been made in favour of the applicant or complainant, as before this will not enable it to reveal, for example whether or not there has been an interception and if so whether it was authorised. The Tribunal does not give reasons for its decision, and there is an attempt in section 67(8) to prevent appeal or review except as provided by the Home Secretary. The obligation on the Home Secretary to do so is limited to complaints under (ii) above, and with respect to any new jurisdiction he has given the Tribunal. Doubts have been cast on official assurances that the Tribunal is E.C.H.R. compliant.[64]

III. Freedom of Information and Open Government[65]

26–024 Although the common law recognised freedom of expression, it did so as a negative liberty, it did not develop a concept of freedom of information.[66] Indeed by virtue of doctrines such as Crown privilege and confidentiality the common law acted to prevent open government and preserve secrecy.[67] This can be contrasted with the position in the United States where the First Amendment's guarantee of free speech was interpreted to include access to information and the notion of open government.[68] International treaties such as the United Nations Covenant on Civil and Political Rights in Article 19(2), expressly recognises the connection between freedom of expression and the right to seek and receive information and ideas; Article 10 of the E.C.H.R. does so by implication. The ethos of secrecy has been seen as an important aspect of government in the United Kingdom, something that would only change if required to do so by legislation.[69] This section will first consider a variety of statutory reforms that

[64] See Akdeniz, Taylor and Walker *op. cit.*

[65] Beatson and Cripps (eds), *Freedom of Expression and Freedom of Information* (2000); R. Austin, Chap. 12, "Freedom of Information, the Constitutional Impact" in Jowell and Oliver, *The Changing Constitution* (4th ed., 2000); P. Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (3rd edn., 2001).

[66] See the Hon. Sir Anthony Mason, "The Relationship Between Freedom of Expression and Freedom of Information", Chap. 13 in *Freedom of Expression and Freedom of Information* (2000) and Sir Stephen Sedley, "Information as a Human Right", Chap. 14 *op. cit.*

[67] A change in approach in the common law can be seen in *Conway v. Rimmer* [1968] A.C. 910 and *Attorney General v. Guardian Newspapers Ltd (No. 2)* [1990] 1 A.C. 1010.

[68] *New York Times Co v. United States* 403 U.S. 713 (1971); but see also the Freedom of Information Act 1966.

[69] See the remarks by Sir Richard Scott in his *Report into the Export of Defence Equipment and Dual Use Goods to Iraq* H.C. 115, vol. iv (1995–96).

aimed to make official information more widely available, but only in limited specified circumstances, before considering the more general attempt to do so in the Freedom of Information Act 2000.

The Data Protection Act 1998

26–025 An aspect of the right to know is the right of an individual to know what information is held about him on government records. This is reflected in the Data Protection Act 1998 which replaces the 1984 Act of the same name and was passed to implement European Council Directive 95/46. Although the 1998 Act addresses some of the flaws in the previous legislation, it retains the core structure of the 1984 Act. It is notable that in passing both Acts there was little official recognition that this legislation was concerned with human rights. The 1998 Act is likely to be relied on in preference to reliance on the rights given to individuals to have access their health and medical records provided by the Access to Personal Files Act 1987 and the Access to Health Records Act 1990.

Data protection legislation is designed to provide protection for privacy in relation to personal information. The data covered by the Act was been widened by the 1998 Act to include not just information stored electronically, but also to certain paper records (section 1). The definition of data was amended by the Freedom of Information Act 2000 to extend to all data held by a public authority. This enables data subjects[70] to have access to personal data held about them by public authorities by way of the Data Protection Act rather than the Freedom of Information Act. Those who hold data covered by the Act are subject to a system of compulsory notification and registration and have to comply with the eight data protection principles laid down in Schedule 1. The idea of these principles is to limit the use which can be made of personal information and to regulate the control of such information by requiring it, *e.g.* to be obtained lawfully and fairly and to be relevant and accurate. Additional protections are provided for sensitive data, which includes information about a person's race or ethnic origins, physical or mental health or condition (section 2). An Information Commissioner[71] has extensive regulatory powers to enforce the data protection principles, appeals against her decision can be made to the Information Tribunal. An individual who suffers damage or distress by reason of the contravention of the Act can seek damages (section 13). This provides a possibility for an action against the press for the misuse of data information which causes distress (subject to section 32).

26–026 The 1998 Act provides certain rights for those to whom the information relates: the *data subject*. The data subject is entitled to be told whether information about him is being processed, and if so he is entitled to have a more extensive range of information about this data than was the case under the 1984 Act (section 7). He has additional rights including, in certain circumstances, the right to prevent processing of data likely to cause damage or distress (section 10), to prevent processing for the purpose of direct marketing (section 11) and to go to court to obtain an order for the rectification, blocking, erasing or destruction of inaccurate data (section 14).

The Data Protection Act has the potential to apply widely to all types of bodies who control data within the meaning of the Act. Not surprisingly extensive

[70] See below para. 26–026.

[71] The name given to the Data Protection Commissioner by the Freedom of Information Act 2000, in consequence the supervision and enforcement both Acts are by the same person.

exemptions to the Act are found in Part IV, and the Secretary of State has significant powers to exempt classes of personal data from the Act. The exclusions from the Act include data processed for the following purposes: safeguarding national security (section 28); prevention or detection of crime and the collection of taxes (section 29); in connection with health, education and social work (section 30); regulatory functions over a variety of areas *e.g.* financial services, charities, fair trading, health and safety at work (section 31); research, history and statistics (section 33). Section 3 of the Act provided for an exemption for "special purposes", this is further explained by section 32, which exempts data which is processed *only* for the purposes of journalism, art or literature. The majority of the exemptions are connected with the working of government, and as such they enable the government to maintain secrecy.

Environmental Information Regulations 1992 (as amended 1998)

26–027 These regulations which provide a right of access to environmental information held by public authorities required revision to implement the Aarhus Convention 1998, and section 74 of the Freedom of Information Act 2000 makes provision for this. The eventual regulations will provide a code for access to environmental information, and are likely to follow the pattern of the Freedom of Information Act 2000.

Local Government

26–028 The Local Government (Access to Information) Act 1985 imposed a statutory duty on local authorities to disclose information. The Local Government Act 2000, s.22 extends this openness to local authority executives. Certain information is exempted, and all other information held by local authorities is covered by the Freedom of Information Act.[72]

The Freedom of Information Act 2000

26–029 So far as the general right to official information was concerned, the previous Conservation Government issued the *Code of Practice on Access to Government Information*[73] in 1994 (revised in 1997). This was a non-statutory and little publicised document which although it required government departments to make official information available, this was not a legally enforceable obligation: the notion of open government represented by the Code was one which provided more transparency in the working of government, but was based on the grace and favour of government and not on a statutory right. In addition the Code provided an extensive list of class based exemptions, further restricting its usefulness. Its operation was supervised by the Parliamentary Commissioner for Administration.[74]

The Labour Government elected in 1997 had a manifesto commitment to introduce a Freedom of Information Act which would differ from the existing Code by giving rights of access to information, imposing duties on those holding information to make information available and having a formal means of enforcement and appeal. The Bill which formed the basis of the Freedom of Information Act 2000 had a long gestation period.[75] The 2000 Act applies to

[72] See S.I. 2000 No. 3272.

[73] See Cm. 2290.

[74] *post* para. 34–006.

[75] See the White Paper Cm. 3818 (1997); a consultation document and draft Bill, Cm. 4355, which departed from many of the more liberal aspects of the 1997 White Paper; and pre-legislative scrutiny by committees in both Houses H.C. 570 (1998–99), H.L. 97 (1998–99).

United Kingdom public authorities and regional public authorities in England, Wales and Northern Ireland. It does not apply to such public authorities in Scotland. In March 2001 the Scottish Executive published for consultation a draft Freedom of Information Act which, if enacted, will be in many respects more liberal than the 2000 Act.[76]

Section 1 of the Freedom of Information Act provides a general right of access to information held by public authorities[77] which includes government departments, local authorities, health authorities, maintained schools, the British Council, the Sentencing Advisory Panel and a wide variety of bodies listed in Schedule 1, which can be amended by the Secretary of State. This right has two aspects: the right to know whether or not the information requested exists and the right to be given the information if it is held. The right is backed up by imposing duties on public authorities to comply with these rights. However the rights and duties are subject to a variety of limitations and exemptions.

The first type of limitation is relatively uncontroversial and is based on the need to make the Act workable, it is not concerned with the substance of the information requested. It allows a public authority to refuse a request for example because further information is required to enable it to comply (section 1(3)); the cost of compliance would exceed "the appropriate limit"; (found in detailed regulations) (section 12); the request is "vexatious" or is a repeated request for the same information (section 14).

26–030 The second types of restriction is more controversial and is based on the content of the information requested. Part II of the Act creates 23 exemptions, which can be applied to limit either of the rights created by section 1; however, they do not necessarily apply in the same way to the duty to confirm or deny the existence of the information as they apply to the duty to release the information. Eight of these exemptions are in whole or in part absolute *viz.*: the information is accessible by other means (section 21); the information deals with security matters (section 23); court records (section 32); Parliamentary privilege (section 34); information held by either House of Parliament which would prejudice effective conduct of public affairs (section 36); personal information concerning the applicant (section 40); confidential information (section 41); information whose disclosure is prohibited by statute, court order or European Community law (section 44).[78] The fact that one of these absolute exemptions applies does not necessarily mean that disclosure is not required, only that it is not required under the Freedom of Information Act. The exceptions to the common law duty of confidence may enable information that falls under section 41 to be disclosed by other means and information covered by section 40 may be available by virtue of the Data Protection Act 1998.[79]

The remaining exemptions are subject to a public interest test: the relevant public authority has to decide whether the public interest in disclosure is outweighed by the public interest in concealment (section 2). The exemptions subject to a public interest test are: information intended for future publication

[76] See http://www.scotland.gov.uk/news/2001/03. In July 1999 a non-statutory Code of Practice on Access to Scottish Executive information was published which will remain in force until the new Act is enacted.

[77] Defined in s.3, and listed in sched. 1. See too s.7 which controversially allows the Secretary of State an extensive power by order to create additional limitations on the type of information which s.1 requires public authorities to disclose, thereby further limiting the application of the Act.

[78] There are about 400 such provisions.

[79] *ante* para. 26–025.

(section 22); national security (section 24)[80]; defence (section 26); international relations (section 27); relations within the United Kingdom (section 28); the economy (section 29); investigations and proceedings conducted by public authorities, *e.g.* investigating or prosecuting criminal offences (section 30); law enforcement (section 31); audit functions (section 33); information relating to the formulation of government policy, Ministerial communications etc. (section 35); communications with the Queen (section 37); health and safety (section 38); environmental information (section 39); personal information with respect to a third party (section 40); legal professional privilege (section 42); commercial interests (section 43). Most of the sections provide the "prejudice" test to help determine where the public interest lies. Such a test should require the prejudice to be real and substantial.[81] Exactly what interest or interests have to be prejudiced is defined vaguely in some of the sections, *e.g.* sections 27 and 28, which has the potential to limit the right to disclosure. Section 35 does not require the application of a prejudice test, the exemption is very wide and could result in a great deal of information about government being exempt from disclosure.

It is questionable whether the Act with its extensive exemptions will ensure that there is more open government, there is plenty of opportunity provided by the Act to foster continued secrecy in government.

The implementation and enforcement of the Act

26–031 Section 18 of the Act renames the Data Protection Commissioner as the Information Commissioner, and the Data Protection Tribunal as the Information Tribunal. The Commissioner and the Tribunal have important roles in enforcing and promoting the Act. To ensure that the Act is working properly, power to issue codes of practice are given to the Home Secretary and the Lord Chancellor who, in advance of making such codes, have to consult the Commissioner (sections 45 and 46). Public authorities have a duty to adopt, implement, operate and keep under review publication schemes (section 19). Such schemes first have to be approved by the Commissioner, who in addition may approve model schemes for public authorities not wishing to devise their own schemes (section 20). Publication schemes have to specify the classes of information which the public authority publishes or intends to publish, specify the manner in which information is to be published, and indicate whether a charge will be made for access to such material. One of the advantages of a publication scheme for a public authority is that information that has been, or is going to be, published falls within sections 21 and 22, and may provide a statutory justification for refusing access.

The Commissioner has a general duty to promote good practice and general compliance with the Act by public authorities. This includes giving advise on how to handle requests for information, the management of records and the handling of complaints. If it appears to the Commissioner that a public authority is not complying with good practice, she may make recommendations specifying the steps to be taken to rectify the position (section 48). The Commissioner is required to make an annual report to Parliament on the exercise of her functions under the Act (section 49).

[80] s.24 does not cover all aspects of national security, information that does not fall within s.23 is covered by s.24. For both sections certificates signed by senior Government Ministers are required to certify that the relevant section applies (s.25); for limited review of such certificates by the Tribunal, see s.60.

[81] The draft FOI Act (Scotland) provides the test of "substantial prejudice".

In addition to supervisory functions the Commissioner has enforcement functions (Part IV). Someone who has had a request for information refused can apply to the Commissioner for a decision that an application for access to information has not be dealt with by a public authority in accordance with the requirements of the Act. The Commissioner may only decline such a request in limited circumstances such as undue delay by the complainant or a failure by the complainant to exhaust the internal complaints procedures provided by the public authority (section 50(2)). To enable her to reach a decision on the merits of a complaint the Commissioner may serve the public authority with an information notice (section 51), backed up if necessary by a power to obtain from a circuit judge a warrant to enter and search the premises of a public authority (section 55 and Schedule 3). If the Commissioner is satisfied that the public authority was in breach of the Act, then she may issue a decision notice specifying the steps the public authority must take to comply with the Act, or an enforcement notice requiring it within a specified time scale to comply with the Act (section 52). A limitation to these powers is found in section 53, which allows the Government in certain circumstances to nullify a decision or an enforcement notice served on a government department, the National Assembly of Wales or other public authorities so designated by a Minister. The Commissioner's decisions are treated as court orders and can be enforced by proceedings for contempt of court (section 54).

Appeals from the Commissioner are to the Information Tribunal, and can be made by the applicant or the public authority (Part V). The Tribunal has wide powers, it can review any findings of fact made by the Commissioner, and in addition to quashing the Commissioner's decision, it can substitute its own decision. An appeal from the Tribunal to the High Court can only be made on a point of law (section 59).

The Public Interest Disclosure Act 1998[82]

26–032 The Public Interest Disclosure Act (PIDA) rectifies the position whereby workers who disclosed information in the public interest had no statutory protection from victimisation by their employers. The workers covered by the Act are broadly those defined by section 43 of the Employment Rights Act 1996 (ERA). Not all workers are covered, *e.g.* the police service and the security service are excluded, but Crown servants are included. The PIDA makes a distinction between "protected" and "qualifying" disclosures, and inserts new provisions into the ERA to provide for the relevant protections. A protected disclosure is a qualifying disclosure which falls within section 43C to 43H of the ERA. This includes disclosures which, in the reasonable belief of the worker, show that a criminal offence has been committed; that a person has failed in a legal obligation; that the health or afety of an individual is endangered; that the environment is likely to be damaged, etc. If a disclosure falls within the definition of a qualified disclosure, to be a protected disclosure it must also fall under sections 43C to 43H. These include disclosures: made in good faith to the discloser's employer; made in the course of obtaining legal advise; made in good faith to a proscribed person such as the Chief Executive of the Criminal Cases Review Commission, the Health and Safety Executive and the Environment Agency; made in good faith, and with respect to something of an exceptionally serious

[82] Yvonne Cripps, Chap. 17, "The Public Interest Disclosure Act 1999", in Beatson and Cripps, *op. cit.*

nature, in certain circumstances to someone other than the discloser's employer. An employee's dismissal or redundancy is unfair if the principle reason for it was a protected disclosure (sections 103A and 105(6A) of the ERA). In 1999 regulations were introduced whereby there is no longer an upper limit on the compensation available to an employee dismissed primarily for making a protected disclosure. This Act, together with the Freedom of Information Act, could prevent important information about disasters such as rail and sea accidents, and environmental pollution and financial mismanagement being hidden. The PIDA, by protecting workers from retaliation from employers who are keen to prevent the public from being aware of important information, is another aspect of a move towards more open government.

CHAPTER 27

FREEDOM OF ASSEMBLY AND ASSOCIATION[1]

Introduction

27–001 These freedoms, which are closely associated with freedom of speech, include: (a) taking part in public meetings, processions and demonstrations; and (b) forming and belonging to political parties, trade unions, societies and other organisations. Under English law, until the coming into force of the Human Rights Act 1998, these were by and large liberties rather than rights in the strict sense, and were residual.[2] A wide variety of statutory provisions applied (and still apply) to regulate and in some cases limit these liberties. However the courts have interpreted some of these limitations in the light of a common law principle in favour of freedom of assembly.[3] In certain limited circumstances only does statue law recognise positive rights to freedom of assembly and freedom of speech.

The European Convention on Human Rights recognises a right to freedom of peaceful assembly and association (Article 11) and a right to free expression (Article 10). Both these articles permit restrictions on these freedoms, but only in so far as is provided in the articles themselves, and the E.Ct.H.R. has adopted a strict approach to the restrictions found in both Article 10(2) and Article 11(2). In future statutory and common law restrictions on freedom of assembly and association will have to be interpreted and applied so as to comply with the E.C.H.R.,[4] and it should be born in mind that all legal provisions discussed in this Chapter are potentially open to question. Articles 10 and 11 require any limitation on the right stated to be: (i) prescribed by law, and (ii) necessary in a democratic society. Each article specifies its particular requirements for (ii), which, in addition, must be "proportionate to the legitimate aim pursued"[5]; in other words, even when the State is acting in accordance with a legitimate aim in its restriction to a Convention right, the State must demonstrate that the restriction is strictly necessary to achieve that aim.[6]

[1] Robertson, *Freedom, the Individual and the law* (3rd ed., 1995); R. Card, *Public Order Law* (2000).

[2] For the position at common law see Dicey, *Law of the Constitution* (10th ed.) Chap. 7; also David Williams, *Keeping the Peace: The Police and Public Order* (1967); L. Radzinowicz, *History of English Criminal Law*, Vol. 4 (1968) especially Chap. 4.

[3] See for, *e.g. Burden v. Rigler* [1911] 1 K.B. 337, *Hirst and Agu v. Chief Constable of West Yorkshire* 85 Cr. App. R. 143, *D.P.P. v. Jones* [1999] 2 All E.R. 257, HL, [1999] 2 A.C. 240; but *cf. Arrowsmith v. Jenkins* [1963] 2 Q.B. 561. See also the dictum of Lord Denning *Hubbard v. Pitt* [1976] Q.B. 142 "so long as good order is maintained, the right to demonstrate must be preserved". In his report *The Red Lion Square Disorders of June 15, 1975* Cmnd. 5919, Scarman L.J (as he then was) suggested that there was a right to demonstrate subject only to limits required by the need for good order and the passage of traffic. K. J. Keith, "The Right to Protest", in *Essays on Human Rights* (ed. Keith, N.Z., 1968), p. 49; O. Hood Phillips, "A Right to Demonstrate?" (1970) 86 L.Q.R. 1.

[4] See Mead, "The Human Rights Act—A Panacea for Peaceful Public Protest?" [1998] J.Civ.Lib. 206; Fenwick, "The Right to Protest, the Human Rights Act and the Margin of Appreciation", (1999) 62 M.L.R. 491.

[5] *Handyside v. United Kingdom* (1979–80) 1 E.H.R.R. 737.

[6] In *Steel v. UK* (1998) 28 E.H.R.R. 603 the E.Ct.H.R. suggests that the punishment of peaceful protesters is disproportionate to the aim of the maintenance of public order.

Articles 10 and 11 are likely to provide fertile grounds for argument in the fields of freedom of assembly and association.

I. Freedom of Assembly

Public meetings, assemblies and demonstrations

27–002 The common practice of holding public meetings dates from the habit of promoting meetings to discuss and present petitions to Parliament in the late eighteenth and early nineteenth centuries, the popular interest in parliamentary affairs being no doubt stimulated, first, by a more widespread dissemination of newspapers, and then by the extension of the franchise. The restrictive legislation of that period shows that the executive was concerned with criticism of the government, whereas the later statutes are intended mainly to prevent outbreaks of disorder (although the Public Order Act 1986 and subsequent legislation go beyond this). Today public meetings, assemblies and processions are still of importance in context of demonstrations on matters as diverse as animal rights, capitalism, gay rights and the status of Tibet. In addition there has been the use of mass picketing at the scenes of industrial disputes and problems surrounding groups of people attending sporting events. Although a wide variety of laws and offences will apply to all types of meetings, assemblies and demonstrations, account will have to be taken to ensure that the application of law in question is in accordance with Articles [illegible] 11 E.C.H.R., this means that a different view could be taken of the applic[illegible] of, for example section 4 of the Public Order Act 1986, to a football supporter and an animal rights protester.

A "*public meeting*" may be defined as a meeting held for the purpose of discussing or expressing views on matters of public interest, and which the public or any section thereof is invited to attend. A public meeting may be held either on private premises or in a public place. "Private premises" are premises to which the public have access only by permission of the owner or occupier. A "public place" includes any high[illegible] or any other premises or place (such as a public park, sea beach or public [illegible] to which the public have or are permitted to have access, whether on pay[illegible] or otherwise,[7] or by virtue of express or im[illegible]ed permission. The Public [illegible] Act 1986, s.14[8] enables conditions to be imposed in certain circumstances [illegible] a "public assembly" which is defined in section 16.

There is a general liberty to promote or take part in a public meeting on private premises, subject to infringement of particular legal rules. It is doubtful whether there is such a general liberty to promote or take part in a public meeting in a public place without the licence of the owners (often the local authority[9]), since this will almost invariably involve trespass to land as well as in many cases an obstruction or a public nuisance, although a public meeting in a public place is not necessarily unlawful.[10]

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[7] Definitions adapted from Public Order Acts and Criminal Justice Act 1972.

[8] *post* para. 27–012.

[9] It may be arguable that, with the entry into force of the Human Rights Act 1998, there is a duty on public authorities to provide a place for public assemble.

[10] *cf.* A. L. Goodhart, "Public Meetings and Processions", (1937) 6 C.L.J. 161. See also E. C. S. Wade, "The Law of Public Meetings", (1938) 2 M.L.R. 177; E. R. Ivamy, "The Right of Public Meeting", (1949) C.L.P. 183. For a consideration of the laws that could be infringed by the holding of public meetings or demonstrations see *post* para. 27–011 *et seq.*

The place of assembly

Public meetings in private premises or places

27–003 The owner or occupier of private premises, for example, the hirer of a hall, may hold a public meeting there or licence others to do so. The organiser of the meeting may exclude or eject trespassers, after first asking them to leave; if they refuse he may use reasonable force, although he may not arrest or detain them. A qualification to this right of the occupier or licensee is found in the common law power of the police to enter such premises to deal with or prevent a breach of the peace,[11] as recognised in *Thomas v. Sawkins*.[12] This case has been criticised as it recognised a police power not only to enter private premises to quell an existing breach of the peace, but also to do so where there were reasonable grounds for believing that a breach of the peace was imminent. The E.Ct.H.R. has accepted that this is a legitimate aim within the E.C.H.R.[13] It would appear that the power to enter to deal with or prevent a breach of the peace may apply also to private meetings on private premises.[14] In addition, the police have particular powers to deal with certain types of noisy, nocturnal, open air gatherings.[15] Section 14 of the Public Order Act 1986 is not applicable to indoor meetings.

Public meetings in public places

27–004 There is no general obligation on state authorities to provide places for public assemblies or for the exercise of free speech,[16] nor is there any common law right to use a common,[17] the foreshore,[18] public parks,[19] gardens or town halls as venues. There is rather more latitude towards public meetings in public parks and gardens, which are intended for recreation and exercise, than to such meetings on the highway. By-laws made by local authorities usually require the written permission of the council for holding a meeting on grounds, such as a square or park, belonging to the local authority as the highway authority or otherwise.[20] Permission may be refused if a breach of the peace is apprehended. By-laws may create minor offences triable summarily in the magistrates' courts.

[11] This power is expressly preserved in s.17 of the PACE Act 1984.

[12] [1935] 2 K.B. 434.

[13] *McLeod v. United Kingdom* 27 E.H.R.R. 493. This case was concerned with entry to a private house, and it was held that in those circumstances the means employed by the police were disproportionate to the ends. The court also accepted that the concept of breach of the peace had been sufficiently clarified by the English courts over the last 20 years for it to be regarded as defined with sufficient precision for the purposes of the E.C.H.R.

[14] *McLeod v. Commissioner of the Metropolis* [1994] 4 All E.R. 553, CA, but subject to the comments of the E.Ct.H.R. in *McLeod v. United Kingdom op. cit.*

[15] s. 63–66, C.J.P.O. Act 1994, see *post* para. 27–013.

[16] Unless this is implied in Arts. 10, 11 E.C.H.R.

[17] *De Morgan v. Metropolitan Board of Works* (1880) 5 Q.B.D. 155.

[18] *Brighton Corporation v. Packham* (1908) 72 J.P. 318.

[19] *Bailey v. Williamson* (1873) L.R. 8 Q.B. 118, (Hyde Park); *R. v. Cunninghame Graham and Burns* (1888) 16 Cox C.C. 420. (Trafalgar Square).

[20] Trafalgar Square and Hyde Park are also subject to restrictions under the Royal and Other Parks and Gardens Regulations 1988. Regulations were first issued in 1892 by Asquith (Home Secretary), who had defended Cunninghame Graham when at the Bar: Roy Jenkins, *Asquith*, pp. 64–65. In *Rai and Others v. United Kingdom* (1995) 82-A D.R. 134, the European Commission was satisfied that a ban on meetings in Trafalgar Square on issues related to Northern Ireland was permitted within Art. 11(2). The fact that other central locations were available for such meetings was crucial to the decision.

A public meeting on a *highway* is not necessarily unlawful.[21] The highway is in a special category, because members of the public have a right to pass and repass on their lawful occasions. It had been accepted that this applied at common law with such incidental or ancillary extensions as looking at shop windows, and talking to one's friends. In *Jones v. D.P.P.*[22] Lords Irvine, Hutton and Clyde held that today the right of passage should go beyond the rubric of "incidental or ancillary to" passage and repassage, which placed "unrealistic and unwarranted restrictions on commonplace day to day activities."[23] The majority of the House of Lords suggested that the public's common law right to use the highway included the right of reasonable, peaceful, non-obstructive temporary assembly or demonstration, which included "handing out leaflets, collecting money for charity, singing carols . . . having a picnic or reading a book."[24] To exceed the common law right to use the highway is technically the tort of trespass against the owner of the surface of the highway, which is usually the local highway authority.[25] To trespass repeatedly might amount to nuisance, public or private.[26] There is also the possibility of the offences of obstructing the highway,[27] aggravated trespass,[28] and trespassory assemblies.[29] In addition sections 12 and 14 of the Public Order Act 1986 impose certain requirements on the holding of processions and meetings, which if breached could lead to prosecution.[30] The Protection of Harassment Act 1997 is sufficiently wide in its terms to allow, for example, injunctions to be granted to prevent protesters gathering on the highway outside the homes or premises of those involved in animal experiments.[31] To breach an injunction could result in an award of damages. The Criminal Justice and Police Act 2001, s.42 gives the police a power to direct persons reasonably believed to be harassing a person in his home to leave the vicinity of residential premises. Knowingly to disobey such a direction is a summary offence.

27–005 Special regulations may apply to meetings and processions in the vicinity of Parliament. At the commencement of the session each House, by order, gives directions that the Commissioner of Metropolitan Police shall keep, during the session, the streets leading to the Houses of Parliament free and open, and that no obstruction shall be permitted to hinder the passage of the Lords or Members.[32]

[21] In *Burden v. Rigler* [1911] 1 K.B. 337, DC, it was held that where R and others had disturbed a political meeting on the highway, they could be convicted of disorderly conduct at a lawful public meeting, contrary to the Public Meeting Act 1908.

[22] [1999] 2 A.C. 240.

[23] *per* Lord Irvine at p. 256.

[24] *per* Lord Irving at p. 255. Lords Slynn and Hope dissented, they adhered to the traditional view that the public's right to use the highway was as a highway. The wider interpretation of the common law put forward by the majority is in accordance with the requirements of Art. 11 E.C.H.R.

[25] *Tunbridge Wells Corporation v. Baird* [1896] A.C. 434, *Llandudno U.D.C. v. Woods* [1899] 2 Ch. 705. Technical trespasses are in practice tolerated, and even if pursued are unlikely to attract more than a nominal penalty.

[26] *post* para. 27–031.

[27] Highways Act 1980, s.137, *post* para. 27–028.

[28] Criminal Justice and Public Order Act 1994, ss.68, 69, *post* para. 27–014.

[29] s.14A of the Public Order Act 1986, *post* para. 27–012; *D.P.P. v. Jones* was concerned with a trespassory assembly.

[30] *post* para. 27–015 *et seq.*

[31] Obviously Art. 11 E.C.H.R. should be considered before an injunction is granted in respect of a public protest.

[32] The Metropolitan Police Commissioner gives effect to this order by issuing directions specifying the streets concerned, Metropolitan Police Act 1839, s.52. A failure to comply with the regulations can result in prosecution and a fine; *Papworth v. Coventry* [1967] 1 W.L.R. 663, DC.

There are limited exceptions to the position that there is no right to hold public meetings in public places. A statutory right is given to candidates at general and local elections to hold a public meeting in furtherance of his candidature. This places an obligation on local authorities to provide a place for such meetings.[33] The Education (No. 2) Act 1986 places an obligation on university, polytechnics and colleges to ensure freedom of speech within the law, and to ensure that the use of premises is not denied to any person or group on the grounds connected with a person or body's beliefs, views, policies or objectives.[34]

Restrictions on meetings, assemblies and demonstrations

27–006 Freedom of assembly is restricted in several ways: the police have common law powers to preserve the peace, which may be used to prevent or disperse assemblies and demonstrations; there are the provisions in the Public Order Act 1986 and Criminal Justice and Public Order Act 1994 which (i) seek to regulate various types and assemblies and processions and (ii) provide a variety of offences that could apply to those who take part on meetings and demonstrations; there are a number of statutory offences (which were not necessarily specifically enacted to regulate public assembly) and common law rules that could be infringed. Meetings addressed by members of "proscribed organisations", picketing and sporting events also give rise to issues connected with free assembly, and these will be considered later.

Common law powers to prevent and provide for the dispersal of meetings, assemblies and demonstrations

27–007 The executive have no power to prohibit a meeting beforehand, unless it is to be on government property. The police, however, have a primary duty to preserve the peace, or more accurately to prevent a breach of the peace.[35] In the past the police have used their powers to keep the peace to prevent people reaching demonstrations, to prevent a meeting from starting, or to order it to disperse at any time after it has started. These powers are backed up by the power to arrest without warrant for breach of the peace; the possibility of a later charge of obstructing a police officer in the execution of his duty,[36] if the police order is disregarded; and the use of the power to seek a binding over order.[37] The use of these powers will now have to be tempered in the light of Articles 10 and 11 E.C.H.R.

Definition of breach of the peace

27–008 It is clearly in the public interest that the public peace is preserved, but in preserving the peace there is a danger that freedom of expression and freedom of assembly may be compromised. What amounts to a breach of the peace has only been clarified by the courts over the last 20 years and the E.Ct.H.R. has accepted that it is sufficiently certain to comply with the requirement "prescribed by law" as required by Article 10(2).[38]

[33] Representation of the People Act 1983, ss.95–97.

[34] See *R. v. University of Liverpool, ex p. Caesar-Gordon* [1991] 1 Q.B. 124.

[35] See *Coffin v. Smith* (1980) 71 Cr.App.Rep. 221 "... a police officer's duty is to be a keeper of the peace and to take all necessary steps with that in view" *per* Donaldson L.J.

[36] Police Act 1996, s.89, see *ante*, para. 24–019 *et seq*. There is a power to arrest without warrant if the obstruction causes or is likely to cause a breach of the peace, or if the general arrest conditions set out in s.25(3) of PACE Act 1984 apply.

[37] *ante*, para. 24–026. Art. 11 has resulted in restrictions on this power.

[38] *McLeod v. United Kingdom* 27 E.H.R.R. 493.

In *R. Howell*[39] Watkins L.J. suggested that:

> "there is likely to be a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence his property or a person is in fear of being so harmed through an assault, an affray, a riot unlawful assembly or other disturbance."[40]

However, in the same year Lord Denning, in a differently constituted Court of Appeal, defined breach of the peace more broadly to include conduct which did not involve violence or a treat of violence.[41] Subsequent cases have followed *Howell*,[42] and the E.Ct.H.R. has accepted that: "breach of the peace is committed only when an individual causes harm, or appears likely to cause harm, to persons or property, or acts in a manner the natural consequences of which would be to provoke violence in others."[43]

This raises a particular problem, namely where a person's or a group's activities are lawful, but those actions provoke others to commit a breach of the peace. The leading case in English law, *Beatty v. Gillbanks*,[44] established that the unlawful must yield to the lawful, and that those who organised assemblies could not be responsible for breaches of the peace by those opposed to them. Subsequent cases qualified this principle,[45] but more recently, and clearly influenced by the requirements of the E.C.H.R.,[46] the courts have been more inclined to return to the principle established in *Beatty v. Gillbanks*.

27–009 In *Foulkes v. Chief Constable of the Merseyside Police*[47] Beldam L.J. accepted that: "the common law power of a police constable to arrest where no actual breach of the peace had taken place but where he apprehends that such a breach may be caused by apparently lawful conduct is exceptional". This comment was influenced by the availability in the Public Order Act 1986 of a variety of offences with powers of arrest without warrant.[48] Beldam L.J. considered that the power to arrest those whose behaviour was lawful but provocative was limited to those cases where there was a real and present threat to a serious or imminent breach of the peace. In *Nicol and Selvanayagam v. D.P.P.*[49] protesters threw sticks into the water and took other action in an attempt to stop a fishing competition. Although the protesters were doing nothing unlawful *per se*, the Divisional Court accepted that their conduct was unreasonable and if they had

[39] [1982] Q.B. 416.

[40] *infra* p. 427.

[41] *R v. Chief Constable of Devon and Cornwall, ex p. Central Electricity Generating Board* [1982] Q.B. 458.

[42] *Percy v. D.P.P.* [1995] 1 W.L.R. 1382, [1995] 3 All E.R. 124; *Nicol and Selvanayagam v. D.P.P.* [1996] 160 J.P. 155.

[43] *McLeod v. UK* at p. 511.

[44] (1882) 9 Q.B. 308.

[45] As have the statutory powers to regulate meetings and processions, see *post* para. 27–011 *et seq*.

[46] The E.Ct.H.R. has held that a State may have a positive obligation to protect participants in a peaceful demonstration from disruption by counter demonstrators. *Plattform Ärzte für das Leben v. Austria* (1988) 13 E.H.R.R. 204.

[47] [1998] 3 All E.R. 705, CA.

[48] *e.g. Wise v. Dunning* [1902] 1 K.B. 167, where the conduct of the defendant would now be covered by the Public Order Act 1986. Also *O'Kelly v. Harvey* (1883) 14 L.R.Ir. 105, the decision that a police officer may disperse a public meeting if he believed that there would be a breach of the peace and that there was no other way of preventing it, would be unlikely to stand today in the light of the variety of statutory powers available to the police.

[49] (1966) 160 J.P. 155.

not been restrained the anglers would have been provoked into violence. The implication is that lawful conduct that is reasonable can not be regarded as giving rise to a risk of a breach of the peace even if others are provoked to violence. A decision that behaviour is lawful but unreasonable, because those being protested against are unduly sensitive, could result in an action which could restrict freedom to protest. In *Redmond-Bate v. D.P.P.*[50] Sedley L.J. held that: "Free speech included not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it did not tend to provoke violence." The fact that a crowd, some of whom were hostile to the speaker, had gathered did not entitle the police to request the defendant to stop preaching, and when she would not do so, to arrest her in apprehension of a breach of the peace. In consequence by refusing to comply with the police officer's instruction she was not guilty of obstructing a police officer in the execution of his duty.[51]

The question whether there has been a reasonable apprehension of a breach of the peace is an objective one, and the court must be satisfied that there existed "proved facts from which a constable could reasonably have anticipated such a breach."[52] In the past the courts have been reluctant to interfere with a police officer's assessment of a situation, but the obligations under the E.C.H.R. may result in a greater willingness by the courts to assess the reasonableness of a police officer's decision. Likewise the police will have to take account of the freedom to protest and freedom to speak when deciding whether there is a reasonable apprehension of a breach of the peace.

27–010 In addition to the need for reasonable grounds for an apprehension of a breach of the peace (as defined above), the risk of the breach of the peace has to be imminent. In the past the police, supported by the courts, have taken a generous view of what is imminent. Relying on their powers to prevent a reasonably apprehended breach of the peace, during the miners' strike 1984/85 the police used road blocks to prevent pickets reaching proposed picket sites.[53] In *Moss v. McLachlan*[54] four would-be picketers ignored police requests to turn back and attempted to force their way through a police cordon which was on a road between one and a half and four miles from likely picket sites. Their subsequent conviction for obstruction of the police was upheld by the Divisional Court, on the ground that there was ample evidence to justify the police view that there was a real possibility of a breach of the peace at the sites of the proposed picketing. The unwillingness of the court to examine the reasonableness of the police view and the rather generous interpretation of imminent in the context of someone behaving lawfully, may need reconsideration in the light of Article 11. In *Peterkin v. Chief Constable of Cheshire*,[55] the County Court did not accept that

[50] *The Times*, July 28, 1999 [2000] H.R.L.R. 249.

[51] But *cf. Percy v. D.P.P. op. cit.* note 42, where the Divisional Court accepted that conduct not of itself unlawful could amount to breach of the peace if the words provoked violence in others even where those others had attended in order to cause trouble; see also *Wise v. Dunning* [1902] 1 K.B. 218, *Duncan v. Jones* [1936] 1 K.B. 218.

[52] *Piddington v. Bates* [1961] 1 W.L.R. 162 at p. 169. In *Moss v. McLachlan* [1985] I.R.L.R. 77, DC, it was held that in deciding whether or not there was a reasonable apprehension of a breach of the peace, the police were entitled to take into account their knowledge of the course of the dispute at a nearby colliery, see *below*.

[53] The setting up of road blocks is now governed by s.4 of the Police and Criminal Evidence Act 1984.

[54] [1985] I.R.L.R. 77, DC.

[55] *The Times*, November 16, 1999.

the police apprehended an imminent threat of breach of the peace when a hunt protester was arrested on a country lane half a mile from where a hunt was due to meet.

The Public Order Act 1986[56]

27–011 The Public Order Act 1986, as amended by the Criminal Justice and Public Order Act 1994 (CJPO Act 1994), provides a variety of powers to regulate public assemblies and processions.

Assemblies

27–012 *Conditions* can be imposed by virtue of section 14, on a public assembly of 20 or more people held in a public place which is wholly or partly open to the air (section 16). However there is no power to ban such assemblies, and there is no need to give advance notice of a proposed assembly to the police.[57] Before conditions may be imposed the senior officer of police (section 14(2), having regard to the time, place and circumstances of either an existing or proposed assembly, must reasonably believe that either: "(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do."[58] (section 14(1)). If the senior police officer has a reasonable belief as outlined above, he may then give such directions: "as appear to him necessary to prevent such disorder, damage, disruption or intimidation." The directions which may be imposed on the organiser of the assembly, or those taking part, are with regard to the place of the assembly, its maximum duration, or the maximum number of persons who may take part (section 14(1)). Anyone who organises or takes part in a public assembly and knowingly fails to comply with a condition imposed commits a summary offence.[59] In both cases it is a defence for the accused to prove that his failure to comply with the condition arose from circumstances beyond his control (section 14(4)(5)). A constable in uniform may arrest without warrant anyone he reasonably suspects is committing an offence under section 14.

Assemblies cannot be banned, but by virtue of the Criminal Justice and Public Order Act 1994 section 70 which inserts sections 14A, 14B and 14C into the 1986 Act, in certain circumstances *trespassory public assemblies* can be banned. Section 14A was enacted to deal with gatherings of new age travellers at places like Stonehenge, but its provisions could also be used in respect of other types of trespassory assemblies that fall within the requirements of the section. Section 14A enables the chief officer of police to apply to the council[60] or district for an order[61] prohibiting, for up to four days, all *trespassory* assemblies in a specified

[56] For the background to the 1986 Act see the Home Office, *Review of the Public Order Act and Related Legislation*, Cmnd. 7891 (1980), and the Law Commission Working Paper No. 82 (1982) and Report No. 123 (1983); the Scarman Report on the Brixton riots (1981) Cmnd. 8427 See generally, Richard Card, *Public Order Law* (2000), A. T. H. Smith, *Offences against Public Order* (1987).

[57] Where the police want to impose conditions on a proposed assembly, they must do so in writing (s.14(3)).

[58] For a discussion of these criteria and the possibility of judicial review see the section on public processions, *post*, para. 27–015.

[59] It is also an offence to incite another not to comply with a condition imposed on an assembly (s.14(6)).

[60] In the case of the London police forces the application is made to the Home Secretary.

[61] The Home Secretary has to consent to such an order, and can modify a proposed order (s.14A(2)).

area.[62] The chief officer has reasonably to believe that an assembly of 20 or more people is to be held in any district at a place on land to which the public has no right of access or only a limited right of access, that it is likely to be held without the permission of the owner or in such a way that it will exceed the permission or the public's right of access, and that it may result:

"(i) in serious disruption to the life of the community, or

(ii) where the land, or a building or monument on it, is of historical, architectural, archaeological or scientific importance, in significant damage to the land, building or monument." (section 14A(1))

An application can only be made with respect to land in the "open air" (section 14A(9)),[63] and land includes land forming part of the highway, enabling an order to be sought in respect of an assembly on the highway if the conditions provided in section 14A(1) are satisfied. Before such an order is made the relevant authority should be mindful of its obligations under the Human Rights Act 1998 and the limitations imposed by Article 11(2) of the E.C.H.R.

27–013 Once such an order is made, it is an offence to organise an assembly which a person knows is prohibited under section 14A, to take part in such an assembly or to incite another to do so, (section 14B).[64] Section 14C give a police constable in uniform power to stop and redirect anyone who is within the area to which the order applies and who is reasonably believed to be on his way to an assembly within that area and which the police officer believes is likely to be an assembly prohibited by the order. A failure to comply with such an order may be an offence.[65]

A particular type of assembly recognised by the CJPO Act 1994 is the "*rave*", defined in section 63 as: "a gathering on land in the open air of 100 or more persons (whether or not trespassers) at which amplified music is played through the night . . . and is such as, by reason of its loudness and duration and time at which it is played, is likely to cause serious distress to the inhabitants of the locality." Sections 63–66 provide a variety of powers to direct those reasonably believed to be planning a rave, those waiting for a rave to begin to, and those taking part in a rave, to desist; those who refuse a police direction may be guilty of an offence.[66]

27–014 *Power to remove trespassers* Section 61 of CJPO Act 1994 provides for the criminalisation of trespass in certain circumstances. A senior police officer may give a direction to trespassers to leave land and to remove any vehicles or other property they have with them on the land provided that the officer reasonably believes that:

a) two or more persons are trespassing on land:

[62] s.14A(6).
[63] *cf.* s.14 where the assembly can be wholly or partly in the open air.
[64] A police officer in uniform has a power to arrest without warrant anyone whom he reasonably suspect to be committing an offence under s.14B.
[65] See *D.P.P. v. Jones op. cit.*
[66] Art. 11 is less likely to be of application here: in *Anderson and Others v. United Kingdom* [1998] E.H.R.L.R. 218 it was accepted by the European Commission on Human Rights that the right under Art. 11 does not include a right to gather for purely social purposes.

b) that those so present have the common purpose of residing on the land for any period;

c) that reasonable steps have been taken by or on behalf of the occupier to ask the trespassers to leave;

d) that either (i) any of the trespassers has caused damage to land or property or used threatening, abusive or insulting words or behaviour to the occupier of the land or others connected with him or (ii) the trespassers have brought more than six vehicles on to the land.

A failure to comply with such a direction is a summary offence. Although section 61 was aimed at "new age travellers", it could apply to other types of trespassers, including those demonstrating or picketing on private land.[67]

The offence of *aggravated trespass* is provided in section of the 68 CJPO Act 1994, and applies where a person trespasses on land in the open air and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect:

a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity or

b) of obstructing that activity or

c) of disrupting that activity.

A police officer who has a reasonable belief that aggravated trespass under section 68 is, has been or is intended to be committed, may direct those concerned to leave; a failure to do so may amount to an offence (section 69).

These offences have been used successfully against anti-hunt protesters.[68]

Public Processions[69]

27–015 A public procession is defined by section 16 of the Public Order Act 1986 as a procession in a public place. A procession has been described as a meeting on the move, and many processions are in fact preliminary to the holding of a meeting.

Written advance notice is required by section 11 to be given of a public procession[70] intended to demonstrate support for or opposition to the views or actions of any person or body of persons; to publicise a cause or campaign; or to commemorate an event must be delivered to the relevant police station, not less

[67] The predecessor to s.61 was s.39 of the Public Order Act 1986, but because of problems with its interpretation and application, it was repealed and replaced by s.61.

[68] *Winder v. D.P.P.* (1996) 160 J.P. 713, DC, *Capon v. D.P.P.* (unreported) discussed by David Mead in [1998] Crim.L.R. 870. Both cases indicate a willing by the courts to broaden the interpretation of these sections to increase police discretion and limit freedom to protest.

[69] There are significant differences in Northern Ireland and Scotland on public order law in general and on processions in particular. See Brigid Hatfield, "Order in the Law of Public Order?", (1987) 38 N.I.L.Q. 86; The Public Processions (Northern Ireland) Act 1998 provided a new legal framework for the regulation of processions in Northern Ireland, including the establishment of a Parades Commission to take decisions on proposed parades; and see Imelda McAulay, "Reforming the law on contentious parades in Northern Ireland", [1998] P.L. 44.

[70] s.16, which also defines "public place", but does not stipulated the number of persons needed for a procession to be a public procession.

than six clear days before the date of the intended procession. Where this is not "reasonably practicable," then delivery should be as soon as delivery is reasonably practicable. The notice must specify the date, time and route of the proposed procession, and the name and address of the organiser (section 11(3)). Each of the persons organising a procession for which proper notice has not been given, or in respect of which the date, time or route differs from that given in the notice, is guilty of an offence.[71] To allow for processions in response to an unexpected event, the above provisions will not apply if it is "not reasonably practicable to give advance notice of the procession" (section 11(1)). The requirement of notice does not apply to processions commonly or customarily held in an area, and funeral processions organised by a funeral director acting in the normal course of his business (section 11(2)). The police do not have to consent to a procession, the notice requirement is to forewarn the police.[72]

Before the senior police officer[73] can impose *conditions* on an actual or proposed procession he must have regard to the time, place, circumstance and route or proposed route of the procession (section 12). In the light of these if he reasonably believes that either

"(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or

(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do."

then he may give directions[74] to the organisers or participants imposing conditions on the procession. The requirement of serious disruption to the life of the community is capable of wide interpretation, while the intimidation provision does not necessarily require any connection with public disorder. A wide discretion is given to the police as to the conditions which are imposed since the section provides that he may impose "such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions" (section 12(1)). To organise or take part in a procession and knowingly to fail to comply with a condition is an offence.

27–016 However, it is a defence to prove that the failure arose from circumstances beyond the control of the accused (section 12(4)(5)). It is also an offence to incite another not to comply with a condition imposed on a procession (section 12(6)). A constable in uniform may arrest without warrant anyone he reasonably suspects is committing any of the above offences.

The police decision to impose conditions on a procession could be subject to judicial review.[75] This could be on one of two grounds. First that there was no basis for the police officer's reasonable belief that the procession would result in

[71] For possible defences, where the burden of proof is on the defendant, see s.11(8) and (9).

[72] s.11 does not apply to Scotland which is regulated by the Civic Government (Scotland) Act 1982, ss.62 and 65

[73] Defined in s.12(2). In relation to a procession being held or a procession intended to be held where persons are assembling with a view to taking part in it, it means the most senior in rank of the police officers present at the scene. In the case of a proposed procession, it means the chief officer of police, who may delegate his functions to a deputy or assistant chief constable (s.15).

[74] Directions in respect of a proposed procession must be in writing (s.12(3)).

[75] See B. Hadfield, "Public Order Police Powers and Judicial Review", [1993] P.L. 915.

serious public disorder, serious damage to property or serious disruption to the life of the community. This could include a challenge to the meaning of, for example, "serious disruption to the life of the community." Secondly, that even if there was a basis for the police officer's beliefs, the conditions imposed were not necessary to prevent disorder, damage, disruption or intimidation. Given that section 12(1) provides that the police officer may give such directions as appear to him necessary, until the coming into force of the Human Rights Act it would have proved difficult to challenge the legality of directions given, except on the ground that they are totally unreasonable. However, an argument based on a breach of Article 11 E.C.H.R. could be raised on the ground that the conditions imposed did not fall within the restrictions permitted under Article 11(2). It may also be possible in certain circumstances to seek judicial review of a decision *not* to impose conditions.[76]

In certain circumstances processions may be *prohibited* (section 13). Where the senior police officer reasonably believes that, because of particular circumstances existing in any district or part of a district, the powers under section 12 will be insufficient to prevent the holding of a public procession from resulting in "serious public disorder," then he shall apply to the council of the district for an order prohibiting for up to three months, the holding of all public processions or of any class of public processions so specified, in the district or part of the district (section 13(1)). On receiving such an application, the council may, with the consent of the Secretary of State, make an order either in the terms of the application or with such modifications as may be approved by the Secretary of State (section 13(2)). Where the area concerned is the City of London, or the metropolitan police district, then the power to seek an order is given to the Commissioner of Police for the City of London or the Commissioner of Police of the Metropolis, who may, with the consent of the Secretary of State, make a similar order to that outlined above. It is an offence to organise, take part, or incite another to take part in a prohibited procession (section 13(7)(8)(9)), and all three offences are arrestable without warrant by a constable in uniform (section 13(10)).

27–017 Orders prohibiting processions may also be subject to judicial review. Section 13 is worded in terms of the "reasonable belief" of the senior police officer, which could provide some prospect of a successful application for judicial review. In the past courts have been unwilling to interfere with the exercise of discretion granted to senior police officers.[77] However, it is clear that under Article 11 of E.C.H.R., orders banning marches can only be justified in extreme circumstances.[78]

Public Order Offences[79]

27–018 In addition to regulating marches and assemblies, the Public Order Act 1986 made extensive reforms to a variety of public order offences. The Criminal Justice and Public Order Act 1994 amended and added to the 1986 Act and introduced additional public order offences.

[76] *Re Murphy* [1991] 5 N.I.J.B. 72, QBD and 88, CA.

[77] *Kent v. Metropolitan Police Commissioner, The Times*, May 15, 1981.

[78] *Christians against Racism and Fascism v. United Kingdom* (1980) 21 D.R. 138.

[79] See Richard Card, *ante*.

Riot (section 1, Public Order Act 1986)

27–019 The problems encountered by the police in bringing successful prosecutions for the common law offence of riot in the wake of the 1984–85 miners' dispute was one of the reasons for the 1986 reforms. Until 1984–85, most of the cases on riot arose out of the Riot (Damage) Act 1886, which provides that where premises are injured or the property therein is destroyed or stolen by any persons "riotously and tumultuously assembled", compensation to the persons aggrieved is to be paid out of the local police fund.[80] It is not necessary for someone to have been prosecuted and convicted for riot before a claim for compensation can be brought.

The offence of riot is the most serious of the public order offences. It is triable only on indictment and punishable by imprisonment for up to 10 years or a fine or both. The consent of the Director of Public Prosecutions is required before a prosecution for riot, or incitement to riot, can be instituted (section 7(1)). The minimum number required for riot is 12 persons present together who use or threaten unlawful violence for a common purpose. Those involved do not have to form a cohesive group or use or threaten violence simultaneously (section 1(2)). Only those who use unlawful violence in the prescribed circumstances are guilty of riot. Provided at least one person is so liable, the other members of the group, if they have the appropriate *mens rea*, may be guilty of aiding and abetting riot[81] or of a lesser offence, such as violent disorder. Violence for this offence, and for the offences of violent disorder (section 2) and using threatening abusive or insulting words or behaviour (section 4), means any violent conduct towards property or persons, whether or not damage or injury is caused or intended (section 8). For this offence, and for the offences of violent disorder, affray and threatening, abusive or insulting behaviour, the definition of the offence is in terms of unlawful violence.[82] The definition of violence concentrates on the conduct rather than the consequences of the violence and section 8 provides that violence: "is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct". To assist in proving a common purpose, it is provided that: "the common purpose may be inferred from conduct" (section 1(3)).[83] The conduct of the "persons who are present together" must be such as could cause a person of reasonable fitness present at the scene to fear for his personal safety. For this offence, as with those of violent disorder (section 2) and affray (section 3) no person of reasonable firmness need actually be, or be likely to be, present at the scene. In common with all the offences in Part I, riot may be committed in private as well as in public places (section 1(5)).[84] It must be proved that a person accused of riot either intended to use violence or was aware that his conduct may be violent (section 6(1)).[85] For the purpose of the

[80] See for example, *Ford v. Metropolitan Police District Receiver* [1921] 2 K.B. 344.

[81] *R. v. Jefferson* 99 Cr.App. Rep. 13, CA.

[82] Violence justified on the grounds of, for example, reasonable force in self-defence, is not unlawful: *R. Rothwell* [1993] Crim. L.R. 626, CA.

[83] For example by making the same gestures, or as in *op. cit.* celebrating England's victory over Egypt in a football match.

[84] Since the offences in Pt I can be committed in a public or a private place (subject to certain exceptions for private dwellings), there is no need for a definition of public place in this Part.

[85] For all offences in Pt I of the Act a provision is made with regard to those who are intoxicated. A person whose awareness is impaired by intoxication, whether by drink, drugs or other means, shall be taken to be aware of "that of which he would be aware if not intoxicated, unless he shows either that his intoxication was not self-induced or that it was caused solely by the taking . . . of a substance in the course of medical treatment." (s.6(5)).

Riot (Damages) Act 1886,[86] "riotous" and "riotously" are to be construed in accordance with section 1 (s.10(1)).[87] Riot is an arrestable offence by virtue of section 24 of the Police and Criminal Evidence Act 1984.

Violent disorder (section 2, Public Order Act 1986)[88]

27–020 This is a wide offence covering both the actual use of violence and the threat of violence. The offence requires that three or more persons present together use or threaten unlawful violence and that their conduct, taken together, would cause a (hypothetical) person of reasonable fitness present at the scene to fear for his personal safety. There is no need for a common purpose on the part of the three or more persons,[89] which marks an important distinction between this offence and riot and may explain why violent disorder a more frequent charge than that of riot. Nor is it necessary for violent disorder that the persons concerned used or threatened unlawful violence simultaneously (section 2(2)). The *mens rea* is an intent to use or threaten violence or an awareness that conduct may be violent or threaten violence (section 6(2)). The offence of violent disorder is triable either way, and is an arrestable offence by virtue of section 24 of the Police and Criminal Evidence Act 1984.[90] The offence of violent disorder may be used in respect of behaviour that would not give rise to serious public order problems.

Affray (section 3, Public Order Act 1986)[91]

27–021 Section 3 provides that a person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a (hypothetical) person of reasonable firmness present at the scene to fear for his personal safety (section 3(1)). Where two or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purpose of section 3(1) (section 3(2)). The threat of unlawful violence must be a physical threat and cannot be made by the use of words alone (section 3(3)).[92] In this section, unlike sections 1 and 2, violence does not include violent conduct towards property (section 8). The provision that affray may be committed in private as well as public (section 3(5)), and that no person of reasonable firmness need actually be, or be likely to be, present at the scene, means that a fight in a private house could amount to the public order offence of affray. The *mens rea* is the same as for the offence of violent disorder (section 6(2)), and a constable may arrest without warrant anyone he reasonably suspects is committing affray (section 3(6)).[93] This is a more limited power of arrest than

[86] Also the Merchant Shipping Act 1894, s.515.

[87] Any enactment in force before s.10 came into effect, which contained the word "riot" or cognate expressions, which would have been construed in accordance with the common law offence of riot, is to be construed in accordance with s.1 (s.10(3)).

[88] For elements which this offence has in common with riot, see earlier section.

[89] *R. v. Mahroof* (1988) 88 Cr.App.R. 317: it was held in *R. v. Hebron* [1989] Crim.L.Rev. that being present at the scene of a fight where bottles were being thrown at the police and threats being made, was sufficient.

[90] The penalties on conviction on indictment are up to five years imprisonment or a fine or both; on summary conviction up to six months imprisonment or a fine not exceeding the statutory maximum.

[91] For elements which this offence has in common with riot, see earlier section. The meaning of this section was considered by the House of Lords in *I v. D.P.P.* [2001] 2 W.L.R. 765.

[92] In *R. v. Dixon* [1993] Crim.L.R. 579, it was held that where the defendant set his dog on police officers with the words, "Go on, go on", the dog was being used as a weapon, and the conduct amounted to affray.

[93] The mode of trial and punishment is the same as for violent disorder, except that on conviction on indictment the maximum term of imprisonment is three years (s.3(7)).

that which applies to sections 1 and 2 by virtue of section 24 of the Police and Criminal Evidence Act 1984. It is likely that the common law power to arrest without warrant for an actual or threatened breach of the peace will be available in circumstances which would amount to an offence under sections 1, 2, or 3.

Threatening, Abusive, Insulting Words or Behaviour: Disorderly Conduct

27–022 Three offences, found in the 1986 Act, cover a variety of words or behaviour and have several elements in common. The most serious offence is section 4, which has similarities with section 5 of the Public Order Act 1936 (which was repealed in 1986). Section 4A was inserted by section 154 of the Criminal Justice and Public Order Act 1994: although section 5 is the least serious of the three offences, it is one of the most controversial sections in the 1986 Act. Section 31 of the Crime and Disorder Act 1998 provides three separate offences which apply if an offence committed under sections 4, 4A or 5, is "racially aggravated".[94]

Threatening, abusive or insulting words or behaviour **(section 4)**

27–023 There are two alternative limbs to section 4. The accused must either

(a) use towards another person threatening, abusive or insulting words or behaviour, or

(b) distribute or display to another person any writing, sign or other visible representation which is threatening, abusive or insulting.

In either case, the accused must do so with an "intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked" (section 4(1)). This list of possible consequences of the accused's words or behaviour covers a wide spectrum, and makes section 4 potentially far reaching. In considering the "likely" effect of the accused's conduct, the existing law, whereby the accused must "take his audience as he finds them."[95] may continue to apply, although considerations of Article 10 and 11 E.C.H.R. may result in a different conclusion.

The words "threatening, abusive or insulting" appeared in section 5 of the 1936 Act, and it is likely that the cases interpreting them apply to sections 4, 4A and 5.[96] In *Cozens v. Brutus*[97] it was held that "insulting" must be given its ordinary meaning: "it is a question of fact in each case and not a question of

[94] For the definition of "racially aggravated" see s.28 of the Crime and Disorder Act 1998; a racially aggravated offence under the Crime and Disorder Act is punishable more severely than an offence under the Public Order Act, see s.31(4),(5). The offences of riot, violent disorder and affray are not covered by the 1998 Act, since the penalties for these offences were considered adequate.

[95] *Jordan v. Burgoyne* [1963] 2 Q.B. 744, DC, and see A. T. H. Smith [1987] Crim.L.R. 156 at p. 164 for an argument to the contrary.

[96] For example *Simcock v. Rhodes* (1977) Cr.App.Rep. 192, DC; *Jordan v. Burgoyne* [1963] Q.B. 744 (DC). The words "threatening abusive or insulting" are also constituents of ss.18(1), 19(1), 20(1), 21(1), 23(1) of the 1986 Act.

[97] [1973] A.C. 854, HL (anti-apartheid demonstration on Wimbledon tennis court: spectators angered, but not insulted), *cf. Masterson v. Holden* [1986] 1 W.L.R. 1017, DC. (Overt homosexual conduct in Oxford St. at 1.55 a.m. Justices "most likely to know what is insulting behaviour" at that hour in that place).

law." Provided the conduct is "threatening, abusive or insulting", it is not necessary that anyone who witnessed it felt threatened etc.[98]

The accused has to be shown to:

(i) intend, or be aware that his words or behaviour towards another person is threatening, abusive or insulting (s.6(3)); and

(ii) (a) that he intended to cause another person to believe that immediate unlawful violence will be used against him or another; or

(b) that he intended to provoke the immediate use of violence by another person, or

(c) that another person was "likely to believe that such violence[99] will be used or it is likely that such violence will be provoked" (s.4(1)).

27–024 Section 4 requires the threatening, abusive or insulting words or behaviour to be used towards another person, or distributed or displayed to another. In *Atkins v. D.P.P.*[1] where the accused's threats were made with respect to a third party who was not present at the time, there was no offence. In *Horseferry Road Stipendiary Magistrate, ex p. Siadatan*[2] the Court of Appeal upheld a refusal by a magistrate to issue a summons against Penguin Books Ltd for an offence under section 4 in respect of the publication of a book by Salman Rushdie which was regarded as offensive by most Muslims, on the basis that there was insufficient evidence of a threat of *immediate* unlawful violence. It suggested that immediate did not mean instantaneous, but that it had to be likely that: "violence will result within a relatively short period of time without any other intervening occurrence."

An offence under section 4 (and sections 4A and 5) can be committed in a private as well as in a public place, but excluding, in effect, domestic disputes (sections 4(2), 4A(2) and 5(2)). A constable may arrest without warrant anyone he reasonably suspects is committing an offence under section 4 (section 4(3)). For this offence, and the offence under section 5, the police could also, in certain circumstances, rely on their common law powers of arrest without warrant in connection with a breach of the peace; and their powers under section 25 of the Police and Criminal Evidence Act 1984. Offences under this section are triable summarily only.[3]

Harassment, alarm or distress (sections 4A and 5)

27–025 Two further summary offences, covering harassment alarm or distress were introduced to deal with the types of antisocial behaviour prevalent in particular in inner city areas, but which did not fall under section 4. Such behaviour is frequently directed at vulnerable groups such as the elderly and ethnic minority groups. Section 4A was introduced to fill a perceived gap in the law and provide for a similar, but more serious offence than that found in section 5.[4]

[98] *Parkin v. Norman* [1983] Q.B. 92, *Marsh v. Arscott* (1983) 75 Cr.App.Rep. 211, DC.
[99] Which must be *immediate* unlawful violence, see below.
[1] (1989) 89 Cr.App.R. 199, DC.
[2] [1991] 1 Q.B. 260.
[3] The penalties are imprisonment for up to six months or a fine not exceeding level 5 on the standard scale, or both. Where a person has been tried on indictment for violent disorder or affray, and found not guilty, the jury may, as an alternative, find him guilty of an offence under s.4 (s.7(3)).
[4] The origin of this offence was a report from the Home Affairs Select Committee H.C. 27 (1993–94) which suggested a new offence of racially motivated violence: the Home Secretary rejected these calls, but instead introduced s.4A which is more general.

Both sections are concerned with a person who either "a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour or b) displays any writing, sign or other visible representation which is threatening, abusive or insulting", (sections 4A(1) and 5(1)). In neither case need the words or behaviour be directed toward another. The discussion of the meaning of "threatening, abusive and insulting", in section 4 apply here also.[5] "Disorderly" is only found in sections 4A and 5, it is not defined and whether or not the words or behaviour are disorderly is a question of fact: no element of violence is required.[6] Nor are the words "harassment, alarm or distress" (found only in sections 4A and 5), defined: they are also questions of fact. Both offences can be committed in a "public or private place" which in the context of sections 4A and 5 have the same meaning as in section 4 (sections 4A(2) and 5(2)). There are additional defences available under sections 4A and 5 that are not available under section 4, in each case the onus of proof is on the accused. These are that he had no reason to believe that there was anyone with hearing in sight who was likely to be caused harassment, alarm or distress; that he was inside a dwelling and had no reason to believe that his words, behaviour, writing, etc. would be heard or seen by a person outside that or any other dwelling: that his conduct was reasonable[7] (sections 4A(3) and 5(3)).

27–026 For an offence under *section 4A*[8] the prosecution does not have to show that the defendant's threatening etc words, behaviour or display were directed towards another person.[9] The differences between this offence and section 5 are that the prosecution must show that the defendant intended to cause harassment, alarm or distress and that an actual victim (not necessarily the one intended) suffered accordingly.[10] The reluctance of such victims to go to court and give evidence may reduce the effectiveness of this offence. The power of arrest and penalty is the same as that for section 4.

An offence under *section 5* is committed in respect of the same type of words, behaviour[11] or display as that found in section 4A, and it must be "within the hearing or sight of a person[12] likely to be caused harassment, alarm or distress thereby" (section 5(1)). There is no need for actual harassment, alarm or distress, it is sufficient that the words or behaviour are likely to cause that person harassment, alarm or distress.[13] The accused must either intend or be aware that his words, behaviour, writing, etc. is threatening, abusive or insulting or he intends or is aware that his behaviour is or may be disorderly (section 6(4)). If a person engages in "offensive conduct", which means conduct which a police officer reasonably suspects to constitute an offence under section 5 (section 5(5)), and the police officer's warning to stop such conduct is ignored, then the police

[5] *ante*.

[6] *Chambers v. D.P.P.* [1995] Crim.L.R. 896.

[7] An objective test. In determining this, account may be taken of all the circumstances, including the reasons for the defendant's conduct: *Morrow v. D.P.P.* [1994] Crim.L.R. 58, DC.

[8] The penalties for this offence are the same as for s.4.

[9] *cf.* s.5 below.

[10] Unlike ss.4 and 5, s.4A does not specifically require the prosecution to show that the defendant intended that his words, behaviour etc. to be threatening etc. or be aware that this was the case; it is assumed that this is also required for s.4A.

[11] In *Vignon v. D.P.P.* [1997] Crim.L.R. 289, DC, it was accepted that it was open to the magistrates to find that installing a hidden video camera in a changing room fell within the behaviour prohibited by s.5.

[12] Which has been held to include a police officer: *D.P.P. v. Orum* [1989] 1 W.L.R. 88.

[13] Which can include alarm etc about the safety of a third party, *Lodge v. D.P.P.*, *The Times*, October 26, 1988, DC.

officer who gave the warning, or another police officer,[14] may arrest that person without warrant. The power to arrest is essentially a preventative measure.[15] This is potentially a very wide offence and its use, application and interpretation has been controversial.[16] The Human Rights Act 1998 may provide scope for argument as to its application.

Some general statutory offences and common law provisions

27–027 There are a variety of offences which could apply in public order situations, and which were enacted without any consideration of the need to provide for freedom of assembly. Should any dispute arise today, then a court should attempt to interpret and apply them "as far as it is possible to do so" in a way which is compatible with Convention rights (section 3(1) of the HRA Act 1998). A public authority which seeks to rely on or apply the provisions of these statutes should bear in mind its obligation in section 6 of the HRA Act.[17]

Highways Act 1980

27–028 Wilful obstruction of the highway without lawful authority or excuse is a summary offence under the Highways Act 1980, s.137. There is a power of arrest without warrant under the general arrest conditions provided by the Police and Criminal Evidence Act 1984, s.25. It is not necessary for the prosecution to prove that anyone was actually obstructed, nor is it a good defence that there was a way round the obstruction, or that there was no intention to obstruct,[18] although these facts may go to mitigation. The courts have for some time looked at this offence in the wider context of freedom of assembly.

In *Hirst v. Chief Constable of Yorkshire*[19] the Divisional Court considered this section and suggested that in deciding whether there was an obstruction it should be asked whether what was being done was incidental to the right of passing and repassing. If not, than there was an obstruction, but it would not amount to an offence if it was a reasonable obstruction. In considering this question Otton J. suggested that account should be taken of the fact that the defendants were exercising rights of assembly and demonstration. In *D.P.P. v. Jones*[20] Lords Irvine and Hutton referred to the right to peaceful assembly on the highway[21]: Lord Hutton suggested that this right would be unduly restricted if it could not in some circumstances be exercised on the public highway.

The Public Meeting Act 1908

27–029 The offences created by this Act are ones designed to protect free speech and public protest, but they have been used very little. Under this Act, as amended by the Public Order Act 1936, disorderly conduct designed to break up a lawful

[14] The Public Order (Amendment) Act 1996 was passed to cure a defect in the original s.5 highlighted in *D.P.P. v. Hancock and Tuttle* [1995] Crim.L.R. 139, whereby the constable who effected the arrest had to be the constable who had administered the warning.

[15] The penalty is a fine not exceeding level 3 on the standard scale.

[16] See Andrew Ashworth, "Criminalising Disrespect", [1995] Crim.L.R. 98.

[17] *ante*, para. 22–016.

[18] *Arrowsmith v. Jenkins* [1963] 2 Q.B. 561, DC. This was in fact under the similar provision in the 1959 Highways Act.

[19] (1986) 85 Cr.App.R. 143.

[20] [1999] 2 A.C. 240.

[21] The case was not on s.137; Lord Clyde did not go as far as Lords Irvine and Hutton in recognising a common law right to assemble on the highway, and Lords Slynn and Hope dissented from this proposition.

public meeting is a summary offence. However, the fact that a meeting is held on the highway is not enough in itself to make the meeting unlawful for the purposes of the Public Meeting Act 1908, in the absence of some other element such as obstruction.[22] Under the Act of 1908, as amended, if a constable reasonably suspects any person of committing an offence under that Act he may, if requested by the chairman of the meeting, require the person to give his name and address. If the person refuses to give his name and address, or gives a false name and address, he is guilty of an offence. The constable may arrest without warrant if the person refuses to give his name and address, or if the constable reasonably suspects him of giving a false name and address.[23]

Obstructing or assaulting a police officer in the execution of his duty[24]

27–030 Cases such as *Duncan v. Jones*[25] demonstrated how these offences which were intended to be defensive or preventive weapons became used by the police as offensive or punitive weapons.[26] The Human Rights Act will require a reconsideration of this approach in the context of public protest.[27]

Miscellaneous Offences and Torts

27–031 A wide variety of offences and torts could be committed by those taking part in assemblies, processions and demonstrations. These include incitement to racial hatred,[28] sedition,[29] and offences connected with the possession of an offensive weapon in any public place.[30] In addition there are general laws governing criminal damage, the possession of firearms and explosives, and offences against the person. A public procession may easily involve the common law offence of public nuisance. A public nuisance will be caused if the user of the highway, although reasonable from the point of view of those taking part in the procession, is not reasonable from the point of view of the public. This question depends on the circumstances of the case, and may be affected by the numbers taking part, the occasion, duration, place and hour, and also whether the obstruction is trivial, casual, temporary and without wrongful intent.[31] The tort of *nuisance* may also apply. Unreasonable interference with the rights of others to use the highway could be a species of the tort of private nuisance, which may give rise to an action for damages or the granting of an injunction.[32] In the light of Article [illegible] E.C.H.R. it is suggested that nuisance, whether public or private, which has been little used in the context of assemblies and processions, is unlikely to be relied upon in the future.

[22] *Burden v. Rigler* [1911] 1 K.B. 337, DC.

[23] See Police and Criminal Evidence Act 1984, s.25, s.26 and sched. 7.

[24] See *ante* para. 24–019 *et seq.*

[25] [1931] 1 K.B. 218.

[26] E. C. S. Wade, "Police Powers and Public Meetings", (1937) 6 C.L.J. 175; T. C. Daintith, "Disobeying a Policeman-A Fresh Look at *Duncan v. Jones*" [1966] P.L. 248.

[27] See *Redman-Bate v. D.P.P.*, *The Times*, July 28, 1999, [2000] H.R.L.R. 249.

[28] *ante*, para. 25–010.

[29] *ante*, para. 25–009.

[30] Prevention of Crime Act 1953, as amended by the Public Order Act 1986, the Criminal Justice Act 1988 as amended by the Offensive Weapons Act 1996.

[31] *Lowdens v. Keaveney* [1903] Ir.R. 82; *R. v. Clark* [1964] 2 Q.B. 315, CCA where a conviction for incitement to commit nuisance was quashed because the jury had not been directed to consider whether or not there was a reasonable use of the highway.

[32] *Thomas v. N.U.M.* [1985] I.R.L.R. 136, at p. 149. See Hazel Carty [1985] P.L. 542. *News Group Newspapers Ltd and others v. S.O.G.A.T. '82* [1986] I.R.L.R. 336. *Hunter v. Canary Wharf Ltd* [1997] A.C. 655.

Meetings addressed by a member of a proscribed organisation

27–032 The Terrorism Act 2000, section 12 makes it an offence to organise or to speak at a meeting in the knowledge that the meeting is to be addressed by a person who belongs or professes to belong to a proscribed organisation.[33] A meeting for the purposes of this clause is a gathering of three or more persons, whether or not the public is admitted. It is not necessary that the speaker or organiser supports the proscribed organisation, or any form of terrorism. It is questionable whether section 12 is compatible with Articles 10 and 11 of E.C.H.R.

Picketing[34]

27–033 The word picket is used to describe those who gather outside a particular place with the aim of persuading others not to enter. Although usually connected with industrial disputes, this is not necessarily the case.[35] There is no legal right to picket as such, but "peaceful picketing" in industrial disputes has long been recognised as being lawful. There is therefore a statutory freedom or liberty to picket peacefully in certain circumstance. The present law is contained in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA), s.220. This provides that:

> "It shall be lawful for a person in contemplation or furtherance of a trade dispute to attend—
>
> > (a) at or near his own place of work, or (b) if he is an official of a trade union, at or near the place of work of a member of that union whom he is accompanying and whom he represents,
>
> for the purpose only of peacefully obtaining or communicating information, or peacefully persuading any person to work or abstain from working."

The immunity given by this section is to attend at or near certain places for particular purposes, so that such attendance does not of itself constitute the torts of trespass[36] or nuisance, or the criminal offences of obstructing the highway or "watching or besetting."[37] However, this may not be the case where mass picketing (*infra*) is involved. The immunity given to those covered by section 220 is in respect only of peaceful picketing, which means without causing a breach of the peace.[38] It is also only in respect of the attendance of pickets for the purposes set out in the section, and if the attendance of the pickets is for any other purpose the immunity is lost.[39] The predecessor to section 220 was described in *Broome v. D.P.P.*[40] as giving a narrow but real immunity, which gives: "no protection in relation to anything the pickets may say or do whilst they are

[33] As defined by the Terrorism Act 2000, section 3.

[34] Originally a military term for a small detachment of troops, from the French *piquet*

[35] *e.g.* consumer picketing and see *D.P.P. v. Fidler* [1992] 1 W.L.R. 91 where a group of people assembled outside an abortion clinic with the aim of dissuading women from entering.

[36] The application of the law of trespass to picketing should now be considered in the light of *Jones v. D.P.P. ante*, which could allow pickets to claim that a peaceful, non-obstructive picket line was not trespass to the highway. s.42 of the Criminal Justice and Police Act 2001 (*ante*, para. 27–004) is expressly stated not to apply to lawful picketing under TULRA.

[37] s.241 TULRA 1992, re-enacting s.7 of the Conspiracy and Protection of Property Act 1875 *infra*.

[38] *e.g. Piddington v. Bates* [1961] 1 W.L.R. 162, DC.

[39] *e.g. Tynan v. Balmer* [1967] 1 Q.B. 91, DC.

[40] [1974] A.C. 587.

attending if what they say or do is itself unlawful."[41] Any pickets who are not covered by the terms of section 220, run the risk of committing the same range of criminal offences and torts as any other demonstrator. In addition they can be sued for certain industrial torts, such as inducement to breach of contract or prosecuted for one of the offences in section 241 of the TULRA[42] which include: intimidating any other person with a view to compelling[43] him to abstain from doing any act which such other person has a legal right to do; and watching and besetting the place where another person works, with the same view.[44]

Mass picketing

27–034 Although mass picketing is not unlawful under section 220, the greater the number of pickets involved, the easier it will be to infer a purpose other than that of peacefully obtaining or communicating information. In *Broome v. D.P.P.* Lord Reid said that in a case of mass picketing "it would not be difficult to infer as matter of fact that pickets who assemble in unreasonably large numbers do have the purpose of preventing free passage"[45]—in other words a purpose outside the limits of section 220. In *Thomas v. N.U.M. (South Wales Area) and others*[46] Scott J. suggested that: "mass picketing—by which I understand to be meant picketing so as by sheer weight of numbers to block the entrance to premises or to prevent the entry thereto of vehicles or people— . . . is clearly both common law nuisance and an offence under section 7 of the (Conspiracy and Protection of Property Act)".[47] Although there is no statutory limit to the number of pickets, the Code of Practice on Picketing,[48] while recognising this,[49] goes on to suggest that: "pickets and their organisers should ensure that in general the number of pickets does not exceed six at any entrance to a workplace; frequently a smaller number will be appropriate."[50] Scott J. in *Thomas v. N.U.M.* was clearly influenced by this guidance since the injunction granted was to restrain the organisation of picketing at colliery gates by more than six persons.[51] The suggested limit of six pickets may need to be read in the light of Article 11 of the E.C.H.R., since the peacefulness or otherwise of a picket line should depend on the attitude of the pickets and not on an arbitrary number of pickets. It may be that the provision on numbers could be regarded as necessary in a democratic society to preserve public order.

Breach of the peace[52]

The most important powers relied on by the police in connection with the maintenance of public order at picket lines are those connected with breach of the

[41] *ibid.*, *per* Lord Salmon at p. 603.
[42] See Francis Bennion, "Mass Picketing and the 1875 Act", [1985] Crim.L.Rev. 64, which discusses the use made of the predecessor to s.241 during the 1984/85 miners' dispute.
[43] In *D.P.P. v. Fidler* [1992] 1 W.L.R. 91 it was held that watching and besetting for the purpose of persuasion as opposed to coercion did not fall within the section.
[44] The Protection from Harassment Act 1997 is sufficiently wide to apply to the mere presence of pickets, if they cause alarm or distress to any person on more than one occasion.
[45] *ante*, at p. 598.
[46] [1985] I.R.L.R. 136.
[47] *ibid.*, at p. 153.
[48] Originally published in 1980. The present revised and reissued version (May 1992) is in force as if made under s.203 of the TULRA 1992.
[49] para. 47.
[50] para. 51.
[51] See also *News Group Newspapers Ltd v. S.O.G.A.T. '82* [1986] I.R.L.R. 337.
[52] *ante*, para. 27–008.

peace. These powers, backed up by the offences of obstructing and assaulting a police officer in the execution of his duty,[53] and obstructing the highway, have enabled the police to limit both the number of pickets,[54] and their activities.[55] The restrictions now recognised as applying to police powers to keep the peace apply to the use of these powers in the context of picketing.

Public Order Act 1986

27–035 Various aspects of this Act have significance for the legality of picketing and associated activities. All the offences in Part I[56] could be used in respect of non peaceful picketing. Of particular significance are the offences of violent disorder (section 2), threatening behaviour (section 4), intentional harassment (section 4A), and disorderly behaviour (section 5). The most important section so far as picketing is concerned is section 14,[57] which enables the police to impose conditions on an open air assembly of more than 20 persons in a public place. This allows the police to limit the location, duration or size of a picket. Although the extensive common law powers of the police in effect enable them to impose such restrictions on pickets, it is only where it is necessary to do so to keep the peace. Section 14 extends the grounds upon which the police may impose conditions on assemblies to include a reasonable belief that the assembly will result in "serious disruption to the life of the community" or where there is a reasonable belief that: "the purpose of the persons organising (the assembly) is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do." The powers available to the police to seek to ban trespassory assemblies (sections 14A, 14B and 14C) could be used in the event of a long strike, such as that of the miners in 1984/85. The general requirement to give advance notice of public processions (section 11) is likely to limit the possibility of mobile demonstrations in the course of industrial disputes.

Sporting events

27–036 The levels of violence and general public order problems at sporting events, and in particular at football matches, led to the enactment of specific legislation. The Criminal Justice (Scotland) Act 1980 and the Sporting Events (Control of Alcohol, etc.) Act 1985 both aimed to reduce the perceived cause of the problems by creating offences in connection with the carrying of alcohol on coaches, trains, and vehicles adapted to carry more than eight persons (section 1A) where the principal purpose of the journey is to go to or from a "designated sporting event".[58] Both Acts provide for offences connected with drunkenness at designated sports grounds, and regulate the sale and supply of alcohol within sports grounds. Additional offences were introduced by the Football (Offences) Act 1991 with respect to misbehaviour at a "designated football match". These include offences of throwing objects (section 2),[59] chanting of an indecent or racist nature (section 3), and pitch invasion (section 4).

[53] *ante*, para. 24–019 *et seq*.
[54] *Piddington v. Bates* [1961] 1 W.L.R., DC.
[55] *Tynan v. Balmer* [1967] 1 Q.B. 91, DC.
[56] *ante*, para. 27–011 *et seq*.
[57] *ante*, para. 27–012 *et seq*.
[58] This can include not only particular sporting events, but also classes of such events, and can be made in respect of events outside Great Britain.
[59] s.8 of the Public Order Act 1987 could also apply to throwing objects, but it would be more difficult for the prosecution to prove.

Banning orders

27–037 Part IV of the Public Order Act, (as amended by the Football (Offences and Disorder) Act 1999 and the Football (Disorder) Act 2000), provides a procedure whereby a person who appears before a court for an offence of actual or threatened violence to person or property committed in connection with a prescribed football match, may be subjected to a domestic banning order (section 30). Such an order precludes the person concerned from attending football matches for a specified period. There is provision in section 37 for the Secretary of State, by order, to extend these orders to other sporting events. Domestic banning orders can only be made with respect to matches in England and Wales. The Football Spectators Act 1989, as amended, allows a court to make an international banning order to prevent those convicted of the offences specified in Schedule 1 of the Act, from attending football matches outside England and Wales.[60] Additions powers are available under the 2000 Act to enable the police, in specified circumstances, to prevent people from leaving the country while they seek a banning order, and to allow the police to detain a person for up to six hours while they make further inquiries before seeking a banning order.

II. Freedom of Association

27–038 Article 10 on free speech and Article [illegible] E.C.H.R. are relevant here. Article 11 recognises the right to form and join a [illegible]de union, and imposes an obligation on States to "both permit and make possible" the freedom for individual trade unionist to protect their rights.[61] Restrictions on these rights are permissable if they fall within Articles 10(2) or 11(2). These have been interpreted to allow, for example, special restrictions on the political activities of civil servants and local government officers.[62] Apart from certain restrictions on these groups and also on the police and members of the armed forces, there are relatively few legal restrictions on the freedom to form and join associations for political or other purposes; those that exist are concerned mostly with terrorism or other types of violence.[63]

Proscribed organisations

27–039 The Terrorism Act 2000[64] reforms andextends existing counter-terrorism legislation and put it on a permanent basis.[65] Part II deals with proscribed organisations, the law on which is now the same throughout the United Kingdom. Section

[60] An international football banning order can also be made in respect of offences of another country which correspond to those found in Sched. 1; corresponding offences under *inter alia* Scottish, Irish, French and Italian law have been listed in an Order in Council.

[61] *National Union of Belgian Police v. Belgium* (1975) 1 E.H.R.R. 578.

[62] *Council for Civil Service Unions v. United Kingdom* (1988) 10 E.H.R.R. 269; [illegible]ned and Others *v. United Kingdom* (2000) 29 E.H.R.R. 1.

[63] Other limitations are that the association does not involve a criminal conspiracy [illegible]iminal Law Act 1977, s.1, or a civil conspiracy (which is a tort).

[64] The Act is based on proposals made in Lord Lloyd of Berwick's *Inquiry into Legislation against terrorism* Cm. 3420 (1996), and the Government's response in *Legislation against terrorism*, Cm. 4178 (1998).

[65] It replaces the Prevention of Terrorism (Temporary Provisions) Act 1989, the Northern Ireland (Emergency Provision) Act 1996 and ss.1–4 of the Criminal Justice (Terrorism and Conspiracy) Act 1998.

3 provides a power to proscribe organisations, which are concerned in international or domestic terrorism[66]; sections 11 and 12 provides for offences in connection with membership (or professed membership) of proscribed organisations,[67] including the promotion of such organisations and of meetings in support of them. The 2000 Act provides for the establishment of the *Proscribed Organisations Appeal Committee*, to hear cases where the Secretary of State has refused to de-proscribe an organisation. Human rights issues could be raised with respect to the compatibility of future banning orders, particularly if the body concerned claims to be a political party.

It is an offence under section 13 for a person in a public place to wear any item of dress or to wear, carry or display any article in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation.

The wearing of "political" uniforms

27–040 It is an offence under section 1 of the Public Order Act 1936[68] to wear in any public place or at any public meeting a uniform signifying association with any political organisation or with the promotion of any political object. The Home Secretary may give permission for the wearing of such uniform on a ceremonial or other special occasion. The consent of the Attorney-General is necessary for the continuance of a prosecution after a person has been charged in court. In *O'Moran v. D.P.P.*[69] men wearing dark glasses, black or blue berets and dark clothing when escorting the coffin of a fellow supporter of the IRA in a funeral procession in London, were held to be wearing a uniform for this purpose.

The statutes against liveries and maintenance passed in Tudor times were repealed in the nineteenth century as being no longer necessary. In the years between the wars, however, the growth of militant fascist, communist and other extreme organisations led, or threatened to lead, to serious public disorder. Section 2 of the Public Order Act 1936 therefore enacted that if members or adherents of any association of persons are:

"(a) organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown: or

(b) organised and trained or organised and equipped either for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object or in such manner as to arouse reasonable apprehension that they are organised and either trained or equipped for that purpose,"

then any person who takes part in the control or management of the association in so organising or training its members or adherents, is guilty of an offence punishable by fine and imprisonment. The consent of the Attorney-General is

[66] Terrorism as defined in section 1 adopts a wider definition than under the previous legislation.

[67] Under the previous law there were separate proscription regimes for Great Britain and Northern Ireland. Sched. 2 of the 2000 Act lists all organisations currently proscribed as being proscribed throughout the United Kingdom. The Home Secretary has power to add to or remove names from this list, and it is likely that organisations connected with international terrorism will be added to the list.

[68] Which applies to Scotland.

[69] [1975] Q.B. 864, DC.

necessary before initiating a prosecution under this section. A person charged with taking part in the control or management of such an association may plead that he neither consented to nor connived at the unlawful organisation, training or equipment.[79]

[79] In *R. v. Jordan and Tyndall* [1963] Crim.L.R. 124. The Court of Appeal held that the fact that there was no evidence of actual attacks or plans for attacks on opponents did not necessarily remove grounds for "reasonable apprehension of that purpose".

Part VI

Administrative Law

The preceding chapters, with the exception of that on the European Communities, have all been concerned with areas of law that would have been known to Blackstone. The centre of political power may have shifted over the centuries but in legal theory the legislature (Parliament) and the executive (the Crown) are the bodies known to the common law from time immemorial. The armed forces and the police nowadays derive their existence and powers from statute but both discharge the primary duty of any state, to protect the lives and property of its citizens from attack whether from enemies abroad or criminals at home. The acquisition of nationality and the control of aliens are equally areas of law as old as the constitution even if they are nowadays based on statute. In the nineteenth century, however, the State began to recognise new obligations. To carry them out it created organisations of a kind unknown in earlier times and gave to them powers which were similarly unknown formerly. It is with these new developments that the following chapters are concerned. The chapter on Crown Proceedings may seem to be out of place in such a discussion. Crown Proceedings is a subject which has its origins in the beginnings of the Constitution but its modern importance is not in connection with the position of the monarch in her private capacity but with the position of the government and the many public bodies which can claim, in the eyes of the law, to form part of "the Crown." Moreover, despite the long history of the law relating to the unique legal position of the Crown, the current law is explicable only in the light of the Crown Proceedings Act 1947.

It is the law relating to these new developments that can conveniently be described as Administrative Law, to which must be added the law relating to the control of the exercise of these statutory powers by the courts, Judicial Review. Here also, the origins of the law stretch back into history but the link between the control exercised by the Court of King's Bench over justices of the peace in the eighteenth century and the review of the legality of decisions of local authorities and other public bodies is little more than a formal one.

In a book dealing with both constitutional and administrative law it is not necessary to attempt to define with any particularity where the line between the two should be drawn. For practical purposes the fore-going general description of the contents of the following chapters could be said to suffice. It may seem strange that writers and judges[2] had disputed with vigour the very existence of administrative law and the desirability of the adoption of administrative law (if such a subject does exist) into the law of the United Kingdom. To a large extent the dispute is, or was, one of words. If, by administrative law, is meant a system of rules applicable to public bodies which are enforced in special courts, the United Kingdom did not recognise administrative law in 1885[3] and it does not do so now. If by administrative law is meant that the ordinary courts possess a power of review over the legality of administrative acts then clearly the United Kingdom does recognise administrative law and presumably in that sense Dicey

[1] Sir William Wade and C. Forsyth, Administrative Law (8th ed., Oxford 2000); P. P. Craig, *Administrative Law* (4th ed., Sweet & Maxwell, 1999).

[2] *Supra* p. 32.

[3] The date of the first edition of Dicey's *The Law of the Constitution*.

would approve.[4] The dispute may also be a political one, disguised as a question about law. The statement that a country does not, or should not, have a body of administrative law may conceal the writer's political view that the State ought not to have the types of organisation and undertake the types of activities which typically are regarded as falling within the scope of administrative law.

Since the decision of the House of Lords in *O'Reilly v. Mackman*[5] the courts have begun to use a new terminology in which they distinguish between private law and public law. The latter, vague phrase is sufficiently wide to cover both constitutional and administrative law. Indeed in those jurisdictions where the distinction, borrowed from Roman law,[6] has long been followed public law includes criminal law—although it may be doubted whether the House of Lords had that area of law in mind. Lord Wilberforce has warned of the danger of using, except as convenient shorthand, terms taken from other legal systems where they belong and applying them out of context.[7] Certainly the discovery of public law and, even more, of public law rights, unknown to private law, as a consequence of procedural reforms,[8] designed to rationalise the remedies available where public bodies have acted unlawfully, was somewhat surprising. The availability of remedies to litigants in cases where formerly the courts could not interfere may, at least to the litigants concerned, seem to be proof of the merits of the new distinction between private and public law.[9] On the other hand, it can be argued that by the adoption of the terminology the courts have, in effect, given themselves an almost unlimited power to decide when to strike down decisions of public bodies, untrammelled by earlier rules and precedents. Despite the general terms in which the House of Lords has in the last few years referred to public law it is difficult to believe that in effect it can mean more than administrative law. It can hardly be thought, for example, that by reference to public law, the courts would claim the right (which they have carefully denied themselves in the past) to scrutinise the proceedings of Parliament or to set limits to the legislative competence of Parliament.[10] Nor is it likely that the actions of the government in the sphere of foreign affairs are now susceptible to judicial review.[11]

The growth of administrative law[12]

Almost 100 years ago Maitland pointed out that, at first sight, Parliament in the eighteenth century got through more work than it did in the nineteenth. But, on

[4] It is in this sense that the judges have congratulated themselves on creating a body of administrative law: *Breen v. A.E.U.* [1971] 2 Q.B. 175, *per* Lord Denning M.R., *Mahon v. Air New Zealand* [1984] A.C. 808, 816 *per* Lord Diplock.

[5] [1983] 2 A.C. 237.

[6] In the Institutes public law is defined as "*quod ad statum rei Romanae spectat*" while private law is "*quod ad singulorum utilitatem pertinet*": I.1.1.4. In the Digest Ulpian describes public law as that which "*in sacris, in sacerdotibus, in magistratibus consistat*": D.1.1.1.2.

[7] *Davy v. Spelthorne B.C.* [1984] A.C. 262. See too Parker L.J. in *Wandsworth L.B.C. v. Winder* [1983] 3 W.L.R. 563, CA; affirmed HL [1985] A.C. 461.

[8] *post* para. 32-001.

[9] In practice the individual litigant may be more impressed by the risk of an action failing because it was begun by what turned out to be the wrong procedure: see the criticisms of H.W.R.W. "Public Law, Private Law and Judicial Review," (1983) 99 L.Q.R. 166, and the rebuttal of those criticisms by Woolf L.J., "Public Law-Private Law: Why the Divide? A Personal View," [1986] P.L. 220; *post* para. 3-011.

[10] *ante* para. 32-012.

[11] *R. v. Ex p. Molyneaux* [1986] 1 W.L.R. 332 *ante*.

[12] A. V. Dicey, *Law and Public Opinion During the Nineteenth Century* (2nd ed., 1914, reprinted 1962); H. W. Arthurs, *Without the Law* (1985).

inspection, a volume of statutes from that earlier period contained little that in subsequent ages would be regarded as legislation. Many Acts, public as well as private, dealt with individual cases rather than attempted to lay down general rules. The public acts for 1786, for example, included

"an act for establishing a workhouse at Havering, an act to enable the king to license a playhouse at Margate, an act for erecting a house of correction in Middlesex, an act for incorporating the Clyde Marine Society, an act for paving the town of Cheltenham, an act for widening the roads in the borough of Bodmin. Fully half of the public acts are of this petty local character. Then as to the private acts, these deal with particular persons: an act for naturalizing Andreas Emmerich, an act for enabling Cornelius Salvidge to take the surname of Tutton, an act for rectifying mistakes in the marriage settlement of Lord and Lady Camelford, an act to enable the guardians of William Frye to grant leases, an act to dissolve the marriage between Jonathan Twiss and Francis Dorrill. Then there are almost countless acts for enclosing this, that and the other common. One is inclined to call the last century the century of *privilegia*. It seems afraid to rise to the dignity of a general proposition, it will not say, 'All commons may be enclosed according to these general rules.' 'All aliens may become naturalized if they fulfil these or those conditions.' 'All boroughs shall have these powers for widening their roads.' 'All marriages may be dissolved if the wife's adultery be proved.' No, it deals with this common and that marriage."[13]

In the nineteenth century, however, soon after the Reform Act of 1832 Parliament began, in Maitland's words again:

"to legislate with remarkable vigour, to overhaul the whole law of the country—criminal law, property law, the law of procedure, every department of the law—but about the same time it gives up the attempt to govern the country, to say what commons shall be enclosed, what roads shall be widened, what boroughs shall have paid constables and so forth. It begins to lay down general rules about these matters and to entrust their working partly to officials, to secretaries of state, to boards of commissioners, who for this purpose are endowed with new statutory powers, partly to the law courts."[14]

In this outburst of legislative activity is to be found the origins of that area of law now generally regarded as administrative law.

Maitland attributed Parliament's anxiety in the eighteenth century *to govern* the country by deciding individual cases itself to jealousy of the Crown. Memories of the power of the monarch were too recent: by the nineteenth century that fear had receded. But, at least equally important, was the transformation wrought by the Industrial Revolution. Without that Bentham, Brougham and others might have called for reform in vain or, if it came, it would have taken a different form: "Watt and Stephenson were much more responsible for undermining the dominantly feudal legal system expounded by Blackstone, than Bentham and

[13] F. W. Maitland, *Constitutional History of England* (1908) p. 383.
[14] *op. cit.* p. 384.

Brougham."[15] The concentration of people in large cities presented new problems in sanitation, public health and housing. Working conditions in mines and factories produced calls for legal regulation. The construction of canals and railways was possible only because Parliament was prepared to grant to the companies powers to acquire land compulsorily where the owners refused to sell. Education came to be seen as a concern of the government in the public interest as well as for the benefit of individual citizens. In this century the State has further concerned itself with making provision for a wide range of financial payments to the elderly, the unemployed and others in need. From compulsory purchase the legislature has progressed to attempting generally to control the use to which land is put through various Town and Country Planning Acts. From detailed legislation restricting and regulating the activities of money-lenders and hire purchase companies the legislature has proceeded to make general provision for the protection of consumers when obtaining credit in one form or another.[16]

The consequences of these legislative developments from 1832 onwards largely form the subject matter of the succeeding chapters of this Part. Parliament has entrusted the carrying out of legislation to bodies of various kinds, whether elected local authorities or non-elected public corporations of widely differing composition and constitution. These bodies may be under duties to provide services or have powers to ensure compliance with statutory standards. Duties and powers, too, may be conferred on individual ministers. Legislation cast in wide, general terms and often dealing with highly technical subject matter requires more detailed implementation by rules and regulations, usually but not always made by ministers (Chapter 29). Disputes relating to the provision of services and the regulation of activities may be best dealt with by particular tribunals established outside the structure of the civil and criminal courts (Chapter 30). The increase in the powers of ministers and the proliferation of bodies with the legal ability to affect the rights and duties of citizens (and public bodies) has led to the recognition of the need for procedures to deal with grievances of various kinds relating to the working of the administration (Chapter 34). Where it is alleged that the administration has acted in such a way that it has exceeded its legal powers the appropriate remedy is recourse to the Courts (Chapters 31 and 32). Finally something must be said about the cases and circumstances in which the rights and duties of public officials and bodies under the general law may differ from those of the private citizen (Chapter 33).

[15] Mr Justice Frankfurter, "Foreword to a Discussion of Current Developments in Administrative Law," (1937–8) 47 Yale L.J. 515, quoted H. W. Arthurs, *op. cit.* p. 34.

[16] Consumer Credit Act 1974: a statute of 193 sections and 5 Schedules which nonetheless can be described as "merely a blueprint for the system of regulation and licensing which it establishes": Guest and Lloyd, *Current Law Statutes Annotated*.

CHAPTER 28

PUBLIC CORPORATIONS AND REGULATORY BODIES[1]

I. NATURE AND PURPOSE OF PUBLIC CORPORATIONS[2]

28–001 In addition to the central government departments under the direct control of Ministers of the Crown, and the local government authorities elected by the local electors, public affairs in Great Britain are administered by or with the aid of various public bodies.

Once Parliament had begun in the nineteenth century, in Maitland's words to legislate instead of trying to govern,[3] it became necessary to establish bodies to carry out the purposes of legislation themselves or to supervise and regulate other bodies. Particularly since the end of the Second World War, Parliament has established public bodies to provide commercial services which had formerly been provided by private companies and local authorities. The increasing acceptance of responsibility by the State for matters cultural, environmental and artistic is shown by the establishment of Councils and Commissions. Racial harmony and sexual equality are seen to be best fostered by establishing Commissions. Tourism, the interests of Consumers, the supervision of Gaming, the encouragement of Design are all appropriate matters for a board or committee. The more important of these bodies are created by statute or royal charter.[4] They all possess a considerable, although varying, degree of independence from ministerial and therefore parliamentary control. To the extent that they are all directly responsible neither to Parliament nor to local authorities they can be said to belong to the class of Quangos, an acronym which can be translated either to mean quasi autonomous non-governmental organisation or quasi autonomous national government organisations.[5] Whether such a classification, which can include at one extreme Boards of nationalised industries and at the other the National Association of Youth Clubs, is of great value may be doubted. In this

[1] *Government Enterprise* (ed. W. Friedmann and J. F. Garner, 1970); J. A. G. Griffith and H. Street, *Principles of Administrative Law* (5th ed., 1973), Chap. 7; W. A. Robson, *Nationalised Industry and Public Ownership* (2nd ed., 1962); Herbert Morrison, *Government and Parliament* (1954), Chap. 12; Sir Arthur Street, "Quasi-Government Bodies since 1918", in *British Government since 1918* (by Sir G. Campion and Others); *Public Enterprise* (ed. Robson); D. N. Chester, *The Nationalised Industries: A Statutory Analysis* (Institute of Public Administration, 2nd ed., 1951); *The Nationalised Industries* (Cmnd. 7131, 1978); T. Prosser, *Nationalised Industries and Public Control* (1986).

[2] The term was first used in the Report of the Crawford Committee on Broadcasting in 1926 (Cmnd. 2599).

[3] *ante*, Introduction. The Poor Law Commissioners had been followed by the Inclosure Commissioners (1844), the Railway Commission (1846) and the General Board of Health (1848). This century saw, *inter alia*, the Port of London Authority (1908) and the London Passenger Transport Board (1933).

[4] Other methods include, royal warrant, treasury minute, registration under the Companies Act or as a charitable trust.

[5] P. Holland, *Quango, Quango, Quango* (1978). *What's Wrong With Quangos?* (Outer Circle Policy Unit 1979). The vagueness of the term "quango" is obvious from the differences in the lists of such organisations in these two publications. See also *Report on Non Departmental Public Bodies* (1980, Cmnd. 7797).

chapter the main attention will be devoted to public authorities or public corporations[6] in a rather narrower sense, with particular emphasis on nationalised industries and bodies of constitutional significance, whether, strictly speaking, corporations or not.

It is difficult to generalise about these public corporations. A possible classification is as follows:

(i) Managerial—industrial or commercial

28–002 Executive bodies set up to manage nationalised industries or branches of commerce, *e.g.* National Coal Board: British Railways Board: British Steel Corporation: Central Electricity Generating Board, Electricity Council and area electricity boards: South of Scotland Electricity Board, North of Scotland Hydro-electricity Board: Post Office; Bank of England: United Kingdom Atomic Energy Authority.

After the Second World War nationalisation usually took the form of the compulsory acquisition of the assets of existing private undertakings and the vesting of them in a public corporation.[7] From the time of Disraeli's purchase of shares in the Suez Canal Company the government had been aware of the possibility of establishing public control of a private undertaking through ownership of its shares. A similar procedure ensured government control of the Cable and Wireless Co. In 1938 a small government holding was established and in 1946 all the shares of the company were transferred into the ownership of named civil servants.[8] In 1971 Rolls Royce was rescued from financial collapse by the purchase of its shares by a new company created by statute[9] and in 1975 legislation enabled the government to buy the shares of British Leyland when it, too, faced financial disaster.[10]

The Bank of England, established by statute and Royal Charter in 1694[11] was similarly brought into public control by the transfer of its stock to Treasury ownership.[12] As we saw in Chapter 11, the Bank of England Act 1998 has transferred to the Bank independent responsibility for the setting of interest rates in the context of the economic policies of Her Majesty's Government. In relation to its regulatory responsibilities the Bank was liable to be sued for misfeasance in public office.[13]

Among the public corporations providing commercial services the Post Office occupies a unique position. Historically, it originated as a department of State

[6] There is no consistency of usage in statutes: the Post Office, for example, was "a public authority": Post Office Act 1969. The British Telecommunications Act 1981, however, created "a public corporation."

[7] Coal Industry Nationalisation Act 1946: Transport Act 1947: Electricity Act 1947: Gas Act 1948, as amended by the Gas Act 1972: Airways Corporations Act 1949 (see now Civil Aviation Act 1980). A late example of this type of nationalisation is provided by the Aircraft and Shipbuilding Industries Act 1977 (British Aerospace and British Shipbuilders).

[8] Cable and Wireless Act 1946. Similarly in 1914 the government acquired a majority shareholding in Anglo Persian Oil Co.

[9] Rolls-Royce (Purchase) Act 1971.

[10] British Leyland Act 1975.

[11] The Bank obtained the exclusive right of issuing bank notes in England and Wales by the Bank Charter Act 1844, s.11. Existing rights were preserved. The last private bank with the right to issue notes was Messrs. Fox, Fowler & Co of Wellington, Somerset, who merged with Lloyds in 1921.

[12] Bank of England Act 1946; a new Charter was granted: Cmd 6752.

[13] *Three Rivers District Council v. Governor and Company of the Bank of England*, *The Times*, March 23, 2001, HL; *post* para. 32–021. Under the Bank of England Act 1998, the Bank no longer has regulatory responsibilities.

providing an essential service to the Crown. The opening of its services to the public was a device to raise money. Blackstone discussed "the post office or duty for the carriage of letters" in that part of the Commentaries devoted to the King's Revenue. "There cannot," he said, "be devised a more eligible method . . . of raising money upon the subject [than by a duty on letters]; for therein both the government and the people find a mutual benefit. The government acquires a large revenue: and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed."[14] In the nineteenth century telegraphs and telephones were added to its monopoly. In 1967 a government White Paper recommended turning the Post Office into a public corporation in order that it could be run on commercial lines, bringing to its business a structure and method drawing on the best modern practice.[15] The legislation which followed that report preserved for the Post Office its remarkable immunity from actions in tort which had been explicable when it was part of the Crown in earlier centuries and had even survived the passing of the Crown Proceedings Act 1947.[16] Nor has it ever been suggested that the new status of the Post Office affects the long established rule that there is no contractual relationship between the Post Office and the sender of a letter or parcel.[17] As will be seen below the Post Office not merely has the longest history of modern commercial public corporations but has also been involved in the latest stage in the history of such bodies, privatisation.

(ii) **Managerial—social services**

28–003 Executive bodies set up to manage social services, *e.g.* development corporations for the various new towns,[18] the New Towns Commission[19] and the Urban Development Corporations[20]; National Health Service bodies[21]; British Broadcasting Corporation; Water Authorities.

The British Broadcasting Corporation is unusual in having been created by royal charter and in deriving its income from a licence fee levied on the holders of (formerly) wireless and (now) television sets. Its first charter was granted in 1926: the current charter was granted in 1996.[22] Because of the way the BBC has operated since its foundation it is thought of as providing a social service but broadcasting can be regarded as a commercial undertaking, which is the case with the services falling under the control of the Independent Television Commission.[23]

The Water Authorities similarly tend to be thought of as providing a public service although they charge for their services. The Water Act 1973 removed

[14] *Bl. Comm.* i. 323. "A branch of the revenue": *Whitfield v. Le Despencer* (1778) 2 Cowp. 754, 764 *per* Lord Mansfield.

[15] *Reorganisation of the Post Office* (Cmnd. 3233, 1967).

[16] Crown Proceedings Act 1947, s.9: Post Office Act 1969, s.29: *American Express v. British Airways Board* [1983] 1 W.L.R. 701.

[17] *Triefus Co Ltd v. Post Office* [1957] 2 Q.B. 352, CA. See [1972] P.L. 97. See too its statutory privileges, *e.g.* the Telegraph Act 1878: *Post Office v. Mears Construction* [1979] 2 All E.R. 814.

[18] New Towns Act 1946: New Towns Act 1965.

[19] New Towns Act 1981: New Towns and Urban Development Corporations Act 1985.

[20] Local Government, Planning and Land Act 1980.

[21] National Health Service Act 1977; National Health Service and Community Care Act 1990. See C. Webster, *The National Health Service—A Political History* (Oxford, 1998) and G. Rivett, *From Cradle to Grave—Fifty Years of the NHS* (King's Fund, 1998).

[22] Cm 3248.

[23] See T. Prosser, *Law and the Regulators* (Oxford, 1997) Chap. 9.

responsibility for the supply of water from local authorities and statutory undertakers and transferred it to the new regional authorities which were also to be responsible for water resources generally—conservation, sewage disposal, pollution and drainage.[24]

(iii) **Regulatory and advisory**

28–004 (a) Bodies set up to regulate private enterprise in certain fields, *e.g.* the Civil Aviation Authority[25]; the Director General of Fair Trading, and the Health and Safety at Work Commission and Executive.

The office of Director General of Fair Trading was created by the Fair Trading Act 1973. The Consumer Credit Act 1974 confers on the Director General a wide range of duties and powers which exemplify strikingly the devices to which Parliament has recourse to ensure the effective operation of much modern legislation. It is the duty of the Director General:

(a) to administer the licensing system set up by the Consumer Credit Act;

(b) to exercise the adjudicating functions conferred on him by the Act in relation to the issue, renewal, variation, suspension and revocation of licences, and other matters,

(c) generally to superintend the working and enforcement of the Act, and regulations made under it; and

(d) where necessary or expedient, himself to take steps to enforce the Act, and regulations so made.

The Director is also required to keep under review and from time to time advise the Secretary of State about—

(a) social and commercial developments in the United Kingdom and elsewhere relating to the provision of credit or bailment or (in Scotland) hiring of goods to individuals, and related activities; and

(b) the working and enforcement of this Act and orders and regulations made under it (section 1).

28–005 In addition, he is to arrange for the dissemination of such information and advice as it may appear to him expedient to give to the public about the operation of the Act, the credit facilities available and other matters within the scope of his functions (section 4). The Director is also a tribunal, for the purposes of the Tribunal and Inquiries Act 1992, with regard to the exercise of his licensing functions (section 3).

Possibly one of the most important and certainly most controversial regulatory authorities to be established is the Financial Services Authority, created by section 1 of the Financial Services and Markets Act 2000. It assumes responsibility for the work of nine self regulatory bodies recognised by the Secretary of State under the terms of the Financial Services Act 1986.

Serious concerns have been voiced about the compatibility of the powers of the Authority with the terms of the Convention on Human Rights. In substance,

[24] H. M. Purdue, "The Implications of the Constitution and Functions of Regional Water Authorities" [1979] P.L. 119. For the current legislation, see below at para. 28–013.
[25] Civil Aviation Act 1982. And see the Transport Act 2000.

for example, some of its powers are criminal but its procedures do not necessarily comply with those required of criminal procedures by the Convention. It is empowered to fine anyone engaging in market abuse (section 123) but the definition of market abuse in section 118 is remarkably vague, even when supplemented by any Code issued under section 119. In addition to its vagueness it applies to anyone, not merely those who, in other circumstances, fall within the regulatory power of the Authority. The general duties of the Authority are defined by section 2 of the Act in terms which it would be impossible to paraphrase:

> "In discharging its general functions the Authority must, so far as is reasonably possible, act in a way—
>
> (a) which is compatible with the regulatory objectives; and
> (b) which the Authority considers most appropriate for the purpose of meeting those objectives.
>
> (2) The regulatory objectives are—
>
> (a) market confidence;
> (b) public awareness;
> (c) the protection of consumers; and
> (d) the reduction of financial crime.
>
> (3) In discharging its general functions the Authority must have regard to—
>
> (a) the need to use its resources in the most efficient and economic way;
> (b) the responsibilities of those who manage the affairs of authorised persons;
> (c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, which are expected to result from the imposition of that burden or restriction;
> (d) the desirability of facilitating innovation in connection with regulated activities;
> (e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom;
> (f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions;
> (g) the desirability of facilitating competition between those who are subject to any form of regulation by the Authority."

28–006 The Health and Safety Commission and the Health and Safety Executive are bodies corporate established by the Health and Safety at Work etc. Act 1974 to further the purposes of the Act (sections 10 and 11). In addition to very general statements of their responsibilities for advising, monitoring and overseeing various sections deal with specific matters: for example, section 15 provides for the approval by the Commission of Codes of Practice issued under the Act. Section 18 imposes on the Executive the duty of making adequate arrangements for the enforcement of the provisions of the Act, except to the extent that other authorities have specific responsibilities.

(b) Bodies set up to advise Ministers and other authorities with regard to the exercise of their powers and responsibilities, *e.g.* the Police Council,[6] the Nature

[6] Police Act 1964, s.45(4).

Conservancy Council,[27] renamed English Nature by the Countryside and Rights of Way Act 2000, s.73), the various advisory bodies established under the Environment Act 1995. The Audit Commission, established by the Local Government Finance Act 1982[28] is an advisory body in so far as it is required to make recommendations for improving economy, efficiency and effectiveness in the provision of local government services and to report on the impact of such services of statutory provisions and directions given by ministers (sections 26 and 27). As the body responsible for organising the auditing of local government accounts it can perhaps be regarded as a regulatory or managerial body (section 12). The Human Fertilisation and Embryology Act 1990 established the Human Fertilisation and Embryology Authority which, in the areas indicated by its name, must keep developments under review and advise the Secretary of State (section 8). It also has the responsibility of licensing research activities through a number of committees (section 9).

(c) Miscellaneous Bodies. Two important bodies with powers of advising, monitoring and enforcing legislation are the Commission for Racial Equality and the Equal Opportunities Commission, both of which were established by statute to operate in areas formerly falling outside the direct concern of the law.[29] The Commonwealth Development Corporation was established "to assist overseas countries . . . in the development of their economies."[30] The National Biological Standards Board is a body corporate which is responsible for the establishment of standards for, the provision of standard preparations of, and the testing of biological substances.[31] The Learning and Skills Council for England[32] was established to secure the provision of proper facilities for education (other than higher) for persons between 16 and 19. (It also has responsibilities for those over 19). The Crown Agents were constituted as a body corporate by the Crown Agents Act 1979 and their full title (Crown Agents for Overseas Governments and Administrations) explains their role: to act as agents on behalf of governments and public authorities specified in Schedule 3 of the Act.[33]

II. LEGAL POSITION OF PUBLIC CORPORATIONS[34]

28–007 The main constitutional problems relate to the legal status of those public corporations that manage some nationalised industry or branch of commerce or public service, especially their liability in contract and tort, and the question of parliamentary supervision. The latter is discussed in Part IV below.

[27] Wildlife and Countryside Act 1981, s.24.

[28] See now the Audit Commission Act 1998, as amended by the Local Government Act 2000, s.90.

[29] Race Relations Act 1976; Race Relations (Amendment) Act 2000; Sex Discrimination Act 1975.

[30] Commonwealth Development Corporation Act 1978; Commonwealth Development Corporation Act 1996.

[31] Biological Standards Act 1975.

[32] Learning and Skills Act 2000.

[33] For the Agents' subsequent history, see *post*, Part III and the Crown Agents Act 1995.

[34] Glanville Williams, *Crown Proceedings* (1948), pp. 4–8, 21–28, 30–37, 85; J. A. G. Griffith, "Public Corporations as Crown Servants" 9 U.T.L.J. 169; H. Street, *Government Liability* (1953), pp. 28–36; W. Friedmann, "The New Public Corporations and the Law" (1947) 10 M.L.R. 233–254, 377–395; W. A. Robson, "The Public Corporations in Britain Today" (1950) 63 Harv. Law Rev. 1321–1348.

Appointment and powers

28–008 To ascertain the legal position of any public corporation it is necessary first of all to look at the particular Act of Parliament that created it, for no two of them are alike. It is generally provided that they are bodies corporate, with perpetual succession and a common seal and power to hold land. The chairmen and other members of the boards are appointed and may be removed by the competent Minister or by the Crown. Their members do not have to be representative of any particular interests. Their salaries are generally fixed by the Minister with the approval of the Treasury. The large number of appointments to be made, subject to no effective form of control, has placed in the hands of ministers a power of patronage undreamed of even in the eighteenth century. As there are no shareholders to exercise any control over the board, the Acts provide that the Minister may set up advisory committees or councils to advise him.

The powers of a public corporation are set out in the constituent Act. They are subject to judicial determination by the doctrine of *ultra vires* (*Smith v. London Transport Executive*[35]), but their powers in some cases are very wide. There is generally no legal means by which these bodies may be compelled by private citizens to exercise their functions. The Minister might be able to apply for mandamus or a declaration in some cases, unless this is expressly excluded by statute. The Transport Act 1962, s.3(1), provided that it should be the "duty" of the Railways Board to provide railway services, and in connection therewith such other services and facilities as might appear to the Board to be expedient; but section 3(4) went on to say that no such duty or liability should be enforceable by judicial proceedings. A similar provision was contained in the Post Office Act 1969, s.9(4).[36] Exceptionally, the Transport Act 1968, s.106(1), allowed any person to apply to the court for an order requiring the Waterways Board to maintain commercial and cruising waterways for public use. Usually nationalisation statutes provided that the Minister may give directions "of a general character" in the public interest.[37] In some cases he has power to give specific directions, *e.g.* to the former National Enterprise Board.[38] In the cases of the BBC and the IBA the Home Secretary has powers to give directions requiring that an announcement be broadcast, or requiring that those bodies refrain from broadcasting particular items.[39] This issue will be considered below in connection with privatisation. A Minister cannot give a direction which contradicts the provisions of the Act of Parliament under which he is purporting to act.[39a]

Liability to judicial proceedings

28–009 The question whether a public corporation is a servant or agent of the Crown is of considerable legal importance. If it is a servant or agent of the Crown, civil proceedings would be governed by the Crown Proceedings Act 1947 (unless it was set up by a later statute expressly or impliedly inconsistent with the Act), and the action (if available) would have to be brought by or against the authorised

[35] [1951] A.C. 555, HL, and see *post*, Chap. 31.

[36] See *Harold Stephen & Co v. The Post Office* [1977] 1 W.L.R. 1172, CA.

[37] *e.g.* Coal Industry Nationalisation Act 1946, s.3(1).

[38] Industry Act 1975, s.3(1); *Booth & Co. v. N.E.B.* [1978] 3 All E.R. 624.

[39] Broadcasting Act 1981, s.29. See *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C. 696, HL, *ante* para. 22–011 and para. 25–035.

[39a] *Laker Airways Ltd v. Department of Trade* [1977] Q.B. 643, CA.

department or the Attorney-General. The corporation would also have the advantage of the Crown privileges relating to injunction, execution and interrogatories,[40] and would not be bound by Acts of Parliament (including rates and taxes) unless expressly or by necessary implication.[41] And this might well affect the position of individual members of the board and its employees.

If the corporation is not a servant or agent of the Crown, the Crown Proceedings Act does not apply: it would be liable in the ordinary way in contract and tort; its staff would be employees of the corporation and not Crown servants; and proceedings by or against it (in so far as not expressly excluded or limited by the statute) would be in the name of the corporation (*Mersey Docks and Harbour Board v. Gibbs*[42]).

Where the statute is not explicit

28–010 Most of the earlier Acts creating public corporations were not explicit on the question whether the corporation was a servant or agent of the Crown. In so far as such Acts have not been replaced by later legislation, if the matter should come before the court it would be a question of interpretation.

In *Tamlin v. Hannaford*[43] the Court of Appeal held that the British Transport Commission[44] was not a servant or agent of the Crown. The question in issue was whether a house which had been leased from the Great Western Railway was withdrawn from the protection of the Rent Restriction Acts by reason of its being vested in the British Transport Commission under the Transport Act 1947.[45] In considering whether any subordinate body is entitled to the Crown privilege of not being bound by a statute unless Parliament shows an intention that it should be bound, said Denning L.J. in delivering the judgment of the Court, the question is not so much whether it is an "emanation of the Crown"[46] but whether it is properly to be regarded as a servant or agent of the Crown.[47] This depended on the true construction of the Transport Act 1947, especially the powers of the Minister in relation to the Commission.[48] When Parliament intends that a new corporation should act on behalf of the Crown, it usually says so expressly.[49] In the absence of express provision the proper inference, in the case (at any rate) of a commercial corporation, is that it acts on its own behalf.

It is probable that none of the industrial or commercial corporations created after the Second World War is a servant or agent of the Crown. None of them is in the list of "authorised departments" issued by the Treasury under the Crown Proceedings Act 1947, s.17, although this is not conclusive as proceedings may

[40] *post*, Chap. 33.
[41] *ante*, para. 15–019.
[42] (1866) L.R. 1 HL 93; *Gallagher v. Post Office* [1970] 1 All E.R. 712; *Westwood v. Post Office*, *The Times*, November 24, 1972, CA.
[43] [1951] 1 K.B. 18. And see *British Broadcasting Corporation v. Johns* [1965] Ch. 32; *Mellinger v. New Brunswick Development Corporation* [1971] 1 W.L.R. 604; *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529.
[44] Predecessor of the British Railways Board.
[45] *cf.* Crown Lessees (Protection of Sub-Tenants) Act 1952, which extended to sub-tenants of Crown lands the benefit of the Rent Restriction Acts.
[46] *cf. Gilbert v. Trinity House Corporation* (1886) 17 Q.B.D. 795.
[47] *International Ry v. Niagara Parks Commission* [1941] A.C. 328, PC.
[48] See *Central Control Board (Liquor Traffic) v. Cannon Brewery Co* [1918] 2 Ch. 123; [1919] A.C. 757.
[49] *e.g.* Central Land Board (now dissolved); Town and Country Planning Act 1947; *Glasgow Corporation v. Central Land Board*, 1956 S.L.T. 41. Also the former National Assistance Board and Land Commission.

be taken under that Act against the Attorney-General. Many proceedings have been brought by and against industrial corporations in their own names without the question being raised in court.[50]

Where the statute is explicit

28–011 The National Health Service Act 1946, s.13, expressly stated that a regional hospital board, notwithstanding that it exercised functions on behalf of the Minister, should be entitled to enforce rights and be liable for liabilities (including liability in tort) as if it were acting as a principal: proceedings were to be brought by or against the board in its own name, and it was not entitled to the privileges of the Crown in respect of discovery or production of documents. Similar principles applied to a hospital management committee, although it exercised its functions on behalf of the regional hospital board.[51] On the other hand, the Crown might claim privilege in respect of its documents: and it was held in *Nottingham Area No. 1 Hospital Management Committee v. Owen*[52] that a hospital vested in the Minister of Health under the Act of 1946 was "premises occupied for the public service of the Crown" under the Public Health Act 1936, and that the justices had therefore no jurisdiction to make an order under that Act to abate a nuisance constituted by a smoking chimney.

Later Acts constituting public corporations have been explicit on the point, at least in cases where there might be doubt, as in the case of corporations that own or occupy land or have taken over functions formerly exercised by a Minister. Thus the Atomic Energy Authority Act 1954 provided that land occupied by the Authority was deemed for rating purposes to be occupied by the Crown for public purposes: otherwise the Authority was not to enjoy Crown privileges. The Electricity Act 1957, s.38, stated: "It is hereby declared for the avoidance of doubt that neither the Electricity Council nor the Generating Board nor any of the Area Boards are to be treated as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown, and no property of the Council or any of those Boards is to be regarded as property of, or held on behalf of, the Crown." Similar provision was made by the New Towns Act 1965, s.35(3), with regard to the Commission for the New Towns.[53]

The Crown Agents Act 1979, s.1(5) provides that the Crown Agents, "despite their name" are not to be regarded as servants of the Crown nor as agents except to the extent that they so act by virtue of any provision in the Act authorising them to do so.

Conversely, the Postal Services Act 2000, s.1 and the Utilities Act 2000, s.1, both provide explicitly that the functions of the Postal Services Commission and the Gas and Electricity Markets Authority are to be performed on behalf of the Crown.

Post office

28–012 The purpose of the Post Office Act 1969 was that the Post Office should cease to be a government department and should become an independent corporation, and the Act was, of course, quite explicit on this point. The functions and powers formerly exercised by the Postmaster-General as a Minister of the Crown were

[50] e.g. *National Coal Board v. Galley* [1958] 1 W.L.R. 16.

[51] *Bullard v. Croydon Hospital Group Management Committee* [1953] 1 Q.B. 511.

[52] [1958] 1 Q.B. 50, DC. And see *Pfizer v. Ministry of Health* [1965] A.C. 512.

[53] New Towns Act 1981, s.35

transferred to the new corporation. The postal service as we saw above is a public service derived from a prerogative monopoly of the Crown.[54] As a public corporation it retained immunity from actions in tort which even other government departments lost under the Crown Proceedings Act 1947.[55] Section 29 of the Post Office Act provided that, subject to section 30, no proceedings in tort lie against the Post Office for any loss or damage arising out of the postal or telecommunication service. The Post Office was exempt, for example, from liability for loss of or damage to unregistered postal packets, and for defamation published by telegram, telephone or postmark.[56] The section further provided that (contrary to common law) no individual—whether officer, servant, agent or independent contractor of the Post Office—was subject, except at the suit of the Post Office, to any civil liability for any loss or damage from which the Post Office is exempt. The question whether, despite this wide measure of immunity, the Post Office might, in some circumstances, be liable as a bailee was raised but not answered in *Stephen & Co v. The Post Office*.[57] Section 30 of the Post Office Act provided that the Post Office was liable for the loss of, or damage to, a *registered inland*[58] *postal packet* due to the wrongful act, neglect or default of an officer, servant or agent of the Post Office while dealing with the packet; proceedings had to be brought within 12 months instead of the usual six years.

As we shall see in Part III the Post Office has been turned into a company by the Postal Services Act 2000. The substance of sections 29 and 30 are preserved by sections 90 and 91 of the new Act but they are now described as attaching to the "universal service provider", that is any organisation licensed under the Act to provide a universal post service as defined in section 4(1). The provisions relating to registered inland packets are similarly preserved (sections 91 and 92) but the Secretary of State, after consulting the Postal Services Commission and the Consumer Council for Postal Services may amend the terms of those sections (section 93).

III. Privatisation

28–013 The Conservative Government which was elected in 1979 began a programme of divesting itself of control of nationalised industries by turning them into companies in which the shares are owned by member of the public and in some cases selling to the public shares which the government owned in a company. The objects and motives of the programme were varied and probably conflicting and

[54] In *Malins v. Post Office* [1975] I.C.R. 60, Thesiger J. held that, at least in the case of employees engaged prior to the 1969 Act, the Post Office had inherited the right of the Crown to dismiss at will or upon reasonable notice, whatever the terms of the servant's contract.
[55] *post*, Chap. 33.
[56] *Boakes v. Postmaster-General, The Times*, October 27, 1962, CA: postmark, "Remember that Road Accidents are Caused by People Like You."
[57] [1977] 1 W.L.R. 1172, CA. (Mandatory injunction to order Post Office to deliver up postal packets in its possession, detained as a result of industrial action, refused.)
[58] *i.e.* posted in the United Kingdom, the Isle of Man or the Channel Islands for delivery therein.

inconsistent.[59] Little thought was given to the long term consequences of establishing systems of control by regulators with statutory powers to fix prices and licence companies. The concept of privatisation has been embraced world-wide, while remaining in fashion with the current Labour government. The European Union committed itself to competition in fields previously in the hands of state monopolies, in particular telecommunications, transport, postal services and energy at the Lisbon Summit in 2000. (By the time of the Stockholm meeting in 2001 it had become clear that France was not, in fact, prepared to open its public services to foreign competition.)

The first method of privatisation is exemplified by the case of British Telecommunications. The British Telecommunications Act 1981 established a public corporation whose duty was to provide throughout the British Islands such telephone services as satisfy all reasonable demands for them except to the extent that provision was, in the corporation's opinion, impracticable or not reasonably practicable (section 3). The Telecommunications Act 1984 abolished British Telecommunications' monopoly in the field of telecommunications and provided that on a date nominated by the Secretary of State all the assets of the corporation should vest in a company nominated by the minister (section 60). Subsequently shares in the company were offered for public sale. Similar arrangements were made in relation to British Airways by the Civil Aviation Act 1980, in relation to British Aerospace by the British Aerospace Act 1980 and in relation to British Gas by the Gas Act 1986. Electricity was similarly privatised by the Electricity Act 1989, Water by the Water Act 1989,[60] the railway system by the Railways Act 1993, as amended by the Transport Act 2000 and the coal industry by the Coal Industry Act 1994.[61]

28–014 The political controversy involved in any suggestion of privatising the Post Office is avoided by the Postal Services Act 2000 which, as will be seen, subjects the Post Office to the legal regime common to privatised industries. The Post Office becomes, by section 62, a company subject to the Companies Act 1985 but the shares will be held by the Secretary of State.

The method of privatisation by disposing of shares held by the government in an existing company is illustrated by the case of Cable and Wireless Ltd.[62]

It is not necessary, of course, to sell all the shares in a company. In the case of the National Air Traffic Services, for instance, which had been formed as a company by the Conservative Government in 1996, the Transport Act 2000, s.41 provides for the sale of 51 per cent of the shares and the retention by the government of 49 per cent plus a controlling "golden share".[63] This arrangement,

[59] The motives behind privatisation are largely responsible for the development of Next Step Agencies and the process of contracting out of services: Local Government Act 1988 (but see now Local Government Act 1999) and the Deregulation and Contracting Out Act 1994. See P. P. Craig, *Administrative Law* (4th ed., Sweet & Maxwell, 1999) Chap. 5.

[60] Followed by a consolidating statute, the Water Industry Act 1991, and more recently by the Water Industry Act 1999.

[61] Other examples include the Ordnance Factories and Military Services Act 1984; Airports Act 1986; Ports Act 1991. The Crown Agents Act 1995 seems to be a typical privatisation statute but the government gave assurances during the passage of the legislation that the shares would not be offered for sale on the open market but would be transferred to an independent foundation, established as a company by guarantee.

[62] British Telecommunications Act 1981, s.79. Other examples are the sale of Amersham International and British Nuclear Fuels (Atomic Energy (Miscellaneous Provisions) Act 1981 and of Rolls Royce, originally bought in 1971, Jaguar Motors and British Petroleum.

[63] C. Graham and T. Prosser, "Golden Shares: Industrial Policy by Stealth?" [1988] P.L. 413.

while not amounting to privatisation, enables the government to draw on private finance through a relationship called PPP, Public-private Partnership.

A common feature of the scheme for privatising the basic utilities—such as gas or water—is the creation for each industry of a statutory regulator[64] known by an appropriate ugly acronym, for example OFTEL or OFWAT. Each regulator is empowered to license suppliers in the relevant market and to regulate the prices which may be charged for the product.

The Telecommunications Act 1984 established the precedent of licensing and regulation by a Director General in charge of an office—in that case OFTEL. The Utilities Act 2000 in providing a unified regulatory regime for gas and electricity departed from that precedent by replacing the two Directors with a body corporate, the Gas and Electricity Markets Authority (GEMA). Similarly the regulatory body in the case of postal services is a body corporate—the Postal Services Commission (section 1). In both cases the statutes provide that the relevant bodies exercise their functions on behalf of the Crown.

28–015 The regulator has the power to issue licences to applicants in each area and to attach conditions to them. He is also, very importantly, entitled to fix the prices suppliers may charge within limits set by a formula. In exercising these powers regulators can be faced with conflicting considerations. The Utilities Act 2000 indicates clearly that in exercising their powers the principal objective of the Secretary of State and the authority is to protect the interests of the consumer[65] and to promote effective competition (sections 9 and 13). These considerations, while admirable, may nonetheless point in different ways, whether in relation to fixing a price or attaching conditions to a licence. The Postal Services Commission must exercise its powers in the manner it considers best calculated to ensure the provision of a universal postal service (section 3). The requirements of a universal postal service are defined in section 4.

Although the regulators are clearly intended to act independently in the exercise of their statutory powers, ministers are entitled to issue directions to them in specific circumstances. Thus both the Telecommunications Act (section 94) and the Postal Services Act (section 101) authorise the Secretary of State to give to the relevant bodies such directions as appear to him to be requisite in the interests of national security or relations with a foreign government. He may also give a direction requiring such persons "to do, or not to do, a particular thing specified in the direction". Any direction given under the section will be laid before each House of Parliament unless the Secretary of State is of opinion that disclosure of the direction is against the interests of national security or relations with a foreign government or the commercial interests of any person. On those grounds the Secretary of State may also forbid any person to reveal that he has received a direction.[66]

The Railways Act 1993 entitles the Secretary of State to give directions in the case of "hostilities, severe international tension or great national emergency (section 118). More mundanely he can also give directions to require railway

[64] T. Prosser, *Law and Regulators* (Oxford, 1997); "Regulation, Markets and Legitimacy", Chap. 5 of *The Changing Constitution* (eds J. Jowell and D. Oliver) (4th ed., Oxford, 2000); C. Graham *Regulating Public Utilities* (art. 2000); J. Froud, R. Boden, A. Ogus and P. Stubbs, *Controlling the Regulators* (Macmillan 1998); A. McHarg, *Accountability and the Public/Private Distinction* (Oxford, 2000); P. P. Craig, *op. cit.* Chap. 11.

[65] The need for provision to secure protection for the interests of the consumer was recognised by the Citizens Charter and found early expression in the Competition and Service (Utilities) Act 1992.

[66] Similarly the Water Industry Act 1991, s.208 which also includes "mitigating the effects of any civil emergency".

operators to take steps to ensure that the users of railway services are protected from violence (section 119).

IV. Regulating the Regulators

28–016 In the era from the end of the Second World War to the late 1970s the basic industries and utilities were, as we have seen, nationalised and subject to a much greater, general control by ministers than is the case now under typical privatisation statutes. In the earlier era the question was seen as one of accountability of ministers to Parliament for nationalised industries. It was not a question that was satisfactorily answered.[67] Ministers, for instance, could be asked questions about the exercise of their statutory powers to give directions to the board of a nationalised industry.[68] But experience showed that in practice they often exerted unofficial pressure in the form of "requests"[69] which could not form the subject matter of questions in the House. Ministers often refused to answer questions on the ground that they related to matters of day to day administration of the industry.

From 1956 to 1979 there was a Select Committee on Nationalised Industries which had power: to examine the Reports and Accounts of the nationalised industries established by Statute whose controlling Boards are appointed by Ministers of the Crown and whose annual receipts are not wholly or mainly derived from moneys provided by Parliament or advanced from the Exchequer". This Committee was very active and issued a number of reports, several of which were critical of the role Ministers played in the running of nationalised industries.[70] The reform of the Select Committee system in 1979 resulted in the abolition of this committee,[71] only a few years before the abolition of the nationalised industries themselves. In the case of privatised industries minister have, as we have seen, only limited powers to give directions. The regulators are appointed for a fixed term and only removable for incapacity or misbehaviour. But it cannot be pretended that there is no political concern in the functioning of the industries they regulate—whether from the disconnection of water supplies of customers who cannot pay their bills or the safety of passengers travelling on the railway system.

28–017 A suggestion that a Select Committee be established with responsibility for privatised utilities and industries (on the analogy of the Select Committee on Nationalised Industries) was rejected by the Trade and Industry Committee.[72]

[67] See Sir Ivor Jennings, *Parliament* (2nd ed., 1957), Chap. 10; Herbert Morrison, *Government and Parliament* (1954), Chap. 12; W. A. Robson, *Nationalised Industry and Public Ownership*, Chaps 7, 8–10; *Report from the Select Committee on Nationalised Industries* (1952) H.C. No. 332, I, pp. 130–133; A. H. Hanson, *Parliament and Public Ownership* (Hansard Society, 1961). See too works cited *ante*, para. 28–001 n.1.

[68] *ante*, para. 12–024.

[69] D. Coombs, "The Scrutiny of Ministers' Powers by the Select Committee on Nationalised Industries", [1965] P.L. 9; H. W. R. Wade, "Anglo-American Administrative Law: Some Reflections" (1965) 81 L.Q.R. 357, 361–363.

[70] See, e.g. Second Report from the Select Committee on Nationalised Industries, *The British Steel Corporation*, H.C. 26 (1977–78) and Fourth Report from the Select Committee, *British Waterways Board*, H.C. 239 (1977–78).

[71] For the present system, see *ante*, para. 11–016 and para. 12–029.

[72] HCSO (1996–97) paras 15–16.

The Public Accounts Committee has undertaken a general survey of the regulatory framework of the electricity, gas, telecommunications and water industries, and specific investigations into individual regulators.[73] Individual industries fall within the areas of responsibilities of particular select committees but there may be issues which cross departmental boundaries.

In an era of judicial activism recourse to the courts[74] might be thought to offer a means of challenging decisions of the regulators or, where relevant, ministers. Actions for breach of statutory duty cannot be regarded as a realistic possibility in the light of abstract language of the relevant provisions and the complete absence of any suggestion that a duty is owed to any particular class of litigant.[75] Judicial review in theory must be available where regulators can be argued to have exercised their powers irrationally or unlawfully.[76] Finally there is always the possibility of invoking the Human Rights Act 1998.

[73] See *Graham op. cit.* p. 76.

[74] *post*, Chap. 31.

[75] *post*, para. 32–021.

[76] *Mercury Communications Ltd v. Director General of Telecommunications* [1996] 1 W.L.R. 48, HL merely unhelpfully decided that a dispute about the terms of a licence did not have to be made the subject of an application for judicial review.