CHAPTER 29

DELEGATED LEGISLATION[1]

29–001 In this chapter it is proposed to discuss delegated legislation in the sense in which that phrase is commonly used to refer to regulations and rules made under powers delegated by Parliament to Ministers, local authorities and other bodies. The logical distinction between Acts of Parliament (primary legislation) and delegated (or secondary) legislation is not always as clear as would be expected. The distinction has been blurred by the Human Rights Act 1998 which includes in the definition of primary legislation Measures (see below), and a range of Orders in Council made under statute (section 21(1)). The term "Acts" is not legislatively defined and it is not made clear whether the Acts made by the Scottish Parliament and Northern Ireland Assembly are a species of primary or delegated legislation.[2] Legislation by the Queen and Commons under the Parliament Acts 1911 and 1949 may arguably be regarded as a special kind of delegated legislation.[3]

I. NATURE AND PURPOSE OF DELEGATED LEGISLATION

29–002 The delegation of law-making power by Parliament to other persons or bodies is no new practice, although it has greatly increased in frequency and importance in the nineteenth and twentieth centuries, and will continue to increase in this century.[4] In the period between the Wars the growth of delegated legislative powers was a matter of controversy among writers on the newly emerging subject of administrative law. There has been no diminution in resort to such powers since 1945 but widespread use of them has continues to be accepted,

[1] *Report of the Committee on Ministers' Powers* ("*Donoughmore Committee*") (1932) Cmd. 4060; Sir Carlton Allen, *Law and Orders* (3rd ed., 1965); Wade and Forsyth, *Administrative Law* (8th ed., 2000), (Sir William Wade and Christopher Forsyth eds.), Chap. 23; J. A. G. Griffith, "The Constitutional Significance of Delegated Legislation in England" (1950) 48 *Michigan Law Review* 1079; G. Ganz, "Delegated Legislation: A Necessary Evil or a Constitutional Outrage?", Chap. 3 in *The Constitution After Scott* (Adam Tomkins ed., 1998).

[2] See Noreen Burrows, *Devolution* (2000), pp. 56–68. The Human Rights Act 1998 defines subordinate legislation for the purpose of that Act as including Acts from the Scottish Parliament and Northern Ireland Assembly (s.21). This was necessary to enable judicial control to be exercised over such legislation in the light of the prohibition in the Scotland Act and the Northern Ireland Act on either body legislating contrary to the E.C.H.R.

[3] *ante*, para. 4–035.

[4] About 1,500 general statutory instruments are laid before Parliament each year. There has been a growth not only in terms of the number of general statutory instruments, but also in terms of their length. See evidence submitted by the Clerk of the House to the Procedure Committee H.C. 48 (1999–2000), pp. 26–27.

despite recent events such as those commented on in the Scott Report.[5] Indeed new types of delegated legislation have been devised.[6]

The judicial control of delegated legislation, exercised mainly under the doctrine of *ultra vires*, is discussed later in Chapter 31.

The executive has no inherent power, as it has in France, to issue ordinances or decrees filling out the details of statutes. The authority of an Act of Parliament is necessary: *Case of Proclamations*[7] When the government commands a majority in Parliament it can procure from Parliament any powers it thinks it needs.

We consider in this section the nature and purpose of delegated legislation, and in the next section the parliamentary safeguards that have been provided.

Forms of delegated legislation

29–003 Delegated legislation takes various forms and assumes a variety of names. The primary classification is according to the person or body which has the legislative power, of which for present purposes the chief are:

(i) *The Queen in Council*—power to issue Statutory Orders in Council, *e.g.* under the Emergency Powers Act 1920. This kind of delegated legislation has the most dignified and "national" character.

(ii) *Ministers and other heads of government departments*—power to issue departmental or ministerial regulations, rules, orders, etc. These are extremely numerous, and legislation made under them is much greater in bulk year by year than Acts of Parliament.

(iii) *Local Authorities*—power to make byelaws for their areas under the Local Government Act 1972 s.235(1), and other Acts.

(iv) *Public bodies*—power conferred by their constituent Acts to make byelaws and other regulations for the purposes for which they were created.[8]

(v) *Rule Committees*—power to make rules for procedure in court, *e.g.* Civil Procedure Rule Committee (Civil Procedure Act 1997 s.1)[9]; Crown Court Rule Committee (Supreme Court Act 1981, s.86); and judges or committees with power to make rules of procedure relating to family proceedings, bankruptcy, etc.

(vi) *Measures*—under the Church of England (Assembly) Powers Act 1919 delegated legislation relating to the Church of England is framed by the General Synod of the Church and presented for Royal Assent after

[5] *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* H.C. 115 (1995–96).

[6] See *post* paras 29–030 *et seq.* In addition from 1974 to 2000 the government of Northern Ireland was, exceptionally, conducted through the form of delegated legislation under the Northern Ireland Act 1974; although such legislation was subject to more parliamentary control than most delegated legislation, it was still of a minimal degree. For powers devolved to the National Assembly for Wales to make subordinate legislation, see *ante* Chap. 5.

[7] (1610) 32 Co.Rep. 74; (1610) 2 St.Tr. 723. The exception is the prerogative of the Crown to legislate by Order in Council, *ante*, Chap. 15 and *post*, Chap. 35.

[8] *e.g.* Internal Drainage Boards (Land Drainage Act 1991, s.66); Nature Conservancy Councils (Wildlife and Countryside Act 1981, s.37); Strategic Rail Authority (Transport Act 2000, s.211).

[9] Replacing the Supreme Court and County Court Rule Committees, for its composition see s.2. The rules made by the Committee have to be laid before Parliament and are subject to the negative procedure.

approval by both Houses of Parliament. A Measure may amend or repeal the whole or any part of any Act of Parliament, including the 1919 Act.[10]

(vii) *Special Procedure Orders* under the Statutory Orders (Special Procedure) Acts 1945 and 1965 are now rare, and have been replaced by Orders under the Transport and Works Act 1992.[11]

Quasi legislation[12]

29–004 In addition to delegated legislation, of various kinds, statutes increasingly provide for the making of "Codes of Practice" which have legal effect to the extent that their terms are usually laid before Parliament and must be taken into account by tribunals and courts where they are relevant to proceedings. Breach of their provisions is not in itself unlawful but may be evidence of failure to behave according to a requisite standard, whether that of the careful driver or the reasonable employer.[13] Differing views were initially expressed about the legal status of the immigration rules made under the Immigration Act 1971[14] but there can now be no doubt that they form a kind of "quasi-law", to be interpreted in a less technical way than statutes and delegated legislation.[15] The growing resort to informal legislation of various kinds is open to question on grounds of inadequate Parliamentary control and a large degree of immunity from judicial control.[16] Indirectly, however, informal legislation may be challenged in the courts. For example, a minister entrusted with a discretion by statute cannot fetter that discretion[17] but must in each case consider the relevant merits before reaching a decision. Hence if a minister issues a circular declaring how he is going to deal with individual cases in advance, a particular decision may be attacked on the ground that the minister had prejudged the issue.[18] Moreover, in

[10] *e.g.* Synodical Government Measure 1969 which amended the 1919 Act. A Measure to amend the procedure for the appointment of Bishops was rejected by the House of Commons in July 1984.

[11] See Chap. 10 para. 11–036.

[12] G. Ganz, *Quasi-legislation: Recent Developments in Secondary Legislation* (1987).

[13] Road Traffic Act 1988, s.38 (The Highway Code); Employment Protection Act 1975, s.6; Police and Criminal Evidence Act 1984, ss.66–67, see *ante* para. 24–003; the Police Act 1976 provides that the Secretary of State may issue "guidance" relating to the investigation of complaints (s.83), and in relation to the conduct of disciplinary hearings (s.87). Failure to observe such guidance "shall be admissible in evidence on any appeal", (s.83). Under the Health and Safety at Work, etc. Act 1974 the Health and Safety Commission may approve and issue Codes of Practice with the consent of the Secretary of State under ss.16 and 17. There is no requirement of laying before Parliament.

[14] In *R. v. Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi* [1976] 1 W.L.R. 979, Roskill L.J. thought the rules had the force of delegated legislation. In *R. v. Secretary of State for the Home Department, ex p. Hosenball* [1977] 1 W.L.R. 766, Lord Denning M.R. described the rules as "rules of practice laid down for the guidance of immigration officers and tribunals". Geoffrey Lane L.J. said: "These rules are very difficult to categorise or classify. They are in a class of their own."

[15] *R. v. Immigration Appeal Tribunal, ex p. Alexander* [1982] 1 W.L.R. 1076, 1080 *per* Lord Roskill; *R. v. Immigration Appeal Tribunal, ex p. Bakhtaur Singh* [1986] 1 W.L.R. 910, 917, *per* Lord Bridge who cited with approval the dictum of Geoffrey Lane L.J. in *ex p. Hosenball, supra*. See similarly *R. v. Secretary of State for the Home Department, ex p. Swati* [1986] 1 All E.R. 717, 719, *per* Sir John Donaldson, M.R. "documents called House of Commons Statements". See also *R. v. Immigration Appeal Tribunal, ex p. Begum, The Times*, July 24, 1986.

[16] R. Baldwin and J. Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules", [1986] P.L. 239.

[17] *post*, para. 31–010.

[18] *R. v. Secretary of State for the Home Department, ex p. Bennett, The Times*, August 18, 1986, C.A.

Gillick v. West Norfolk Area Health Authority[19] the House of Lords recognised that its own earlier decision in *Royal College of Nursing v. Department of Health and Social Security*[20] involved the existence of a jurisdiction in the courts to declare that advice contained in a public document, even if non-statutory in form, was erroneous in law. Such a jurisdiction, according to Lord Bridge, was no doubt "salutary and indeed a necessary one in certain circumstances" but it should be exercised sparingly. The number of cases, his Lordship thought, where a non-statutory publication by a department raised "a clearly defined issue of law, unclouded by political, social or moral overtones, [would] be rare."

Statutory Instruments

29–005 The Statutory Instruments Act 1946, which is mainly concerned with the publication[21] of the more important kinds of delegated legislation, provides in section 1 that where by that Act or any subsequent Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on the Crown in Council or any Minister or government department, then *if the power is expressed to be exercisable by Order in Council or by Statutory Instrument*, as the case may be, any document by which that power is exercised shall be known as a "Statutory Instrument". The expression is also important in connection with laying before Parliament[22] and the work of the scrutiny committees.[23] The term "Statutory Instrument" also extends to any legislative instrument made after January 1, 1948, in exercise of a power conferred before that date to make "Statutory Rules" within the meaning of the (repealed) Rules Publication Act 1893.[24]

The reasons for delegated legislation

29–006 In spite of much criticism it has been generally accepted since the report of the Committee on Ministers' Powers in 1932 that delegated legislation has come to stay in our legal system, and that there are the following legitimate reasons for its use:

(i) *Pressure on parliamentary time*

29–007 Parliament in its legislative work—especially in the House of Commons—barely has time to discuss essential principles. Much time can be saved, and amendments to Acts of Parliament obviated, by delegating the consideration of procedure and subordinate matters to Ministers and their departments.

(ii) *Technicality of subject-matter*

29–008 The subject-matter of modern legislation is often highly technical. Technical matters, as distinct from broad policy, are not susceptible to discussion in Parliament and therefore cannot readily be included in a Bill. Delegation to Ministers enables them to consult expert advisers and interested parties while the regulations are still in the draft stage. Under the Building Act 1984, for example,

[19] [1981] A.C. 800.
[20] [1986] A.C. 112.
[21] *post*, para. 29–036.
[22] *post*, para. 29–019.
[23] *post*, para. 19–024.
[24] See Statutory Instruments Regulations 1947 (S.I. 1948 No. 1) which, broadly provides, *inter alia*, that every instrument of a *legislative* character made by a rule-making authority (which includes Her Majesty in Council and any Government Department) shall be a Statutory Instrument if made after January 1, 1948.

the Secretary of State is given wide powers to make regulations relating to the design and construction of buildings in order to secure the health, safety and welfare of persons, to conserve energy and to prevent waste and contamination of water (section 1). In making such regulations he is to take the advice of the Buildings Regulations Advisory Committee and to consult other bodies and representatives of the interests concerned (section 14).

(iii) *Flexibility*

29–009 In large and complex measures it is not possible to foresee all the contingencies and local conditions for which provision will have to be made, and it would be difficult to settle all the administrative machinery in time for insertion in the Bill. Delegated legislation provides a degree of flexibility, as changes can be made from time to time in the light of experience without the necessity for a series of amending Acts, *e.g.* under Road Traffic and Social Security legislation. It can also allows for experimentation, as in Town and Country Planning Acts, and for adjusting financial provisions in consequence of, *e.g.* changes in the value of money, as in the level of fines[25] or expenditure on elections.[26]

(iv) *Emergency powers*

29–010 In emergencies, such as war, serious strikes and economic crises, there would often not be time to pass Acts of Parliament, even if (as may not be the case) Parliament is sitting. Within limits unlawful acts can be done bone fide on the authority of the government in the expectation of later being legalised by an Act of Indemnity, but this is clearly not a desirable proceeding. Hence the emergency powers delegated by the Defence of the Realm Acts 1914–15 and the Emergency Powers (Defence) Act 1939–40 in two world wars, and the permanent peacetime provisions of the Emergency Powers Act 1920.

The Scott Report was a salutary reminder that emergency powers initially granted for a limited period may continue long after the justifying emergency has ceased.[27]

Concerns with certain types of delegated powers

(i) *Usurping the role of Parliament*

29–011 The Committee on Ministers to Powers recommended that enabling or skeleton legislation, that is legislation which contains only basic principles and which leaves the details to be provided by delegated legislation, should be exceptional.[28] Such legislation shifts the balance of power between Parliament and the Executive. The increase in this type of legislation, and in particular legislation which delegated extensive and contentious powers to Ministers to make or change policy, was one of the reasons for the creation in 1992 of the House of Lords Delegated Powers Scrutiny Committee.[29] One of the functions of this Committee is to report on whether Bills inappropriately delegate legislative powers. Examples of Acts which delegate powers in relation to matters of

[25] Magistrates' Court Act 1980 s.143, as amended, Criminal Justice Act 1982 s.38.
[26] Parliamentary Parties Elections and Referendums Act 2000, s.155.
[27] H.C. 115 (1995–96) C1.1–1.65; Civil servants and Ministers were happy to rely on the Import, Export and Customs Powers (Defence) Act 1939 until its allegedly temporary provisions were regularized in the Import and Export Control Act 1990.
[28] Cmd. 4060 (1932) p. 31.
[29] Since 1994 known as the Delegated Powers and Deregulation Committee.

principle are the Education (Student Loans) Act 1990, the Child Support Act 1991 and the Jobseekers Act 1995. It was on the recommendation of this Committee that the Pollution Prevention and Control Bill 1999 was re-written.[30]

Major policy changes may be required by European Directives which can be implemented by delegated legislation under the authority of the European Communities Act 1972 s.2 and Schedule 2, *e.g.* Equal Pay and Working Time Regulations.

(ii) *Imposition of taxation or incurring of expenditure*

29–012 Only if an Act of Parliament makes specific provision can taxation be imposed by delegated legislation.[31] Section 2 of the Emergency Powers (Defence) Act 1939 provided that the Treasury might by order impose, in connection with any scheme of control authorised by Defence Regulations (themselves delegated legislation), such charges as might be specified in the order. The Excise Duties (Surcharges or Rebates Act 1979 (as amended) allows for excise duties to be amended by delegated legislation, and the Value Added Tax Act 1994 s.2 contains a power to vary that tax by delegated legislation by 25 per cent. Certain taxes may be collected for a limited period by resolution of the Commons under the Provisional Collection of Taxes Act 1968.[32] The first exercise of the power provided by section 82 of the Welfare Reform and Pensions Act 1999, whereby Ministers can place a Report before the House seeking approval of expenditure on new services in advance of the Royal Assent to the Bill creating those services, was criticised by the Social Security Committee.[33]

(iii) *Power to modify or adapt the enabling Act or other Acts of Parliament: "Henry VIII clauses"*[34]

29–013 Parliament sometimes delegates to a Minister the power of modifying the enabling Act so far as may appear to him to be necessary for the purpose of bringing the Act into operation. Such provisions are usually transitional.

More controversially power may be given to a Minister to modify or adapt other Acts of Parliament by delegated legislation, for example, by the Local Government Act 1972, s.254(2) which allows the Secretary of State or appropriate Minister to amend, repeal of revoke any provision of any Act passed before 1st April 1974.[35] The growth in the inclusion of such provisions in legislation, with variable degrees of Parliamentary control over the making of delegated legislation which amends primary legislation, was another reason for the establishment of the Delegated Powers Scrutiny Committee in the House of Lords.[36] Exceptional examples of this type of provision are found in the European Communities Act 1972 s.2(2).[37] Part I of the Deregulation and Contracting

[30] See too HL 11 (1993–94) on the Education Bill.

[31] See *Att.-Gen. v. Wilts United Dairies* (1922) 91 L.J.K.B. 897; (1921) T.L.R. 884; Art. 4 Bill of Rights 1688; *cf. McCarthy and Stone Development Ltd v. Richmond-on-Thames L.B.C.* [1992] 2 A.C. 48.

[32] *ante*, para. 12–014.

[33] See H.C. 180 (1999–2000).

[34] This name arose by a far-fetched analogy to the Statute of Proclamations 1539 (repealed in 1547), which gave the king a limited power to legislate by proclamation.

[35] See also the Sex Discrimination Act 1975 and Courts and Legal Services Act 1990.

[36] See Memorandum by Lord Alexander to the Procedure Committee H.C. 152 (1995–96), pp. 58–61.

[37] *ante*, para. 6–018.

Out Act 1994,[38] and the Human Rights Act 1998, s.10(2). The alternative to such powers would often involve the drafting and passing of large numbers of amending Acts.[39]

The courts are aware of the constitutional significance of such powers and have indicated that a power to modify the provisions of a statute by delegated legislation should be narrowly and strictly construed.[40]

(iv) *Powers excluded from the jurisdiction of the courts*

29–014 The right of the citizen to ask the court to declare delegated legislation *ultra vires* may be expressly excluded by Parliament,[41] although it is not clear precisely what words in an Act will be held to have this effect.[42] The Committee on Ministers' Powers regarded such a provision as generally objectionable, and only justifiable in very exceptional cases, *viz.* in emergency legislation and in cases where finality is desirable, *e.g.* Regulations under the Foreign Marriage Act 1892, on which the validity of marriages may depend. In these non-emergency cases, where property or status may be affected, the Committee suggested that the regulations should be open to challenge for a short initial period.

(v) *Sub-delegation:*

29–015 The power of delegated legislation vested in one authority is itself sometimes delegated to another authority, and this sub-delegation may go through several stages in a hierarchy of law-making authorities. Thus section 1(3) of the Emergency Powers (Defence) Act 1939, which gave power to issue Defence Regulations by Order in Council, stated that Defence Regulations might empower any authorities or persons to make orders, rules and by-laws for any of the purposes for which Defence Regulations might themselves be made. Ministerial orders were issued under the [illegible]ations, directions under these orders, and licences under these directions.

Sub-delegation is only lawful if expressly or impliedly authorised by the enabling Act, for the prima facie principle is *delegatus non potest delegare*,[43] which is discussed more fully later. The requirement of authorisation applies throughout the hierarchy of rules, as does the doctrine of *ultra vires* below the enabling Act itself. Although it is said that sub-delegation should not usually be required except in emergencies, the Pollution Prevention and Control Act 1999 (implementing an E.C. Directive) contains powers to sub-delegate.

(vi) *Failure to exercise an enabling power*

29–016 This can arise either as a failure to use powers laid down in a statute to further implement the legislation, or a failure to bring some or all of a statute into force. Generally the courts have regarded the non-use of enabling powers as a political matter for Parliament. In *R. v. Secretary of State for the Home Department, ex p.*

[38] *post*, para. 29–031.
[39] See V. Korah, "Counter Inflation Legislation. Whither Parliamentary Sovereignty?" (1976) 92 L.Q.R. 42.
[40] See *R. v. Secretary of State for Social Security, ex p. Britnell* [1991] 1 W.L.R. 198; *R. v. Secretary of State for Social Security, ex p. Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275; *Hyde Park Residence Ltd v. Secretary of State for the Environment, Transport and the Regions and Another, The Times*, March 14, 2000.
[41] *cf. Chester v. Bateson* [1920] 1 K.B. 829.
[42] See *post*, para. 32–016 *et seq.*
[43] *post*, para. 31–019.

Fire Brigades Union[44] the opinion of the majority of the House of Lords was that the formula "this Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint" did not impose a legally enforceable duty on the Secretary of State to bring the Act into force. However he had a duty to keep under consideration whether or not to bring it into force. There is merit in the provision found in an unsuccessful Private Members Bill—the Parliamentary Government Bill 1999—to the effect that any provision of an enactment which is not commenced within five years of the passing of the Act should cease to have effect.

II. Parliamentary Safeguards for Delegated Legislation[45]

29–017 Apart from the common law jurisdiction of the courts to prevent a power of delegated legislation from being exceeded by declaring its exercise void as *ultra vires* in cases that may be brought before them.[46] Parliament provides a number of safeguards—of varying degrees of efficacy—to secure the proper use of the power. No attempt has been made in this country to establish a uniform code of procedure for the making and testing of delegated legislation, such as has been provided in somewhat different circumstances[47] by the American Administrative Procedure Act 1946. Several reports have concluded that there are defects in the system for considering delegated legislation and recommended reforms, which by and large await implementation.[48] As will be seen, the enactment of the Deregulation and Contracting Out Act 1994 resulted in additional parliamentary procedures in respect of the making of deregulation orders, but this amounts to a tiny fraction of the total number of Statutory Instruments.

1. At the pre-legislative stage

29–018 The *Delegated Powers and Deregulation Committee* in the House of Lords,[49] in addition to its work on Deregulation Orders,[50] considers almost all bills, including draft bills and government amendments to bills, before they reach their committee stage in the Lords. It reports on whether "the provisions of any bill inappropriately delegate legislative power or whether they subject the exercise of

[44] [1995] 2 A.C. 513.

[45] Report of Committee on Ministers' Powers (1932) Cmd. 4060, pp. 41–48, 64–70; J. E. Kersell, *Parliamentary Supervision of Delegated Legislation*; Erskine May, *Parliamentary Practice* (22nd ed.), Chap. 23; Report from the Select Committee on Procedure (1977–1978) H.C. 588; J. D. Mayhurst and Peter Wallington, "Parliamentary Scrutiny of Delegated Legislation", [1988] P.L. 547;

[46] *post*, Chap. 31.

[47] See B. Schwartz and H. W. R. Wade Q.C., *Legal Control of Government* (1972) App. I; Louis Jaffe, "The American Administrative Procedure Act", [1956] P.L. 218.

[48] See *Report from Joint Committee on Delegated Legislation* (1971–1972) H.L. 184 and H.C. 475; Fourth Report from the Procedure Committee, *Delegated Legislation*, H.C. 152 (1995–96); First Report from the Procedure Committee, *Delegated Legislation*, H.C. 48 (1999–2000); the Royal Commission on the Reform of the House of Lords Cm. 4534 (2000), in Chap. 7 set out proposals for reform of the system of scrutinising statutory instruments.

[49] This was established in 1992 as the Delegated Powers Scrutiny Committee, its name and functions were altered following the enactment of the Deregulation and Contracting Out Act 1994. For an account of the work of this committee see: C. Himsworth, "The Delegated Powers Scrutiny Committee", [1995] P.L. 34; Phillipa Tudor, "Secondary Legislation: Second Class or Crucial?" (2000) 21 Statute Law Rev. 140.

[50] *post* para. 29–032.

legislative power to an inappropriate degree of parliamentary scrutiny." The Committee has paid special attention to Henry VIII clauses and skeleton legislation.[51] This Committee is not concerned with the merits of a bill, only with powers delegated by a bill. The relevant government department has to provide a memorandum on a bill explaining and justifying the degree of delegation found in it. Although the Committee's role is only to advise the House and it has no powers to amend bills, most of its recommendations have been accepted by Government and the necessary amendments made to bills.[52]

2. Laying before Parliament

29–019 There is no general Act which requires delegated legislation to be laid before Parliament. Even the Statutory Instruments Act 1946 does not require all Statutory Instruments to be so laid. The enabling Act has to be examined in each case. Enabling Acts now usually, but not invariably, require Statutory Instruments to be laid. Laying is usually before both Houses, except as regards financial matters when it is before the Commons only.[53] Conversely, statutes may require the laying before Parliament of delegated legislation which does not fall within the Statutory Instruments Act; for example, Immigration Rules made under section 3 of the Immigration Act 1971 or Recommendations for the Welfare of Livestock under section 3 of the Agriculture (Miscellaneous Provisions) Act 1968.

There is no uniformity in the requirements as to laying, most instruments are subject to the negative procedure, some to the affirmative procedure. The Minister who introduces the enabling Act decides what method of laying (if any) shall be prescribed. There are no rules, and it has been said of the distinction that it is: "grounded as often as not on the fortuitous outcome of past debate on the parent legislation. Some affirmatives are of relatively little significance; some negatives are of great importance."[54] Since 1992, the Delegated Powers and Deregulation Committee has helped to ensure that there is greater consistency of approach.

The requirements as to laying may take any of the following forms:

(a) *"Negative parliamentary procedure"*

29–020 (i) To be laid before Parliament with immediate effect, but *subject* to annulment (by Order in Council) following a resolution of either House (*"negative resolution"*), usually without prejudice to the validity of anything done thereunder before annulment. This is the commonest form. Before 1948 there was no uniform period for the passing of negative resolutions, but section 5 of the Statutory Instruments Act 1946 prescribes a period of 40 days after laying excluding any time during which Parliament is dissolved or prorogued or both Houses are adjourned (section 7). Where an instrument is subject to negative resolution, unless a member of the Commons moves a "prayer" for its annulment it will not be debated. Even if such a Motion is tabled the government may ignore the Motion, allow it to be debated in a Standing Committee on Delegated Legislation or on the Floor of the House. The latter is rare. It is by agreement

[51] *ante* para. 29–011 and 29–013.

[52] See evidence to the Procedure Committee H.C. 152 (1995–96), pp. 58–64, and evidence to the Procedure Committee H.C. 48 (1999–2000), p. 20.

[53] "Parliament" in s.4 of the Rates Act 1984 was held to mean the House of Commons alone for the purpose of laying in *R. v. Secretary of State for the Environment ex p. Greenwich L.B.C., The Times*, December 19, 1985, CA.

[54] Memorandum submitted by the Clerk of the House to the Procedure Committee H.C. 152 (1995–96), p. 47.

between the Party Whips that an instrument "prayed against" is referred to a Standing Committee. The Procedure Committee has suggested that where at least 20 members have signed a prayer seeking the annulment of an instrument, a member should be allowed at the start of public business to move that the matter should be referred to a Standing Committee,[55] and that "praying time" should be extended from 40 to 60 days. In practice instruments have seldom been annulled,[56] because the Minister could count on the government's majority. Even if the Government were "caught napping", the Minister could introduce another instrument in identical terms. There has not been enough time in recent years for members to debate prayers for annulment. In any event no amendment of the instrument is possible, although as a result of criticism the Minister may withdraw it and submit another in a modified form.

(ii) To be laid *in draft* before Parliament, but subject to a resolution that no further proceedings be taken. An adverse resolution may be passed by either House within 40 days (Statutory Instrument Act 1946, s.6), which stops further progress on that draft but does not prevent fresh drafts being laid. Prison Rules are made in this way.

(b) *"Affirmative parliamentary procedure"*

29–021 (i) To be laid before Parliament, either in draft or when made, but not to take effect until approved by *affirmative resolution* in each House, which is normally required to be passed within 28 days (excluding any time when Parliament is dissolved or prorogued or both Houses are adjourned). This requires the Government to find time in each House, and unlike the negative procedure it at least allows some form of Parliamentary scrutiny. Since 1995 all affirmative instruments are automatically referred to a Standing Committee on Delegated Legislation unless the Government decides that they should be debated on the Floor of the House. The debate in the Committee is limited to one and a half hours and is on a formal and unamendable Motion, there is no provision for amendment of an Order. A formal approval motion is then put before the House without debate, even if the Order has not been approved by the Committee. If an Order has been "de-referred" to the Floor of the House, it will be debated on a formal and unamendable Motion to approve it; there is a limitation of one and a half hours on such debates. It is rare for such Motions to be defeated if the Government has a majority in the Commons; the House of Lords rejected the Draft Greater London Authority (Expenses) Order in February 2000.[57]

The fact that an Order has been debated in and approved by Parliament does not prevent a court reviewing delegated legislation on the grounds of illegality, procedural impropriety or *Wednesbury* unreasonableness. In *R. (on the application of Javed) v. Secretary of State for the Home Department*[58] the Court of Appeal held that it was entitled to review the legality of the Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996 in

[55] H.C. 152 (1985–86), para. 27.

[56] In 1969 the Government was unwilling to implement recommendations from the Boundary Commission, but to comply with the letter of the law the necessary draft Orders were laid before Parliament, the Minister successfully moving that they should not be approved. In February 2000, the House of Lords rejected the Greater London Authority (Election Rules).

[57] In October 1994 the House of Lords had agreed to a Motion in which it affirmed its right to vote on any subordinate legislation, H.L. Deb., Vol. 558, col. 356, October 20, 1994.

[58] *The Times*, May 24, 2001, [2001] 3 W.L.R. 123; see Wade and Forsyth, *op. cit.*, n. 1 at p. 26, and *Stockdale v. Hansard* (1839) 9 Ad. & E. 1.

designating Pakistan as a country in which there was no serious risk of persecution, on the basis that the applicants had established that among women in Pakistan there was risk of persecution.[59] The Court did not accept that in the short debates in Parliament, in which the position of women was not mentioned, that there had been a sufficient evaluation to enable a decision to be made that the Secretary of State could legally include Pakistan in the Order.

(ii) Sometimes an instrument is to be laid before Parliament with immediate effect, but will cease to have effect unless approved by resolution within the prescribed period. This method combines prompt operation with parliamentary control, *e.g.* regulations made under the Emergency Powers Act 1920.

(c) *To be laid without further provision for control* **29–022**

This method is now very uncommon. It is used where Parliament contemplates that a Minister should take some action, and merely demands to be kept informed of the action taken, *e.g.* the postponing order under the New Valuation Lists (Postponement) Act 1952. No resolution is necessary for the instrument to take effect. Where an instrument is merely laid before the House, it is usually impracticable to find time during the ordinary business of the Commons to move an address for its annulment, and if it is raised on the motion for adjournment no division is allowed. Questions may be asked about regulations lying on the table of the House. The Scott Report was critical of the fact that Orders made under the Import and Export Control Act 1990 were subject to no Parliamentary control.[60]

The procedure of the two Houses and the time available—especially in the Commons—are not adequate to take full advantage of the opportunity for control offered by the laying of regulations before Parliament.

Local instruments, dealing with such matters as local authorities' powers, are far more numerous than general instruments. They are registered, but Parliament is usually not concerned with control or even information, and they are seldom required to be laid before Parliament.

Legal effect of the requirement of laying **29–023**

The legal effect of the requirement that instruments are to be laid before Parliament is uncertain. Is it "mandatory" (imperative), so that the instrument is invalid if the requirement is not fulfilled; or merely "directory", imposing on a public officer a duty of imperfect obligation, but not affecting validity?[61] It seems that so far as concerns instruments subject to negative resolution, and probably also those subject to affirmative resolution, the requirement is directory.[62] There is no penalty specified if the requirement is not observed. In 1944 it was

[59] The court cited *R. v. Immigration Appeals Tribunal, ex p. Shah* [1999] 2 A.C. 692, where on the facts it was established that there was a risk of persecution against women in Pakistan.

[60] H.C. 115 (1995–96), Vol. I, C 1.80–1.121.

[61] *post*, para. 31–005.

[62] It was so held by the West Indian Court of Appeal in *Springer v. Doorly* (1950) L.R.B.G. 10; (1950) L.Q.R. 299. The regulations in that case were to be laid "as soon as possible". And see *Bailey v. Williamson* (1873) L.R. 8 Q.B. 118, *Starey v. Graham* [1899] 1 Q.B. 406, 412; A.I.L. Campbell, "Laying and Delegated Legislation", [1983] P.L. 43. However, in *R. v. Secretary of State for Social Services, ex p. London Borough of Camden and another* [1987] 2 All E.R. 560, it was held that regulations which were not to be made until a draft had been approved by both Houses of Parliament did not come into force in the absence of such approval; the requirement of laying did not extend to documents referred to, but not embodied in, the regulations.

discovered that the Home Secretary had for three years overlooked the requirement that National Fire Service Regulations should be laid before Parliament "as soon as may be" after they were made.[63] An Indemnity Act[64] was therefore passed indemnifying the Home Secretary against "all consequences whatsoever, if any" incurred by this failure.

Section 4(1) of the Statutory Instruments Act 1946 provides that where any Statutory Instrument is required to be laid before Parliament after being made, a copy of the instrument shall be laid before each House before the instrument comes into operation, except in cases of urgency notified to the Lord Chancellor and the Speaker of the Commons.[65]

What constitutes "laying before the House" is for each House to decide. The Laying of Documents before Parliament (Interpretation) Act 1948 defined statutory references to "laying" as taking such action as is directed by virtue of any Standing Order or Sessional Order or other direction or practice of either House to constitute laying, even though it involves action taken when the House is not sitting.[66]

3. Scrutinising committees[67]

Joint Select Committee on Statutory Instruments

29–024 Since 1973, a Joint Committee of both Houses has scrutinised statutory instruments[68] which are required to be laid before both Houses of Parliament—and, in the case of general statutory instruments, whether or not they are required to be laid.

Its terms of reference are to consider whether the special attention of the House should be drawn to any instrument on any of the following grounds, that:

(i) it imposes a charges on the public revenues, or requires the payment of a fee to a public authority for services or a licence;

(ii) it is made in pursuance of an Act specifically excluding it from challenge in the courts;

(iii) it purports to have retrospective effect, where the parent Act confers no such authority;

(iv) there appears to have been unjustifiable delay in its publication, or in laying it before Parliament;

[63] Fire Services (Emergency Provisions) Act 1941.

[64] National Fire Service Regulations (Indemnity) Act 1944. See also Price Control and other Orders (Indemnity) Act 1951 and the Town and Country Planning Regulations (London) Indemnity Act 1971. *cf.* Documentary Evidence Act 1868. Sir Carleton Allen, *op. cit.* p. 146, remarked that the Home Secretary in 1944 "lost a unique opportunity of studying the prison system from the inside."

[65] Sections 4 and 5 do not apply to order which are subject to special parliamentary procedure or to any other instrument which is required to be laid before Parliament before it comes into operation (s.7(3)).

[66] Rules presented to Parliament in a command paper are "laid before Parliament": *R. v. Immigration Appeal Tribunal, ex p. Jeyes* [1972] 1 W.L.R. 1390, DC.

[67] See para. 6–029 for an account of the committees concerned with the implementation of secondary European Community law.

[68] Including draft statutory instruments and those implementing European Community Directives, but excluding deregulation orders, which are considered by the Deregulation Committee, and Church of England measures, which are considered by the Ecclesiastical Committee.

(v) there appears to have been unjustifiable delay in notifying the Speaker where, on the ground of urgency, the instrument came into operation before being laid before Parliament;

(vi) there appears to be a doubt whether it is *intra vires* or it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;

(vii) for any special reason its form or purport calls for elucidation;

(viii) the drafting appears to be defective;

or on any other ground which does not impinge on its merits or on the policy behind it.

29–025 The work of the committee is one which depends on specialist legal skills. Although it has the assistance of Counsel to the Speaker and of Counsel to the Lord Chairman of Committees, it was said of it that it can only hope to perform the role of a lay jury, lacking the skills for the job in hand.[69] The Joint Committee may require the government department concerned to explain, either by memorandum or witness, any instrument under consideration; and the Committee is instructed, before drawing the special attention of the House to any instrument, to afford the department concerned an opportunity of furnishing an explanation. The Committee is concerned with matters of *form*, as set out in its terms of reference. It is not concerned with policy, which is a matter for Parliament. The practice has developed of electing a member of the Opposition as chairman of the Scrutiny Committee, who would not be embarrassed by conflicting loyalties if the Committee criticises departmental action.

The increase in the volume of delegated legislation has put pressure on this committee. Between one and five per cent of Statutory Instruments are reported by the Joint Committee as falling within one of the grounds outlined above. The House of Lords is prohibited by Standing Order No. 70 from considering an instrument requiring affirmative resolution before the Joint Committee has reported. There is no such limitation in the Commons, and instruments have been debated by in the House on in committee before the Joint Committee has reported.[70]

Select Committee on Statutory Instruments

29–026 This is composed of the Commons Members of the Joint Committee on Statutory Instruments, and it fulfils the same function as the Joint Committee in respect of those instruments that have to be laid only before the Commons.

Standing Committees on Delegated Legislation

29–027 As was seen above, most House of Commons debates on statutory instruments are held in Standing Committees rather than on the Floor of the House. The Standing Committee to which an instrument is committed is required only to consider it on a motion: "That the committee has considered the instrument (or draft instrument)". The Chairman of the Committee reports the Statutory Instrument to the House irrespective of whether or not the motion has been agreed; a vote against the Motion by the Committee has no procedural significance.

[69] Evidence to the Procedure Committee H.C. 152 (1995–96), p. 28.

[70] Suggestions for such a S.O. in the House of Commons have been made by the Joint Committee and the Procedure Committee.

although it may result in a Instrument being debated on the Floor of the House. This means of sifting Statutory Instruments has been criticised, and it has been proposed that the Committee should be able to consider substantive motions, *e.g.* that the instrument be approved, or be annulled as well as being able to take note of the Instrument.[71] In addition the existing procedure makes no distinction between those Statutory Instruments that are complex and those that are not. It has been proposed that a Sifting Committee[72] should be established to scrutinise all Statutory Instruments subject to negative procedure, and to identify those of sufficient political importance to merit debate, and to refer such Instruments to a Standing Committee on Delegated Legislation. Since such a reform would require more time, and it was recommended that the period of 40 days for considerations of Statutory Instruments subject to negative procedure should be extended to 60 days.

Reform

29–028 There has long been concern as to the inadequacy of the arrangements for scrutinising delegated legislation.[73] The increase in the use of delegated legislation has compounded this problem. Proposals for reform were made by the Procedure Committee in 1996 and 2000, and by the Royal Commission on the Reform of the House of Lords.[74] In addition to proposals already discussed other suggestions include the creation of a new category of "super affirmative instruments" which would require scrutiny by the relevant departmental Select Committee[75] before being laid in draft before each House, a procedure similar to that for Deregulation Orders.[76] This procedure would be used for instruments of particular significance and complexity, and would enable more effective parliamentary input than that exists at present for affirmative instruments. The Royal Commission on the House of Lords approved the reforms suggested by the Procedure Committee. It was in favour of going further and proposed that the reformed House of Lords should have an enhanced role in scrutinising delegated legislation. Its proposals included giving it a formal power to delay delegated legislation, and the provision of more opportunities for Committees in the Lords to consider delegated legislation in draft form. None of the reports favoured allowing either House to amend Statutory Instruments once they had been formally laid before Parliament.

4. Special types of Delegated Legislation

29–030 There are several types of delegated legislation introduced in recent years which have resulted in more extensive controls with respect to how they are made than those outlined above.

[71] See H.C. 152 (1995–96).

[72] H.C. 152 (1995–96); the Royal Commission on the House of Lords Cm. 4534 (2000) suggested a Joint Sifting Committee; the Procedure Committee has also accepted this as a viable alternative to a Commons' committee, H.C. 48 (1998–99).

[73] Starting with the Committee on Ministers Powers, Cmd. 4060 (1932).

[74] H.C. 152 (1995–96), H.C. 48 (1999–2000), Cm. 4534 (2000); see also the Hansard Society Report, *Making the Law* (1992). For an earlier unimplemented Report from the Procedure Committee see H.C. 588 (1977–78).

[75] *Ante*, para. 12-027 *et seq.*

[76] *Ante*, para. 29–031.

Deregulation orders[77]

Part I of the Deregulation and Contracting Out Act 1994 gave Ministers broad powers to amend or repeal *any* Act of Parliament passed up to the end of the 1993–94 Session in order to remove or reduce a statutory burden on a trade, business, profession or individual, provided that it could be achieved "without removing any necessary protection" (section 1(1)). The purpose of this legislation was to remove from businesses the costs of complying with outdated and unnecessary legislation, and to do so by means of secondary, rather than primary, legislation. The powers in the 1994 Act to amend or repeal an Act of Parliament by delegated legislation, known as Henry VIII clauses, are in consequence subject to a complex parliamentary procedure designed to provide exceptional safeguards. **29–031**

There are three stages to the making of a deregulation order.

(i) Before making a deregulation order the Minister has to consult "such organisations as appear to him to be representative of interests substantially affected by his proposals." The government department concerned must take account of the responses to its consultations, which could result in the proposal being abandoned, amended or pursued instead by primary legislation.[78] There is no time limit for this stage.

(ii) A proposal containing the draft Order is laid before Parliament. The proposal must include details of, *e.g.* the burden to be removed, the savings that would result from the removal of the burden, the protections that exist, the consultations made. The proposal is considered concurrently by the House of Commons Deregulation Committee[79] and in the House of Lords by the Select Committee on Delegated Powers and Deregulation.[80] Each committee has to report to the appropriate House within 60 days of the proposal being made that the proposal is an appropriate use of the power given by the 1994 Act without amendment; or that it is an appropriate use of the power but requires amendment; or that no draft Order should be laid. In the latter case the relevant department should be given warning of the decision. Each committee applies broadly similar criteria when considering a proposal.[81] The most important are: the appropriateness of the proposal; the incidence, identification and magnitude of the burden; the adequacy of the consultation[82]; whether there is adequate protection for those affected by the legislation to be amended or repealed. In reaching its decision each committee may take oral and written evidence, and the two committees have a working relationship with one another. **29–032**

(iii) At the end of the 60 day period the Minister may lay the draft Order for approval by each House. He is required when doing so to have regard to the Committees' Reports and to lay with the draft Order details of any representations made by the Committees and any changes made to the Order. He does not have to make any changes. Each Committee will consider the draft Order once more. Final draft Orders are subject to the affirmative procedure, and the Commons Committee will recommend what form this should take. It may propose approval either without a debate, or after a debate (limited to one and a

[77] David Miers, "The Deregulation Procedure: An Expanding Role", [1999] P.L. 477.
[78] See H.C. 311 (1994–95).
[79] Established for this purpose in 1994.
[80] *ante*, para. 11–030.
[81] See S.O. No. 124A (House of Commons); the House of Lords has not formulated its de-regulation procedure in a S.O.
[82] See H.C. 817 (1995–96).

half hours). If the Committee recommends that the draft Order should not be approved the Government has to table a Motion to disagree with the Committee's Report, which may be debated for up to three hours. If the House approves the motion, then the question on the draft Order is immediately put to the House. The House of Lords generally debates all such Orders. In the light of the Committees' Reports the Minister may decide not to lay the Draft Order.

The most extensive use made of deregulation orders was from 1995–97, since when it has been relatively little used.[83] The new procedures for the approval of deregulation orders have been judged a success; it subjects the making of this type of delegated legislation to a much greater degree of scrutiny than is the norm for delegated legislation.

Regulatory Reform Orders[84]

29–033 The procedure established above was seen as a basis for further expanding the power to make law by Order, and resulted in the enactment of the Regulatory Reform Act 2001. However this Act is concerned with amending primary legislation to *impose* new burdens or *increase* existing burdens, provided the Order has also the effect of removing or reducing a burden (section 1(3)). The Act has the potential to apply much more widely than the 1994 Act, as its provisions can be applied in respect of any legislation imposing burdens on a person "in the carrying on of any activity". This will include businesses, charities, and the public sector. The procedure for making Regulatory Reform Orders is very similar to that for Deregulation Orders, with the same stages as outlined above; the wider powers available to Ministers under the 2001 Act is reflected in additional requirements with respect to making explanatory information available to Parliament. If used extensively there will be implications for the workload of the relevant committees in each House, and additional resources will be required if these committees are to continue to perform to a high standard. For, *e.g.* an early proposal is to reform the fire safety regime—currently spread over 120 pieces of primary legislation and a similar number of Statutory Instruments—a major task.

Remedial Orders under the Human Rights Act 1998[85]

29–034 Section 10 and Schedule 2 of the Human Rights provides for a "fast track" procedure for the amendment of legislation which has been declared incompatible by a court by virtue of section 4, or in the light of a E.Ct.H.R. decision against the United Kingdom. This procedure can only be used if a Minister considers that there are "compelling reasons for proceeding under (section 10)". A remedial order can be far reaching, *e.g.* it may amend any primary legislation, or be retrospective. It must be laid in draft before Parliament for 60 days with

[83] See Report from the Deregulation Committee, *The Future of the Deregulation Procedure*, H.C. 709 (1997–98), Select Committee on Delegated Powers and Deregulation, *Special Report*, HL 158 (1997–98).

[84] For the background see *The Publication of the Draft Regulatory Reform Bill*, Cm. 4713 (2000); *Report on the Regulatory Reform Bill*, Select Committee on Delegated Powers and Deregulation HL 51 (1999–2000); *Second Report on the Regulatory Reform Bill*, HL 8 (2000–01); David Miers, "Regulatory Reform Orders: A new weapon in the armoury of law reform," (2001) 21 Public Money and Management, para. 29–034.

[85] See Wade and Forsyth *op. cit.*, n. 1 pp. 190–1, where this procedure is considered in the light of constitutional principle. The first such order was made as a consequence of the decision of the Court of Appeal in *R. (H) v. Mental Health Review Tribunal, North and East London Division* [2001] H.R.L.R. 752, and see *post*, para. 24–029.

an explanatory statement and approved by each House. An Order can be made without such approval if the Minister declared that because of the urgency of the matter it is necessary to make the order without a draft being so approved. In these circumstances additional requirements apply, in any event the Order will cease to have effect if not approved by resolutions of both Houses.

5. Other controls in Parliament

29–035

(a) Motions of censure on the Minister responsible for the instrument.

(b) Debate and possibly motion.

(c) Questions to Ministers. In either House questions may be asked about instruments lying on the table, but no debate is allowed on a question.

6. Publication

29–036

The Rules Publication Act 1893, s.1 requires antecedent publicity for limited classes of statutory rules. Subsequent publication was provided for by section 3, which required all statutory rules made after 1893 to be sent forthwith after they were made to the Queen's printer.

The Statutory Instruments Act 1946 repealed the Rules Publication Act 1893 and generalised the procedure for subsequent publication; but it made no provision for antecedent publicity, the reason given being that the practice of informal consultation with outside interests had become general. Immediately after the making of any "Statutory Instrument" as defined in section 1,[86] it is to be sent to the Queen's printer and numbered, and copies shall "as soon as possible" be printed and sold (section 2). The Stationery Office is to publish lists showing the date on which every Statutory Instrument printed and sold by the Queen's printer was first *issued* by that office; and in any legal proceedings a copy of any list so published purporting to bear the imprint of the Queen's printer shall be received in evidence of the date on which any Statutory Instrument was first issued by the Stationery Office (section 3(1)).

Delegated legislation generally comes into operation when it is made, unless some other date is specified therein. Failure to comply with any requirement for publication will not normally affect the validity of the instrument concerned.[87] The Statutory Instruments Act 1946, s.3(2), however, provides that where any person is charged with an offence under a Statutory Instrument, it shall be a defence to prove that the instrument had not been "issued" by the Stationery Office at the date of the alleged contravention, unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.[88]

[86] *ante*, para. 29–005.

[87] *Jones v. Robson* [1901] 1 Q.B. 680; but *cf. Johnson v. Sargant* [1918] 1 K.B. 101; Lanham, (1974) 37 M.L.R. 510 [1983] P.L. 395. Publication may be a prerequisite of validity in a case such as that of the immigration rules, which are defined by the Immigration Appeals Act 1969, s.24(2) as "rules . . . which have been published and laid before Parliament". An Act of Parliament comes into operation on the date on which it receives the Royal Assent (printed beneath the title), unless some other date is specified: Acts of Parliament (Commencement) Act 1793; *R. v. Smith* [1910] 1 K.B. 17.

[88] The 1946 Act was amended by the Statutory Instruments (Production and Sale) Act 1996 to allow for the printing and sale of Statutory Instruments under the authority of HMSO; see Ganz *op. cit.* n. 1 at pp. 78–79.

29–037 Where any Statutory Instrument is required to be laid before Parliament after being made, copies sold by the Queen's printer must show the date on which it came or will come into operation; and either the date on which copies were laid before Parliament or a statement that such copies are to be laid before Parliament (section 4(2)).

The Treasury, with the concurrence of the Lord Chancellor and the Speaker of the Commons, is empowered to make regulations for the purposes of the Act, including the numbering, printing and publication of Statutory Instruments, and the exemption of any classes of Statutory Instrument from the requirement of being printed and sold (section 8). The Statutory Instruments Regulation 1947 made thereunder are contained in S.I. 1948 No. 1, which begins the printed series of *Statutory Instruments* that replaces the previous *Statutory Rules and Orders*.

The Regulations exempt from the printing requirement Statutory Instruments which are local, or are otherwise regularly printed as a series (Reg. 5); or temporary (Reg. 6); contain bulky Schedules (Reg. 7); or where it would be contrary to the public interest that they should be printed before coming into operation (Reg. 8). Such exemption requires the certificate of the "responsible authority", *i.e.* the authority that makes the instrument. In *Simmonds v. Newell*[89] a conviction for the offence of selling in contravention of an Iron and Steel Prices Order was quashed by the Divisional Court, because the Schedules had not been printed and no certificate had been issued under Regulation 7 exempting from printing, and presumably reasonable steps had not been taken under section 3(2). Parker J. said it was not necessary to decide whether a Statutory Instrument is wholly invalid if it is required by section 2 to be printed and it is not printed, or whether section 3(2) provides a defence whether the Statutory Instrument is required to be printed or not. In *R. v. Sheer Metalcraft*,[90] a prosecution for buying in contravention of an Iron and Steel Price Order, the Schedules had not been printed and no certificate of exemption had been issued; but the jury found the accused guilty, because sufficient steps had been taken to bring the Schedules to their notice. Streatfield J. told the jury that a Statutory Instrument is "made" (*i.e.* effective) when it is made by the Minister and (presumably, where laying is required) laid before Parliament; whether a Statutory Instrument has been "issued" (*i.e.* printed) is a different question, which can be raised as a defence under section 3(2). The neglect to print or to certify exemption from printing did not make the order invalid, and it was admissible in evidence.

7. Prior consultation[91]

29–038 Acts of Parliament delegating legislative power sometimes provide that the Minister may, or shall, consult interested bodies or an advisory committee before issuing regulations.[92] The interested bodies may be specified in the Act or left to the Minister's discretion. The Minister is not usually bound to accept such advice. Thus the Minister must consult the Council on Tribunals before making

[89] [1953] 1 W.L.R. 826; *sub nom. Defiant Cycle Co v. Newell* [1953] 2 All E.R. 78.
[90] [1954] 1 Q.B. 586.
[91] See J. F. Garner, "Consultation in Subordinate Legislation" [1964] P.L. 105; A. D. Jergensen, "The Legal Requirements of Consultation", [1978] P.L. 290.
[92] *e.g.* Building Act 1984, s.14. The Health and Safety Commission is required similarly to consult before drafting Codes of Practice under the Health and Safety at Work etc. Act 1984; see s.16. The Deregulation and Contracting Out Act 1994 and the Regulatory Reform Act 2001 make extensive and detailed provisions for consultation; *see ante* para. 29–015.

procedural rules for tribunals that come under its supervision; and the Lord Chancellor must consult the Council before making procedural rules for statutory inquiries.[91] In *R. v. Secretary of State for Health, ex p. United States Tobacco International Inc.*[92] it was held that in carrying out his duty to consult the Secretary of State had to act in accordance with the rules of natural justice. What was required for this would depend on the facts of each case. It was on the recommendation of the House of Lords Delegated Powers Scrutiny Committee that a requirement was imposed on the Minister to consult the Social Security Advisory Committee before making exercising his powers to make delegated legislation under the Social Security (Incapacity for Work) Act 1994. This Committee also ensured that the Pollution Prevention and Control Act 1999 imposed wider consultation requirements on the Minister than at first envisaged in the Bill. In some cases a draft scheme is to be prepared by the interested body (*e.g.* a local authority), and confirmed or approved by the Minister. Exceptionally, the Minister is required to submit draft regulations to an advisory committee, without being bound to accept their suggested amendments. Apart from such statutory provisions, the practice of consultation has become generally established.

[91] Tribunals and Inquiries Act 1971, ss. 10 and 11.
[92] [1992] Q.B. 353, DC.

CHAPTER 30

ADMINISTRATIVE JURISDICTION[1]

Introduction

30–001 "Administrative jurisdiction" or "administrative justice" is a name given to various ways of deciding disputes outside the ordinary courts. It is not possible to define precisely what bodies constitute the "ordinary courts," although that expression is used in the Tribunals and Inquiries Act 1992. There are some bodies that might be placed under the heading either of ordinary courts or of special tribunals. Guidance cannot be found in the name of a body; the Employment Appeal Tribunal, for example, is a superior court of record[2] while it was doubted whether a local valuation court was really a court.[3] Certain matters involving calculations of figures or scientific problems, such as the assessment of rates and taxes, local audit, patents, inventions and performing rights, have been considered by Parliament unsuitable for the ordinary courts. Then there has been a great increase of governmental activity, both central and local, under statutory powers in the late nineteenth, twentieth and twenty-first centuries, and a number of social services are provided in the Welfare State. Under both these heads there are complex systems of regulation and control, such as national insurance, pensions, the health service, education, public transport, the regulation of agriculture, rent control, housing and redevelopment, town and country planning and the consequent compulsory acquisition of land. It is inevitable that disputes should arise, or conflicts of rights and interests between the individual citizen and the central or local government authority. The ordinary courts are appropriate for the decision of purely legal rights; but in many[4] of the kinds of cases of which we are speaking, the question in issue is not one of purely legal rights but a conflict between private and public interests, bound up in a greater or lesser degree with ministerial policy as outlined by statute.

30–002 The "administrative justice" we are considering in this chapter must be distinguished from that distinct system of administrative law known in legal systems which have developed under the influence of French law where a separate body of administrative courts or tribunals exercise the jurisdiction which in the common law system belongs to the High Court exercising its supervisory jurisdiction by way of judicial review. Those systems, too, have specialised tribunals for dealing with particular categories of dispute but questions of the

[1] *Report of Committee on Administrative Tribunals and Enquiries* ("Franks Committee") (1957) Cmnd. 218; *Memoranda submitted by Government Departments* (6 vols., H.M.S.O. 1956); *Minutes of Evidence* (H.M.S.O. 1956–1957); *Report of the Committee on Ministers' Powers* (1932) Cmd. 4060, s.III.

Sir Carleton Allen, *Administrative Jurisdiction* (reprinted from (1956) P.L. 13–109); W. A. Robson, *Justice and Administrative Law* (3rd ed., 1951); *Towards Administrative Justice* (Michigan, 1963); Harry Street, *Justice in the Welfare State* (2nd ed., 1975); G. Ganz, *Administrative Procedures* (1974); H. W. R. Wade and C. F. Forsyth, *Administrative Law* (8th ed., Oxford, 2000); M. Harris and M. Partington, *Administrative Justice in the 21st Century* (Hart, 1999).

[2] Employment Tribunals Act 1996, s.20.

[3] *Att.-Gen. v. BBC* [1981] A.C. 303; *ante*, para. 20–007.

[4] But not all: Employment Tribunals deal with disputes between private employers and employees.

legality of government actions are decided according to principles of administrative law in administrative courts.[5]

The subject covered in this chapter under the title of administrative justice is one particularly likely to be affected by the Human Rights Act 1998.

Reference was made in Chapter 22 to examples, even before the Human Rights Act 1998 came into force, of changes necessitated to tribunals as a result of decisions of the European Court of Human Rights.[6] Since the Act came into effect the Employment Appeal Tribunal has held that new procedures for appointing lay members to employment tribunals guaranteed their independence in a way which made the tribunals "Convention compliant".[7] The House of Lords has rejected a claim that the powers of the Secretary of State under the Town and Country Planning Act 1990, the Transport and Works Act 1992, the Highways Act 1980 and the Acquisition of Land Act 1981 to make decisions on planning applications and orders are incompatible with Article 6 (determination by an independent and impartial tribunal of civil rights and obligations).[8] There remains, however, considerable scope for litigation in this area in relation to the independence and impartiality of existing tribunals and in some cases of the absence of bodies entitled to make binding decisions or otherwise provide effective remedies.[9] (Article 13)

The Lord Chancellor announced, in May 2000, the establishment of a Review of Tribunals, a body to be chaired by Sir Andrew Leggatt, a former Lord Justice of Appeal. Its task will involve recommending "a coherent structure for the delivery of administrative justice".

Where Parliament does not consider the ordinary courts suitable for the decision of such disputes, especially at first instance, it prescribes at least three other methods of deciding them: **30–003**

(i) administrative tribunals;

(ii) ministerial decision after statutory inquiry[10];

(iii) ministerial decision, in which the Minister uses his discretion without any prescribed procedure.[11]

The Franks Committee (1957)[12] regarded both tribunals and other administrative procedures as essential to our society. Preference should be given, however, to entrusting adjudication to the ordinary courts rather than to tribunals, unless there are clearly special reasons which make a tribunal more appropriate. Similarly, a tribunal is to be preferred to a Minister, but it is not always possible to express policy in the form of regulations capable of being administered by an

[5] L. N. Brown and J. S. Bell, *French Administrative Law* (5th ed., Oxford, 1998); J. W. Allison, *A Continental Distinction in The Common Law* (Revised ed., Oxford, 2000).

[6] *e.g.* Mental Health Review Tribunals: *X v. United Kingdom* (1981) 4 E.H.R.R. 188 led to amendments contained in the Mental Health Act 1983. Immigration: *Chahal v. United Kingdom* (1996) 23 E.H.R.R. 413 led to the Special Immigration Appeals Commission Act 1997.

[7] *Scanfuture UK Ltd v. Secretary of State for Trade and Industry*, *The Times*, April 26, 2001.

[8] *R. (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2000] 2 W.L.R. 1389, HL.

[9] On the extent to which the United Kingdom Courts can take account of Article 13, see *ante* para. 22–017 and para. 22–043.

[10] *post*, para. 30–024.

[11] *post*, para. 30–024.

[12] (1957) Cmnd. 218, paras 406–408; see *post*, para. 30–018 and para. 34–002. *cf. Report of the Committee on Ministers' Powers* (1932) Cmd. 4060, pp. 115–118.

independent tribunal. The Franks Committee examined the working of administrative law in other countries, notably the United States and France; but concluded that, although there are advantages in comparative study, each country must work out for itself, within the framework of its own institutions and way of life, the proper balance between public and private interest.

I. TRIBUNALS[13]

30–004 These are independent statutory tribunals whose function is judicial. The tribunals are so varied in composition, method of appointment, functions and procedure, and in their relation to Ministers on the one hand and the ordinary courts on the other, that a satisfactory formal classification is impossible.

Reasons for creating special tribunals[14]

30–005 The reasons why Parliament increasingly confers powers of adjudication on special tribunals rather than on the ordinary courts may be stated positively as showing the greater suitability of such tribunals, or negatively as showing the inadequacy of the ordinary courts for the particular kind of work that has to be done. In the following summary we choose mainly the former method.

(i) *Expert knowledge*

30–006 Many of the questions that have to be decided under modern social legislation call for an expert knowledge of matters falling outside the training of the lawyer; also an understanding of the policy of the legislature and experience of administration. They are not primarily legal questions, although at some stage a judicial habit of mind may be required. Members of the Lands Tribunal, for example, may be lawyers or persons experienced in questions relating to valuation of land.[15] Mental Health Review Tribunals include legal, medical and lay members.[16] Employment Tribunals normally include one member representing associations of workers and one representing employers' associations.[17]

(ii) *Cheapness*

30–007 The vast number of questions that arise from day to day, affecting the interests of thousands of people, must be disposed of much more cheaply than can be done in the stately and costly courts of law. The speed and informality mentioned below contribute to the relative cheapness of administrative justice.

(iii) *Speed*

30–008 Again, if these multitudinous questions are to be disposed of without the delay that would clog the administrative machine and work great hardship on interested parties, institutions must be devised and procedure adopted that will dispatch the

[13] Exhaustive information down to 1957 is contained in the *Memoranda submitted by Government Departments* to the Franks Committee. See also R. E. Wraith and D. G. Hutchesson, *Administrative Tribunals* (1973); J. A. Farmer, *Tribunals and Government* (1974); H. Street, *Justice in the Welfare State* (2nd ed., 1975); I. Fulbrook, *Administrative Justice and the Unemployed* (1978).

[14] S. H. Legomsky, *Specialized Justice* (1990, Oxford).

[15] Lands Tribunal Act 1949.

[16] Mental Health Act 1983.

[17] Employment Tribunals Act 1996.

business much more speedily than the ordinary courts can do. Indeed, the courts would not have time to take over this work, in addition to what they already have, without being entirely reconstituted and so losing their present identity.

(iv) *Flexibility*

Although every body of men that has to make decisions evolves in course of time general working principles, and government departments tend to follow their own precedents, the new tribunals are not hampered by the rigid doctrine of binding precedent adhered to by the courts.[18] They thus have greater freedom to develop new branches of law on the basis of modern social legislation and suitable to the needs of the Welfare State, as in times past the Court of Chancery developed Equity.[19] This does not mean that the decisions of tribunals are entirely capricious and unpredictable: there is a growing practice for some of them to publish selected decisions. **30–009**

(v) *Informality*

Tribunals are not bound by such complex rules of procedure or such stringent rules of evidence as prevail in the ordinary courts.[20] They may admit hearsay evidence[21]; they must observe the rules of natural justice but there is not necessarily a right in all cases to cross examine witnesses.[22] Unlike the judges of the ordinary courts, members of tribunals are entitled to rely in deciding cases not merely on the evidence before them but on their professional or industrial knowledge relating to the subject matter of the dispute before them. To hold otherwise would, of course, reduce if not completely destroy the value of choosing members of tribunals by reference to their special knowledge. They may rely on "their cumulative knowledge and experience of the matter in hand."[23] A doctor, for example, may advise other members of a tribunal from his personal experience of the weight to be given to evidence relating to medical matters.[24] **30–010**

Examples of statutory tribunals

In many important areas of everyday life matters affecting a large part of the population are subject to the jurisdiction of statutory tribunals—for example social security benefits of all kinds, employment law, questions of discrimination, immigration, education, mental health. Most tribunals are of recent origin but some have a long history. The General Commissioners of Income Tax date back to 1798. **30–011**

A common structure, particularly in the case of tribunals of modern origin which deal with large numbers of cases and sit throughout the United Kingdom, is a tribunal of three: a legally qualified Chairman and two members chosen

[18] *Merchandise Transport v. B.T.C.* [1962] 2 Q.B. 173.
[19] *cf. James v. Minister of Pensions* [1947] K.B. 867 (Denning J.).
[20] *R. v. Deputy Industrial Injuries Commissioner, ex p. Moore* [1965] 1 Q.B. 456.
[21] *Milier (T.A.) v. Ministry of Housing and Local Government* [1968] 1 W.L.R. 992, CA
[22] *R. v. Newmarket Assessment Committee, ex p. Allen Newport Ltd* [1945] 2 All E.R. 371, 373; *R. v. Deputy Industrial Injuries Commissioner, ex p. Moore (supra); Nicholson v. Secretary of State for Energy* (1977) 76 L.G.R. 693; decisions recognising in the circumstances a right to cross examine. *Contra, Kavanagh v. Chief Constable of Devon and Cornwall* [1974] Q.B. 624.
[23] *Metropolitan Properties v. Lannon* [1969] 1 Q.B. 577, 603 *per* Edmund-Davies L.J. (Rent Assessment Committee).
[24] *R. v. Medical Appeal Tribunal, ex p. Hubble* [1958] 2 Q.B. 228, 240 *per* Diplock J., affirmed [1959] 2 Q.B. 408. See also *Dugdale v. Kraft Foods Ltd* [1977] I.C.R. 48 (E.A.T.).

because of their expertise in the relevant field and representing "both sides" where that can be said to be applicable, for example in employment tribunals. In other cases, for example the Lands Tribunal, there is a small number of members from whom a tribunal is constituted when required. In the particular instance of the Lands Tribunal one member of the panel sitting alone constitutes the Tribunal.

Social security

30–012 There is an elaborate arrangement of tribunals in this wide and important area which covers entitlement to benefits and payments of various kinds.[25] Appeals lie to an Appeals Tribunal. Each tribunal normally consists of a legally qualified Chairman and two members chosen from a panel of persons having knowledge or experience of conditions in the area and being representative of persons working and living in the area but may be constituted by a sole member.[26] The system of tribunals as a whole is under the control of a President who is responsible for superintending the general working of the tribunals.

Appeal lies, subject in some cases to leave, to Commissioners. An appeal is normally heard by one Commissioner. The Chief Commissioner decides which decisions shall be reported.

Employment tribunals[27]

30–013 This is another important body of tribunals, sitting throughout the United Kingdom, with a wide and varied jurisdiction. Established in 1965 to deal with claims relating to redundancy payments they subsequently acquired jurisdiction over unfair dismissals, discrimination claims under the Sex Discrimination and Race Relations legislation and appeals against improvement and prohibition notices served under the Health and Safety at Work, etc. Act 1974. The tribunals are under the supervision of a President. Each tribunal consists of a legally qualified chairman and two laymen, one chosen from a list prepared in consultation with employers' representatives, the other from a list prepared in consultation with trades unions. The Employment Rights (Resolution of Disputes) Act 1998, however, provides for a number of situations where the Chairman may sit alone.[28]

A special feature of Industrial Tribunals is that appeal lies to the Employment Appeal Tribunal which consists of a High Court Judge and two lay members.[29]

Immigration

30–014 The provision for hearing appeals relating to immigration by Immigration Adjudicators and the Immigration Appeal Tribunal has been outlined earlier in Chapter 23.

[25] Social Security Administration Act 1992; Social Security Act 1998. M. Adler, "Lay tribunal members and administrative justice" [1999] P.L. 616.

[26] See Adler, n. 25 *supra*.

[27] Employment Tribunals Act 1996.

[28] Rules for appointing lay members held to be compatible with Convention on Human Rights in *Scantuture UK Ltd v. Secretary of State for Trade and Industry, The Times*, April 26, 2001, EAT.

[29] The court is unusual in having a jurisdiction which extends to both Scotland and England: Employment Tribunals Act 1996, s. 20.

Mental health review tribunals

These important bodies and the difficult jurisdiction which they have to exercise have been discussed in Chapter 24.[30] **30–015**

Taxation

Appeals against assessments to income tax lie in some cases to General Commissioners, in some to Special Commissioners. The former are appointed by the Lord Chancellor and are residents with knowledge of the area in which they sit.[31] Usually two Commissioners hear an appeal which is conducted informally. Special Commissioners[32] are appointed by the Treasury. They are senior civil servants; hearings are in London, sometimes before two, sometimes one Commissioner. **30–016**

Value Added Tax is collected by the Customs and Excise. Appeals are heard by Value Added Tax Tribunals which are under the supervision of a President. Each tribunal consists of a Chairman, appointed by the Lord Chancellor, and one or two laymen chosen from a panel nominated by the Treasury. (The Chairman may sit alone).[33]

Miscellaneous

Further examples which illustrate the width of matters referred to administrative tribunals of various kinds might include Commons Commissioners,[34] the Foreign Compensation Commission,[35] the Independent Schools Tribunal,[36] the Special Educational Needs Tribunal[37] the Conveyancing Appeals Tribunal[38] and the Plant Varieties and Seeds Tribunal.[39] The Wireless Telegraphy Appeal Tribunal, established by the Wireless Telegraphy Act 1949 is unusual in that it is believed never to have heard an appeal. More recent examples include the Tribunal established by the Regulation of Investigatory Powers Act 2000, the Financial Services and Markets Tribunal established by the Financial Services and Markets Act 2000 and the Adjudication Panels set up by the Local Government Act 2000 from which members will be selected to form Case Tribunals to investigate complaints of unethical behaviour in local government. The Director General of Fair Trading is regarded as a tribunal for the purposes of the adjudicatory powers which he exercises under the Fair Trading Act 1973, the Consumer Credit Act 1974 and the Estate Agents Act 1979. Appeals from the Director General lie to the Competition Commission, established by the Competition Act 1998. The Freedom of Information Act 2000 gives adjudicative powers to the Information Commissioner (formerly the Data Protection Commissioner) with appeals to the Information Tribunal (formerly the Data Protection Tribunal). The Financial Services and Markets Act 2000, section 132 establishes

[30] See J. Peay, *Tribunals on Trial* (Oxford, 1989).
[31] Taxes Management Act 1970, s.2.
[32] Taxes Management Act 1970, s.4.
[33] Value Added Tax Act 1994, s.82 and sched. 12.
[34] Commons Registration Act 1965.
[35] Foreign Compensation Acts 1950 and 1969.
[36] Education Act 1996, s.476.
[37] Education Act 1996, s.333. The School Standards and Framework Act 1998 established Exclusion appeal panels (sched. 18) and Admission Appeal Panels (scheds 24 and 25).
[38] Courts and Legal Services Act 1990, s.41.
[39] Plant Varieties Act 1997.

a Tribunal to which appeal lies from decisions of the Financial Services Authority.[40] Appeal from the tribunal lies to the Court of Appeal or Court of Session.

Tribunals of Inquiry, established under the Tribunals of Inquiry (Evidence) Act 1921 belong in a class of their own and are discussed earlier in Part I of Chapter 7.

Domestic tribunals

30–017 Some disciplinary bodies set up for professional or other associations are established by statute, often with appeal to the courts, and therefore find a place here since bodies exercising statutory powers against individuals will normally be regarded as operating in the area of public law.[41]

The supervisory jurisdiction of the High Court[42] is exercised over statutory domestic tribunals in a similar way to that over administrative tribunals, in that they must observe the principles of natural justice; and this supervisory jurisdiction over them provides useful precedents for administrative law.[43] However, whereas excess of jurisdiction renders a statutory tribunal liable to damages, excess of jurisdiction by a non-statutory tribunal does not, unless there is a breach of contract or malice.[44] Proceedings against non-statutory domestic tribunals may be commenced in the normal way. In addition to damages, where appropriate, declarations and injunctions are available but not certiorari and prohibition.[45]

Disciplinary committees have been created by statute for a large number of professions to hear complaints of misconduct and with power to strike members off the register. The Medical Act 1983, for example, establishes a Professional Conduct Committee with power to remove a doctor's name from the register of medical practitioners, either for a fixed period or indefinitely, on proof of conviction of a criminal offence or of serious professional misconduct. Appeal lies to the Privy Council.[46] Architects, Farriers and Pharmacists, on the other hand, may appeal from professional bodies to the High Court.[47]

[40] *ante* para. 28–005.

[41] *R. v. General Medical Council ex p. Gee* [1986] 1 W.L.R. 226; affirmed [1986] 1 W.L.R. 1247, CA.

[42] *post*, Chap. 32.

[43] Lord Justice Morris, "The Courts and Domestic Tribunals" (1953) 69 L.Q.R. 318; D. Lloyd, "The Disciplinary Powers of Professional Bodies" (1950) 13 M.L.R. 281 and (1952) 15 M.L.R. 413; J. D. B. Mitchell, "Domestic Tribunals and the Courts" (1956) 2 *British Journal of Administrative Law* 80; J. Gareth Miller, "The Disciplinary Jurisdiction of Professional Tribunals" (1962) 25 M.L.R. 531; *Report of Departmental Committee on Powers of Subpoena of Disciplinary Tribunals* (1960) Cmnd. 1033.

[44] *Byrne v. Kinematograph Renters Association* [1958] 1 W.L.R. 762.

[45] Now, the remedies of a prohibiting or quashing order. *R. v. National Joint Council for the Craft of Dental Technicians ex p. Veate* [1953] 1 Q.B. 704, DC. *Post*, p. 687.

[46] Medical Act 1983, s.36 and s.40. Similarly, Dentists Act 1984 s.27 and s.29. Appeal also lies to the Privy Council under the Veterinary Surgeons Act 1966. The Health Act 1999, s.60 and Sched. 3 contain wide powers for the amendment of legislation regulating the medical and associated professions.

[47] Architects (Registration) Act 1931; Farriers (Registration) Act 1975 and Farriers (Registration) (Amendment) Act 1977; Pharmacy Act 1954; Medicines Act 1968. Appeals by doctors, dentists and veterinary surgeons and practitioners from decisions of the tribunal established under the Misuse of Drugs Act 1971 lie to the High Court.

Tribunals and Inquiries Act 1992

A Committee on Administrative Tribunals and Inquiries under the chairmanship of Sir Oliver Franks (later Lord Franks) was appointed by the Lord Chancellor: "To consider and make recommendations on: (a) The constitution and working of tribunals other than the ordinary courts of law, constituted under any Act of Parliament by a Minister of the Crown or for the purposes of a Minister's functions. (b) The working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a Minister on an appeal or as the result of objections or representations, and in particular the procedure for the compulsory purchase of land." The Committee reported in 1957.[48] **30–018**

The purpose of Parliament in providing that certain decisions should not be left to the ordinary courts but should be subject to special procedures, said the Committee, must have been to promote good administration: and the general characteristics that should mark these special procedures are "openness, fairness and impartiality." It was not possible to define the principles on which it had been decided that some adjudications should be made by tribunals and others by Ministers: the distinction was a fact that had to be accepted. Tribunals should be regarded as machinery provided by Parliament for adjudication, rather than (as the Committee on Ministers' Powers had suggested in 1932) as part of the machinery of administration.

The Government accepted most of the recommendations of the Franks Committee in the Tribunals and Inquiries Act 1958. Certain reforms could be introduced by administrative directions to government departments or local authorities. The most important innovation made by the Act was the creation of a Council on Tribunals.[49] (The composition and work of the Council is considered in Chapter 34.) The Act also made further provision as to the appointment, qualifications and removal of the chairman and members, and as to the procedure, of certain tribunals; it provided for appeals to the courts from certain tribunals; it required the giving of reasons for certain decisions of tribunals and Ministers; and it extended the supervisory powers of the High Court. The Act was amended in 1959[50] and 1966,[51] and the law was consolidated by the Tribunals and Inquiries Act 1971 and again by the Tribunal and Inquiries Act 1992.

Appointment of members of tribunals

The chairmen of some tribunals are appointed by the Lord Chancellor, and the chairmen of certain other tribunals are selected by the appropriate Minister from a panel of persons appointed by the Lord Chancellor[52] (section 6). **30–019**

The Council on Tribunals may make to the appropriate Minister general recommendations as to the appointment of members of the tribunals specified in Schedule 1 (*i.e.* those under the supervision of the Council), and also of the relevant panels, and the Minister "shall have regard" to such recommendations.

[48] (1957) Cmnd. 218.

[49] The idea appears to have originated with Professor W. A. Robson, who proposed a "Standing Council on Administrative Tribunals" (see Franks Report, *Minutes of Evidence*, p. 496), in addition to an Administrative Appeal Tribunal. It was reinforced by H. W. R. Wade's proposal for an "Administrative Court" (*ibid.* pp. 551–555).

[50] Town and Country Planning Act 1959, s.33 (provision of rules of procedure for statutory inquiries).

[51] Tribunals and Inquiries Act 1966 (provision of rules of procedure for discretionary inquiries).

[52] Or the Lord President of the Court of Session or the Lord Chief Justice of Northern Ireland.

A Minister may not, with certain exceptions, terminate the appointment of a member of a tribunal specified in Schedule 1, or of a relevant panel, without the consent of the Lord Chancellor (section 7).

Procedure

30–020 The Minister must consult the Council on Tribunals before making or approving procedural rules for the tribunals that come under its supervision. There are now no restrictions on legal representation before most statutory tribunals.[52] Legal aid is not available except before the Lands Tribunal, the Employment Appeal Tribunal, Mental Health Review Tribunals and the Commons Commissioners. In the case of other tribunals, however, legal advice is available. In many cases litigants will in fact have the help of their unions or similar bodies.[53] Presumably, too, the right which the Court of Appeal recognised in *McKenzie v. McKenzie*[54] for a litigant to be accompanied by a friend to assist by taking notes and giving advice applies to tribunals as much as to the ordinary courts.

Appeals from tribunals

30–021 A party to proceedings before most statutory tribunals, who is dissatisfied with the tribunal's decision on a point of law, may either appeal to the High Court or require the tribunal to state a case for the opinion of the High Court. Appeal lies by leave of the High Court or of the Court of Appeal to the Court of Appeal[55] and thence to the House of Lords (section 11).

The scope of this right depends on the view of the courts on what constitutes a point of law as opposed to a question of fact. Whether or not the facts were as alleged by an applicant is a matter for the tribunal. Whether those facts in the light of the appropriate rules of law give rise, for example, to a contract of employment is a matter of applying the law to the facts. If a court does not wish to interfere it can call that second stage too a question of fact. If it does wish to interfere it can conclude that it raised a point of law because no reasonable tribunal could have reached such a conclusion unless it had made an error in understanding or applying the law.[56]

Supervisory powers of superior courts

30–022 Any provision in an Act passed *before* August 1, 1958, that any order or determination shall not be called into question in any court, or any similar provision which excludes any of the powers of the High Court, shall not prevent the removal of the proceedings into the High Court by order of certiorari or prejudice the powers of the High Court to make orders of mandamus (section 12).[57] It does not, however, affect statutory provisions prescribing a special time limit within which applications to the High Court must be made.

[52] An exception is provided by tribunals which deal with complaints against National Health Service practitioners: Health and Social Security Act 1984, s.5 and Sched. 3.

[53] See the explicit recognition of this likelihood in the Employment Tribunals Act 1996, s.6(1): *Bache v. Essex County Council, The Times* February 2, 2000, CA.

[54] [1971] p. 33.

[55] The Court of Session takes the place of the High Court and the Court of Appeal in relation to proceedings in Scotland.

[56] *post* para. 32–015.

[57] These are now the remedies of a mandatory or quashing order. There is a corresponding provision in relation to Scotland.

Reasons to be given for decisions

30–023 Where a tribunal which comes under the supervision of the Council gives a decision, it is the duty of the tribunal to furnish a written or oral statement of the reasons for the decision *if requested to do so* by persons concerned. (s.10) The statement may be refused, or the specification of the reasons restricted, on the grounds of national security. Such a statement forms part of the decision and must be incorporated in the record, so that the order will be a "speaking order" for the purposes of certiorari (or quashing order).[59]

The courts have held that the reasons given must be "proper, adequate reasons" which are intelligible and deal with the substantial points which had been raised.[60]

II. Ministerial Decisions and Inquiries

30–024 Parliament often provides that, before a decision is made by a Minister or other public authority which affects the rights of citizens, an inquiry must be held at which those whose interests are concerned may state their objections to the action proposed before a final decision is made. Inquiries are usually prescribed by statute before land is compulsorily acquired for such purposes as town development, slum clearance, the building of housing estates, schools and hospitals, and road improvement; and also before town and country planning schemes are confirmed. Inquiries may also be prescribed in relation to the provision of social services, and for other schemes of control. Most inquiries are arranged by the Ministry for the purposes of its own housing and planning cases and those of local authorities. The procedure provides a framework for a fair hearing in the weighing of the proposals of a public authority against the interests of persons affected by them. The Minister is not bound by the recommendations of the Inspector who holds the inquiry: he must, on the contrary form his own independent decision.[61] An important exception, however, is provided by the power in the Town and Country Planning Act, 1990, Sched. 6 to delegate the power in certain classes of planning appeals to an inspector, in such cases his decision is final.[62]

Some Ministers have the power—often without appeal—to make decisions directly affecting the rights of individuals or other public authorities. This power of decision may be either original or appellate. In either case it may involve a dispute between a public authority and an individual or between two public (often local) authorities. The power is in a greater or less degree discretionary, usually there is no kind of appeal from it, and in the cases we are now considering no public inquiry or other form of procedure is prescribed by statute. Normally, therefore, citizens can only complain about these decisions through

[59] *post*, para. 32–004.

[60] *Re Poser and Mills' Arbitration* [1964] 2 Q.B. 467. For other statutory provisions requiring the giving of reasons for decisions see *Iveagh (Earl) v. Minister of Housing and Local Government* [1964] 1 Q.B. 395; *Givaudan & Co v. Minister of Housing and Local Government* [1967] 1 W.L.R. 250; *Elliott v. Southwark L.B.C.* [1976] 1 W.L.R. 499; *French Kier Developments v. Secretary of State for the Environment* [1977] 1 All E.R. 296.

[61] *Nelsovil Ltd v. Minister of Housing and Local Government* [1962] 1 W.L.R. 404.

[62] S.I. 1981 No. 804; S.I. 1995 No. 2259.

such political means as letters to Members of Parliament, questions in the House and motions in debates on the adjournment.

Examples are the Home Secretary's power to hear appeals from police officers against dismissal or reduction in pay, and his powers relating to prison administration; and the judicial functions of various Ministers in relation to such matters as bankruptcy, weights and measures, registration of business names and trademarks and licensing of road transport.

The Minister *may* hold an inquiry in many of these cases but in such cases the parties concerned will lack the rights which they have where an inquiry must be held.[63]

Inquiries[64]

30–025 A typical provision requiring the holding of an inquiry is to be found in the Acquisition of Land Act 1981. The Act lays down general procedural rules to be observed before compulsory purchase powers conferred by various statutes can be exercised. Section 13 of the 1981 Act provides that if any objection has been made to a proposed compulsory purchase order the Minister shall before confirming the order either cause a public local inquiry to be held or afford to any objector a hearing. Little can be learned from the Act of any rules relating to the holding of such an inquiry or who might hold it. Section 35 of the Town and Country Planning Act 1990 similarly requires the minister, before confirming a structure plan proposed for a planning authority for the development of its area, to afford to any objectors "an opportunity of appearing before and being heard by a person appointed by him for the purpose." Sections 16 and 106 of the Highways Act 1980 require the holding of inquiries and, in some instances, section 16 requires an inquiry under the Statutory Orders (Special Procedure) Act 1945.

Procedure

30–026 The Franks Committee made a number of recommendations relating to procedure at inquiries and, in particular, advocated the adoption of statutory rules to regulate procedure.

The Lord Chancellor was given statutory power to make rules for procedure, after consultation with the Council of Tribunals, by the Town and Country Planning Act 1959, s.33; see now the Tribunals and Inquiries Act 1992, s.9. In due course rules were made for many of the more important types of inquiry[65] and are usually followed by analogy in cases where strictly they do not apply. The rules relate to the notice to be given to persons entitled to appear before the inquiry; the right to representation and the right to call evidence and cross examine. The rules define the right to appear by reference to people whose legal rights are effected by the scheme or proposal. Within limits inspectors allow parties to appear who may not be within the terms of the rules and there is judicial support for the view that a local inquiry is open to anyone living in the locality.[66]

[63] *Essex County Council* v. *Ministry of Housing and Local Government* (1967) 18 P. & C.R. 531 (Stansted Airport Inquiry).

[64] R. E. Wraith and G. B. Lamb, *Public Inquiries as an Instrument of Government* (1971).

[65] Compulsory Purchase by Public Authorities (Inquiries Procedure) Rules 1976, S.I. 1976 No. 746. Town and Country Planning (Inquiries Procedure) (England) Rules 2000 S.I. 2000 No. 1624. Highways (Inquiries Procedure) Rules 1976, S.I. 1976 No. 721.

[66] *Weaneshury Corporation* v. *Ministry of Housing and Local Government* (No. 2) [1966] 2 Q.B. 275, 302 *per* Diplock L.J.

Apart from express procedural rules an inspector must observe the rules of natural justice (or act fairly or not behave with procedural impropriety[67]). Hence he must not receive evidence from one party in the absence of another[68] or base his report on considerations which the objectors had not known were in his mind so that they had had no chance to deal with them.[69]

Fairness and the general nature of local inquiries were considered by the House of Lords in *Bushell v. Secretary of State for the Environment*,[70] an inquiry held under the Highways Act 1959, before the Highways Inquiries Rules had come into force. The House of Lords, Lord Edmund-Davies dissenting, upheld the refusal of the inspector to allow cross-examination of the department's expert witnesses on the reliability and statistical validity of the methods of traffic prediction used by the department to produce its estimates of future traffic needs. Lord Diplock, whose speech contains the lengthiest analysis of the role of the inspector, preferred to use the word "fair" to describe the procedure required to be followed by the inspector: "natural justice was too liable to connote "the procedure followed by English courts of law." What is fair is to be determined in the light of the nature of the subject matter of the inquiry and of the practical realities as to the way in which administrative decisions forming judgments based on technical considerations are reached. A refusal to permit cross-examination is not *per se* unfair. In *Bushell* the method of computing traffic flow was not a topic suitable for investigation by individual inspectors at individual inquiries, unlike the route of a particular stretch of motorway. It was more akin to a question of policy—should motorways be built at all?—which is a matter for Parliament, not local inquiries.[71]

Since the coming into force of the Human Rights Act 1998 questions of procedure may now be open to challenge by reference to Article 6 of the Convention.

The Inspector's Report

Inspectors were, until recently, largely, full time members of the departments for which they hold inquiries. Although this could give rise to some doubt about their independence and impartiality the Franks Committee emphasised that it had received "virtually no criticism of the qualifications of inspectors or of the manner in which they conduct enquiries." Nonetheless the Committee finally decided to recommend that inspectors should be put under the control of the Lord Chancellor rather than being employed as full-time members of particular departments or being appointed from time to time by a department to conduct a particular inquiry. That recommendation was not accepted by the Government. However, the Departments of the Environment and Transport did agree that highway inquiries should in future be conducted by inspectors nominated by the Lord Chancellor.[72] 30–027

[67] *post*, para. 31–013 *et seq.*

[68] *Hibernian Property Co Ltd v. Secretary of State for the Environment* (1973) 27 P. & C.R. 197.

[69] *Fairmount Investments v. Secretary of State for the Environment* [1976] 1 W.L.R. 1255, HL.

[70] [1981] A.C. 75. See too *R. v. Secretary of State for Transport, ex p. Gwent County Council* [1987] 1 All E.R. 161.

[71] The extent to which policy is a proper issue to be raised at an inquiry may depend on whether it is a "local inquiry" or a more far ranging inquiry, in which policy questions are inevitably involved, such as that into proposals to build an airport at Stansted or a nuclear reactor at Sizewell: M. Purdue, R. Kemp and T. O'Riordan, "The Government at the Sizewell B Inquiry" [1985] P.L. 475.

[72] Report on the Review of Highway Inquiry Procedures, Cmnd. 7133 (1978).

Even as formerly organised the hearing of inquiries was probably consistent with Article 6 of the Convention on Human Rights because the availability of judicial review provided the necessary guarantee of an impartial, independent hearing: *Bryan v. UK*.[73]

The independence and impartiality of Inspectors has, however, been strengthened by the establishment as an executive agency of a Planning Inspectorate.

Another important aspect of public confidence in the operation of inquiries is the right to know the contents of the inspector's report. There is likely to be suspicion about a system which grants a hearing and requires ministers in some cases to reopen inquiries or allow further representations, if the report at the centre of the procedure is withheld from the parties. The courts gave no right to see the report but the Franks Committee recommended publication on the ground that "fair play for the citizen" required that he should know what the inspector said to the minister. This recommendation has been accepted and is specifically included in the statutory rules of procedure governing various classes of inquiries. The report is not, however, made available until the minister has made his decision.

The role of the Minister

30–028 Once the inspector has concluded his hearing and produced his report the rights of the ministers and objectors are now largely governed by statutory rules. The Franks Committee had been concerned about the extent to which a minister might take into account new evidence received after an inquiry had concluded. The committee suggested a distinction between new factual evidence and advice on policy, which the Government accepted. A minister is, in many cases, now required to notify all the parties concerned if (i) he intends to differ from an inspector on a finding of fact or (ii) he is likely to disagree with the inspector's recommendations because he has taken into consideration new evidence (which includes expert evidence on a matter of fact) or any new issue of fact (which does not include questions of government policy). Where the minister is differing on a finding of fact the parties have 21 days in which to make written representations. In the other cases the parties have 21 days within which to ask for the reopening of the inquiry. An example of the rules being successfully invoked to invalidate a ministerial decision is to be found in *French Kier Developments Ltd v. Secretary of State for the Environment*.[74] In making his report, an inspector disregarded a document put before him but the minister relied on that document to justify a refusal to accept the inspector's recommendations. Willis J. held that to attach any weight to the contents of the document in the circumstances amounted to the taking into consideration of new evidence and the parties should therefore have had the opportunity to reopen the inquiry. The difficulty which may arise in interpreting the new rules is illustrated by *Murphy (J.) and Sons Ltd v. Secretary of State for the Environment*.[75] An inspector had recommended against allowing a site to be developed for residential use because of the amount of noise coming from the plaintiff company's adjoining premises. The minister, however, granted permission for the development and the plaintiff's company claimed that, in doing so, he had differed from the inspector on a finding of fact. Ackner J. held that the minister had not differed from the inspector on a finding of fact but from the inspector's expression of opinion on the planning merits.

[73] (1995) 21 E.H.R.R. 342.
[74] [1977] 1 All E.R. 296.
[75] 1973 1 W.L.R. 560.

which did not give the plaintiff the right to make further representations.[76] In the case of inquiries governed by these or similar rules the right to make further representations or to reopen the inquiry only arises if the minister differs from his inspector.

In *Bushell v. Secretary of State for the Environment*[77] the House of Lords emphasised that, whatever the restrictions on the minister in reaching his decision, he is perfectly entitled to consult his departmental officials and obtain from them the best advice that he can: "Once he has reached his decision he must be prepared to disclose his reasons for it, because the Tribunals and Inquiries Act 1971 so requires; but he is, in my view, under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert or otherwise, which he receives from his department in the course of making up his mind. If he thinks that to do so will be helpful to him in reaching the right decision in the public interest he may, of course, do so; but if he does not think it will be helpful—and this is for him to decide—failure to do so cannot in my view be treated as a denial of natural justice to the objectors."[78]

[76] See *Lord Luke of Pavenham v. Minister of Housing and Local Government* [1968] 1 Q.B. 172.
[77] [1981] A.C. 75.
[78] At p. 102 *per* Lord Diplock.

CHAPTER 31

JUDICIAL CONTROL OF PUBLIC AUTHORITIES: I. LIABILITY[1]

31–001 We consider in this chapter the general principles in accordance with which the courts control the exercise of powers by public authorities. The remedies available for this purpose are dealt with in the next chapter, and civil proceedings by and against the Crown in Chapter 33. In the terminology of Lord Diplock in *O'Reilly* v. *Mackman*[2] Part I of this chapter deals with judicial control through Public Law while Part II deals with control through the mechanism of Private Law.

1. PUBLIC LAW: EXCESS OR ABUSE OF POWERS

Judicial control of powers

31–002 The exercise by public bodies of powers conferred on them by statute or by the common law may be open to review in the courts on a number of grounds. As a general principle it can be said that the courts do not concern themselves with the wisdom of a particular decision: they cannot, as it is said, examine the merits. They can, however, examine whether a public body has exceeded the powers given to it so that its decision is *ultra vires*, or whether the procedure followed in reaching a decision was flawed by a failure to observe the principles of natural justice. A decision may also be open to review because it is one that no reasonable body could have reached: the *Wednesbury*[3] principle. For present purposes it is unnecessary to consider whether all these grounds should be regarded as aspects of the *ultra vires* doctrine.[4] In the following pages the various bases for judicial review will be examined by reference to the traditional terminology which formerly was to be found in the case law. Reference must, however, be made to Lord Diplock's new terminology which has begun to appear in judgments and which, as will be seen, may be of importance if it extends the scope of judicial review. In the *GCHQ* case Lord Diplock said:

> "Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call

[1] See de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed., 1995).
[2] [1983] 2 A.C. 237.
[3] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374.
[4] *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 K.B. 223; *post*, para. 31–011.
[5] Lord Diplock described review on the *Wednesbury* grounds of unreasonableness as involving a type of *ultra vires*: *British Airways* v. *Laker Airways* [1985] A.C. 58. For judicial doubt that *ultra vires* is the underlying basis of judicial review, see Sir John Laws, "Illegality, the problem of Jurisdiction" in *Judicial Review* (ed. Supperstone and Goudie, 1992); "Lord Woolf: Droit-Public-English Style", [1995] P.L. 57. See further C. Forsyth, "Of Fig Leaves and Fairy Tales", [1996] Camb. L.J. 122; J. Jowell, "Of Vires and Vacuums" [1999] P.L. 448. See also *Judicial Review and the Constitution* (ed. C. Forsyth, Hart, 2000).

'*illegality*,' the second '*irrationality*,' and the third '*procedural impropriety*.' That is not to say that further development on a case by case basis may not in course of time add further grounds."[6]

Within a year that classification had been described as "a valuable and already 'classical' but certainly not exhaustive analysis of the grounds upon which courts will embark on the judicial review of an administrative power exercised by a public officer."[7]

The Human Rights Act 1998 has introduced a new ground of challenge, that a public authority has acted in breach of a convention right, which may be regarded as a specific example of illegality.[8]

Ultra Vires rule

31–003 A Minister, a local authority and any public body may only validly exercise powers within the limits conferred on them by common law or statute. A decision may fall outside those powers and so be *ultrà vires* because the body concerned has attempted to deal with a matter outside the range of the power conferred on it—substantive *ultra vires*—or because it has failed, in reaching its decision, to follow a prescribed procedure—procedural *ultra vires*.

In so far as the common law powers of public authorities are part of the royal prerogative the jurisdiction of the courts over them was asserted in such cases as the *Case of Monopolies*[9] the *Case of Proclamations*[10] and *The Zamora*.[11] In the *GCHQ* Case the House of Lords clearly affirmed that the exercise of prerogative powers is subject to judicial review, although that case was concerned with natural justice (or procedural impropriety), where the powers relate to matters which are "justiciable."[12]

As regards the innumerable statutory powers, the question is one of interpretation of the statute concerned. The acts of a competent authority must fall within the four corners of the powers given by the legislature.[13] The court must examine the nature, objects and scheme of the legislation, and in the light of that examination must consider what is the exact area over which powers are given by the section under which the competent authority purports to act.[14]

31–004 In *Attorney-General v. Fulham Corporation*,[15] for example it was held that a local authority which had power under the Baths and Wash-houses Acts 1846 to 1878 to establish baths, wash-houses and open bathing places was not entitled to carry on the business of a laundry, and was acting *ultra vires* in washing or partly

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[6] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, 410. One development to which Lord Diplock referred specifically was the possible recognition of the principle known to the European Court of Justice as proportionality: see, for example, *R. v. Intervention Board for Agricultural Produce, ex p. E.D. & F. Man (Sugar) Ltd* [1986] 2 All E.R. 115. See further, *R. v. Secretary of State for Transport, ex p. Pegasus Holdings (London) Ltd* [1988] 1 W.L.R. 990; *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C. 696.

[7] *R. v. Secretary of State for the Environment, ex p. Nottinghamshire C.C.* [1986] A.C. 240, *per* Lord Simon.

[8] See *ante* para. 22–016.

[9] (1602) 11 Co.Rep. 84b.

[10] (1610) 12 Co.Rep. 74.

[11] [1916] 2 A.C. 77.

[12] *C.C.S.U. v. Minister for the Civil Service* [1985] A.C. 374; *ante*, para. 15–004.

[13] *per* Lord Greene M.R. in *Carltona Ltd v. Commissioners of Works* [1943] 2 All E.R. 560, 564.

[14] *per* Sachs J., in *Commissioners of Customs and Excise v. Cure and Deeley Ltd* [1962] 1 Q.B. 340.

[15] [1921] 1 Ch. 440.

washing customers' clothes as distinct from providing facilities for persons to wash their own clothes.

A more controversial and difficult example is provided by *Bromley L.B.C. v. G.L.C.*[16] where the legality of a grant by the G.L.C. to the London Transport Executive was challenged on a number of grounds. The House of Lords held, *inter alia*, that the grant was *ultra vires* because the authority did not have the power to make grants to the Transport Executive merely for the purpose of reducing fares. In *Re Westminster City Council*[17] the House of Lords held that attempts by the G.L.C. in the last months of its existence to provide funding for future years for the Inner London Education Authority and an array of voluntary bodies was *ultra vires*.

Delay in exercising a statutory power, if contrary to express or implied requirements in the relevant Act, may invalidate the decision on the ground of *ultra vires*.[18]

Legislative Powers

31–005 Delegated legislation has been held void on the ground of *ultra vires* in a number of cases. In *Chester v. Bateson*,[19] it was held that a regulation made by the Minister under the Defence of the Realm Act 1914 was *ultra vires* in that it made it an offence to take, without the consent of the Minister, any proceedings in the courts for the recovery of possession of houses occupied by workmen employed on war production in special areas so long as they continued to pay their rent and to observe the other conditions of the tenancy. In *Commissioners of Customs and Excise v. Cure and Deeley*[20] a purchase tax regulation which provided that if any person furnished an incomplete return the Commissioners might determine the amount of tax appearing to them to be due and demand payment thereof, which amount should be deemed to be proper tax due unless within seven days it was shown *to the satisfaction of the Commissioners* that some other amount was due, was held *ultra vires* the Finance (No. 2) Act 1940.

[16] [1983] A.C. 768: "An ultra vires case which involved difficult questions of construction of some obscurely worded statutory provisions": *Pickwell v. Camden L.B.C.* [1983] 1 All E.R. 602, 628 *per* Ormrod L.J.

[17] [1983] 1 A.C. 768. In the case of the voluntary bodies the House, in reaching its conclusion, had to distinguish its own previous decision in *Manchester C.C. v. Greater Manchester C.C.* (1980) 78 L.G.R. 560, something which Lord Bridge found himself unable to do.

[18] *Simpsons Motor Sales (London) Ltd v. Hendon Corporation* [1963] Ch. 57, 82–83 *per* Upjohn L.J. cited and approved [1964] A.C. 1088, 1117; *Collector of Land Revenue South West District Penang v. Kam Giu Paik* [1986] 1 W.L.R. 412, PC.

[19] [1920] 1 K.B. 829, DC. Applied to invalidate a Home Office standing order restricting access to solicitors by prisoners in *R. v. Secretary of State for the Home Dept., ex p. Anderson* [1984] Q.B. 778, DC. And see *Att.-Gen. v. Wilts United Dairies* (1921) 91 L.J.K.B. 897; (1921) 37 T.L.R. 884, HL, no authority to impose charges; *Utah Construction & Engineering Pty Ltd v. Pataky* [1966] A.C. 629, PC, power to make regulations relating to "the manner of carrying out excavation work" did not extend to imposing an absolute duty of care on employers; *Hotel and Catering Industry Training Board v. Automobile Proprietary* [1969] 1 W.L.R. 697; [1969] 2 All E.R. 582, HL, power to establish training boards for persons "in any activities of industry or commerce" did not extend to persons employed by private clubs. For an unsuccessful attempt to claim that regulations were *ultra vires* because of vagueness and arbitrariness see *McEldowney v. Forde* [1971] A.C. 632, HL; discussed, D. N. MacCormick, "Delegated Legislation and Civil Liberty" (1970) 86 L.Q.R. 171.

[20] [1962] 1 Q.B. 340. The Purchase Tax Act 1963, s.27(2), later provided that where a person did not keep proper accounts and the Commissioners estimated the amount of tax due, the amount should be recoverable unless *in any action relating thereto* the person liable proved the amount properly due and that amount was less than the amount estimated. For a more recent example see *R. v. Customs and Excise Commissioners, ex p. Heages & Butler Ltd* [1986] 2 All E.R. 164.

In *Daymond v. Plymouth C.C.*[21] the House of Lords held that a power to fix such charges as a water authority might "think fit" did not authorise the making of an Order levying charges for sewage services on the occupiers of properties which were not connected to public sewers.

The fact that a rule has been laid before the Houses and not been annulled does not bar review by the courts,[22] and it should be immaterial that a Statutory Instrument has been affirmed by a resolution of both Houses.[23]

Where the enabling Act prescribes a particular *procedure* for the exercise of a power, the exercise of the power may be void if that procedure is not followed.[24] In *Agricultural Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd*[25] the Minister purported to make an industrial training order under the Industrial Training Act 1964, s.1(4) which required him, before making an order to "consult any organisation," appearing to him to be representative of substantial numbers of employers engaged in the activities concerned. . . ." Donaldson J. held that failure to consult the body representing mushroom growers rendered the order in question invalid as against mushroom growers. **31–006**

In considering the effect of procedural irregularities the Courts distinguish between mandatory requirements, breach of which results in invalidity, and directory requirements, breach of which does not result in invalidity. The more important the requirement, the more likely it is that it will be held to be mandatory. To attempt to deduce clear principles from the case law is, however, impossible.[26] Moreover, even where the court holds that a mandatory requirement has not been complied with, relief may be withheld.[27]

Byelaws are *ultra vires* if they are repugnant to the general law; but it is not easy to decide in what circumstances a byelaw will be held invalid on that ground. It obviously must not be contrary to statute, although it can, of course, forbid what would otherwise be lawful at common law. In *Powell v. May*[28] a

[21] [1976] A.C. 609. See now Water Charges Act 1976; *South West Water Authority v. Rumbles* [1984] 1 W.L.R. 800, CA.

[22] *Mackay v. Marks* [1916] 2 I.R. 241; *Institute of Patents Agents v. Lockwood* [1894] A.C. 347, 366; *Hoffman La Roche v. Secretary of State for Trade and Industry* [1975] A.C. 295; *Laker Airways Ltd v. Department of Trade* [1977] Q.B. 643, CA; *cf. Bowles v. Bank of England* [1913] 1 Ch. 57.

[23] But see the reluctance of the House of Lords to examine the *reasonableness* of guidance given by a minister which had in accordance with statute been submitted for Parliamentary approval—and duly approved: *R. v. Secretary of State for the Environment, ex p. Nottinghamshire C.C.* [1986] A.C. 240.

[24] See *R. v. Minister of Health, ex p. Yaffe* [1930] 2 K.B. 98 (failure to follow appropriate procedure at local inquiry invalidated subsequent Ministerial order). *Cf. Minister of Health v. The King (on the prosecution of Yaffe)* [1931] A.C. 494, where the House of Lords approved the principle laid down by the Court of Appeal but upheld the scheme.

[25] [1972] 1 W.L.R. 190. See too *R. v. Secretary of State for Transport, ex p. Philippine Airlines, The Times*, October 17 (1984), CA. For an unsuccessful attempt to invoke procedural *ultra vires* see *Port Louis Corporation v. Att.-Gen. of Mauritius* [1965] A.C. 1111, PC. See too *R. v. Post Office, ex p. Association of Scientific, Technical and Managerial Staffs* [1981] I.C.R. 76, CA; *R. v. Secretary of State for Trade and Industry, ex p. Ian Kynaston Ford* (1985) 4 Tr. L. 150.

[26] For discussions of the distinction see *Coney v. Choyce* [1975] 1 All E.R. 979; *London & Clydeside Estates Ltd v. Aberdeen D.C.* [1980] 1 W.L.R. 182, HL; *R. v. St Edmundsbury B.C., ex p. Investors Ltd* [1985] 1 W.L.R. 1168; *Steeples v. Derbyshire C.C.* [1984] 3 All E.R. 468; *Walsh v. Barlow* [1985] 1 W.L.R. 90; *Secretary of State for Trade and Industry v. Langridge* [1991] Ch. 402, CA; *Wang v. C.I.R.* [1994] 1 W.L.R. 1286, PC.

[27] *R. v. Secretary of State for Social Services ex p. Association of Metropolitan Authorities* [1986] 1 W.L.R. 1.

[28] [1946] K.B. 330. And see *Thomas v. Sutters* [1900] 1 Ch. 10; *White v. Morley* [1899] 2 Q.B. 30; *Gentel v. Rapps* [1902] 1 K.B. 160, 166; *R. and W. Paul Ltd v. Wheat Commission* [1917] A.C. 139.

byelaw made by a county council forbidding generally any person to frequent or use any street or other public place for the purpose of bookmaking or betting or wagering, was held invalid as being repugnant to the Street Betting Act 1906 and the Betting and Lotteries Act 1934, which would have allowed the appellant bookmaker certain defences.

Where a statutory instrument or byelaw contains *ultra vires* provisions it may be possible to sever the offending portions and preserve other parts of the instrument or byelaw which fall within the powers conferred by Parliament.[29]

Judicial Powers

31–007 A tribunal or other body with a limited jurisdiction acts *ultra vires* if it purports to decide a case falling outside its jurisdiction. Thus a rent tribunal which is given power to fix the rent of a dwelling house cannot make an order relating to premises which are let for business purposes.[30] If such a tribunal erroneously concludes that the facts of a case fall within its jurisdiction its decision is *ultra vires* and can be set aside by the courts. Facts which must exist if a tribunal is to exercise its jurisdiction validly are known as *jurisdictional facts*. On matters which do not go to jurisdiction the tribunal may err without exceeding its jurisdiction. No satisfactory test has ever been suggested to distinguish jurisdictional from non-jurisdictional facts but there is no doubt that the courts use the distinction as the basis for exercising their supervisory control.

Since *Anisminic Ltd* v. *Foreign Compensation Commission*[31] it has also been the law that a tribunal acting within its jurisdictional limits may act *ultra vires* if it errs in applying the relevant law to the facts. Prior to that case it had been believed that errors of law made after embarking on consideration of a matter within a tribunal's jurisdiction could not deprive it of jurisdiction.[32] Such errors were only open to review if they were apparent from the formal statement of the tribunal's decision: error of law on the face of the record.[33] It is not yet clear whether *Anisminic* has established that every error of law amounts to an excess of jurisdiction, in which case error of law on the face of the record no longer has any significance. In the case of tribunals, as distinguished from courts of limited jurisdiction (such as county courts) there is support for the wide view of *Anisminic* in *Re Racal Communications*.[34] On the other hand the Privy Council in *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union*[35] has affirmed the continued distinction between jurisdictional and non-jurisdictional errors.

[29] *Dunkley* v. *Evans* [1981] 1 W.L.R. 1522, DC; *D.P.P.* v. *Hutchinson* [1990] 2 A.C. 783, HL.

[30] *R.* v. *Hackney, Islington and Stoke Newington Rent Tribunal ex p. Keats* [1951] 2 K.B. 15n. See too *White and Collins* v. *Minister of Health* [1939] 2 K.B. 838; *supra*, para. 25–038 *et seq.* for immigration cases.

[31] [1969] 2 A.C. 147.

[32] A view often expressed in the words of Lord Sumner in *R.* v. *Nat Bell Liquors Ltd* [1922] A.C. 128, 151, PC.

[33] This head of review raises the difficult matter of distinguishing between questions of law and questions of fact. C. T. Emery and B. Smythe, "Error of Law in Administrative Law" (1984) 100 L.Q.R. 612; J. Beatson, "The Scope of Judicial Review for Error of Law" (1984) 4 O.J.L.S. 22; G. Pitt, "Law, Fact and Casual Workers" (1985) 101 L.Q.R. 217; *post*, para. 32–015.

[34] [1981] A.C. 374. See too *R.* v. *Hull University Visitor, ex p. Page* [1993] A.C. 682, 707, *De Smith op. cit.*, 244–249.

[35] [1981] A.C. 363. The Privy Council preferred the dissent of Geoffrey Lane L.J. in *Pearlman* v. *Harrow School Governors* [1979] Q.B. 56 to the view expressed in that case by Lord Denning M.R.

The possible extension of review beyond errors of law to questions of fact has been raised by the House of Lords in *R. v. Criminal Injuries Board, ex p. A.*[36]

Abuse of power

31–008 Statutes often confer upon ministers, local authorities and other public bodies discretionary powers, for example in the area of planning law or when a trade or occupation is subject to a system of licensing. The courts, in the absence of a statutory right of appeal, cannot review the correctness of a decision made in the exercise of such a discretionary power. They may, however, interfere where the power has been improperly exercised so that the person exercising the power has acted in a way not intended by Parliament. Abuse of power, in this sense, includes exercising a power for an unauthorised purpose,[37] disregarding relevant considerations in reaching a decision[38] or taking into account irrelevant considerations.[39]

Even where a discretion seems unfettered the courts will interfere where it has been exercised in a way which thwarts or frustrates the objects of the Act conferring the power: *Padfield v. Minister of Agriculture, Fisheries and Food.*[40] A Minister possessing an apparently unlimited power to revoke licences has been held not to be entitled to use that power to revoke licences bought before the date of an announced increase in licence fees.[41]

It cannot be assumed merely from a Minister's refusal to give reasons for the way he has exercised a discretionary power that he has reached his decision by taking into account factors which he ought to have ignored or that he has disregarded factors which he ought to have regarded as relevant.[42]

31–009 Abuse of power may be either in good faith or in bad faith. An authority acts in bad faith if it acts dishonestly, in order to achieve an object other than that for which it believes the power has been given; or maliciously, if it acts out of personal animosity. Thus a local authority which has the power of compulsory acquisition of land for civic extensions or improvements would not be entitled to acquire compulsorily if its purpose were merely to reap the benefit of enhanced values (*Municipal Council of Sydney v. Campbell*[43]); nor may an education authority which has power to dismiss teachers on educational grounds dismiss them in order to effect economy (*Hanson v. Radcliffe Urban District Council*[44]). The court may infer the purpose for which the enabling Act granted the power.

[36] [1999] 2 A.C. 330, HL.

[37] *e.g. R. v. Leigh* [1897] 1 Q.B. 132: power to require pensioner to present himself for medical examination was used to attempt to secure L's return to the United Kingdom to subject him to the jurisdiction of the Bankruptcy Court. See too *Webb v. Minister of Housing and Local Government* [1965] 1 W.L.R. 755; *Westminster Bank v. Minister of Housing and Local Government* [1971] A.C. 508; H. W. R. Wade (1970) 86 L.Q.R. 165; *R. v. Hillingdon L.B.C., ex p. Royco Homes* [1974] Q.B. 720.

[38] *R. v. Greater Birmingham Appeal Tribunal, ex p. Simper* [1974] Q.B. 543; *Grunwick Processing Laboratories v. A.C.A.S.* [1978] A.C. 655.

[39] *Short v. Poole Corporation* [1926] Ch. 66; *dictum* that the red hair of a teacher clearly irrelevant to consideration or exercise by a local authority of its powers and duties in connection with maintaining "efficient" schools. *Bromley L.B.C. v. G.L.C.* [1983] A.C. 768. (G.L.C. improperly influenced by terms of political manifesto).

[40] [1968] A.C. 997, *post*, p. 689.

[41] *Congreve v. Home Office* [1976] Q.B. 629. For a critical comment see G. Ganz, [1976] P.L. 14.

[42] *Gourlet v. Union of Post Office Workers* [1978] A.C. 435; *British Airways v. Laker Airways* [1985] A.C. 58.

[43] [1925] A.C. 338.

[44] [1922] 2 Ch. 490.

and hold that the power has been abused, *e.g.* where a local authority referred tenancies in bulk to a rent tribunal so as in effect to turn the tribunal into a general rent-fixing agency (*R. v. Paddington Rent Tribunal, ex p. Bell Properties Ltd*[45]). The High Court can control the exercise of statutory powers if they are being exercised otherwise than in accordance with the purpose for which they were conferred. Thus a compulsory purchase order made in 1951 in order to provide a car park was set aside as it was based on a notice to treat served in 1939 for the purpose of widening the street and creating a market hall (*Grice v. Dudley Corporation*[46]).

The question is complicated where a power is exercised both for an authorised and an unauthorised purpose.[47] The courts on the whole have tried to find the true purpose for which the power was exercised. Thus in *Westminster Corporation v. L. & N. W. Ry.*,[48] where the local authority had power to construct underground public conveniences, the court considered whether this was the true purpose which the Corporation sought to affect in acquiring land compulsorily, or whether it was merely a colourable device to enable it to make a subway for pedestrians. Where a public body has exercised a power to achieve a legitimate purpose, the fact that incidentally it achieves another purpose of its own which is not a relevant objective in the eyes of the law does not invalidate the decision. But where the purpose of the exercise is improper it is irrelevant that a legitimate purpose is also served. In *R. v. ILEA, ex p. Westminster C.C.*[49] Glidewell J. had to consider the legality of the expenditure of funds by ILEA under the Local Government Act 1972, s.142 which authorises expenditure on the publication of "information on matters relating to local government." The learned judge concluded that the publication of certain facts by ILEA was intended not merely to inform but to persuade the public to accept ILEA's views about the wisdom of the Government's education policies. The expenditure was held to be unlawful: persuasion not information had been the true purpose of the authority: its decision had been materially affected by its wish to pursue an unauthorised objective. The courts tend to avoid the question of motive, which seems to be immaterial if the purpose is within the statute (*Robins & Son Ltd v. Minister of Health*[50]), for they must not usurp the discretion given to administrative authorities.

31–010 A difficulty which has arisen in a number of cases is the extent to which a body exercising a discretionary power has the right in reaching decisions in individual cases to have regard to a general policy which it has formulated. Clearly, licensing justices who refuse all applications for licences because they have a policy of attempting to stop the sale of alcohol are not exercising the discretion vested in them.[51] But concern about drunkenness and hooliganism in the late evening may justify a general policy of not granting late licences provided that

[45] [1949] 1 K.B. 606.

[46] [1958] Ch. 339. And see *Webb v. Minister of Housing and Local Government* [1965] 1 W.L.R. 755, [1965] 2 All E.R. 193, CA; *supra*.

[47] See *e.g. Earl Fitzwilliam's Wentworth Estate Co v. Minister of Town and Country Planning* [1951] 2 K.B. 284, CA; [1952] A.C. 362, HL.

[48] [1905] A.C. 426.

[49] [1986] 1 W.L.R. 28. See also *R. v. Broadcasting Complaints Commission, ex p. Owen* [1985] Q.B. 1153, 1177 *per* May L.J.: decision lawful even although reached in reliance on a reason bad in law if Commission would have reached the same decision in reliance on other valid reasons.

[50] [1939] 1 K.B. 537.

[51] *R. v. L.C.C., ex p. Corrie* [1918] 1 K.B. 68. See too *Sagnata Investments v. Norwich Corporation* [1971] 2 Q.B. 614.

each application is genuinely considered on its merits.[52] In the words of Ackner *L.J. in R. v. Secretary of State for the Environment, ex p. Brent L.B.C.*[53] it is not necessary that each case must be approached with an open mind in the sense of an empty mind but the mind of the person exercising the discretion "must be kept 'ajar.'"

Unreasonableness

The requirement that public bodies vested with statutory powers must exercise them reasonably was asserted by Lord Macnaghten in *Westminster Corporation v. London and North Western Railway*.[54] Modern discussions of unreasonableness in the field of judicial review almost inevitably, however, start from the judgment of Lord Greene, M.R. in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*.[55] The Master of the Rolls cited various defects which might render a decision "unreasonable," of the kind discussed in the previous pages. He went on, however, to envisage the possibility of a decision being open to challenge on the ground that it is unreasonable in the sense that, in the view of the court, it was a decision which no reasonable body could reach. Lord Greene's judgment has been frequently quoted in subsequent cases and is so well known that later judges often refer to "the *Wednesbury* principle" without any further explanation. In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*[56] the House of Lords referred to Lord Greene's judgment in the *Wednesbury* case and Lord Diplock said. **31–011**

> "In public law 'unreasonable' as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."

Because of the frequent citation of Lord Greene's words it is important, as judges have emphasised, not to treat them as a legislative text, not to take them out of context and to read the whole of the judgment since at different places the principle of unreasonableness is defined (or described) in different terms.[57]

Usually where an administrative decision has been quashed on the ground of unreasonableness at least one of the specific vitiating factors already discussed has been held to have been present. Is, however, unreasonableness merely a short hand way of referring to those factors or does it go beyond them? While there is no clear judicial authority the current tendency of the courts to widen the scope of judicial review suggests that it would be unsafe to assert that unreasonableness must be confined to the former of the two meanings, *i.e.* a synonym for the **31–012**

[52] *R. v. Torbay Licensing Justices, ex p. White* [1980] 2 All E.R. 25. See too *Docherty v. South Tyneside Borough, The Times*, July 3, 1982; *R. v. Secretary of State for the Home Dept., ex p. Bennett, The Times*, August 18, 1986, CA. The leading authority for the legality of the adoption in principle of a policy is *British Oxygen v. Board of Trade* [1971] A.C. 610, HL.

[53] [1982] Q.B. 593, DC.

[54] [1905] A.C. 426.

[55] [1948] 1 K.B. 223. (Condition attached to licence for opening of cinema on Sunday that no child under the age of 15 should be admitted not unreasonable).

[56] [1977] A.C. 1014. See *post*, para. 32–020.

[57] *Pickwell v. Camden L.B.C.* [1983] Q.B. 962, *per* Ormrod L.J.; *R. v. Chief Registrar of Friendly Societies, ex p. New Cross Bldg. Society* [1984] 2 W.L.R. 370, *per* Griffiths L.J.; *R. v. Home Secretary, ex p. Benwell* [1984] 3 W.L.R. 843, 855 *per* Hodgson J.

various specific issues discussed earlier. The argument for the widest possible meaning is strengthened—or at least not weakened—by Lord Diplock's choice in the *GCHQ* case of the term irrationality to refer to cases falling within the *Wednesbury* principle.[58] He went on to explain that head of review as applying to "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

Byelaws may be held void for unreasonableness. In *Kruse v. Johnson*[59] Lord Russell of Killowen C.J. said that local byelaws are not unreasonable merely because particular judges may think that they go farther than is necessary or convenient: but a court might hold them unreasonable if they were found to be partial or unequal in their operation between classes, or if they were manifestly unjust, disclosed bad faith, or involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men. Applying this test, the court held that the byelaw in question, which authorised a householder or police constable to request a person to desist from playing a musical instrument within fifty yards of any dwelling house, was not unreasonable.

In subsequent cases the courts have emphasised the heavy burden lying on anyone who challenges the reasonableness of a byelaw.[60]

It is doubtful whether the principle laid down in *Kruse v. Johnson* applies to delegated legislation[61] although it might be open to argument that a particular rule or regulation is so unreasonable that it must be beyond the limits envisaged by Parliament. The special status of Immigration Rules made under the Immigration Act 1971[62] has been held to justify the courts applying to them the test of reasonableness as laid down in *Kruse v. Johnson*.[63]

Natural justice: procedural impropriety[64]

31–013 Natural justice, at least as that phrase is normally used by lawyers, refers principally to two fundamental principles of procedure: that whoever takes a decision should be impartial, having no personal interest in the outcome of the case (*nemo judex in re sua*) and that a decision should not be taken until the person affected by it has had an opportunity to state his case (*audi alteram partem*). Natural justice may sometimes be used in a wider sense to refer to a

[58] *ante*, para. 31–011.

[59] [1898] 2 Q.B. 91. "The judgment in *Kruse v. Johnson* has been quoted so frequently in subsequent cases that it has almost been erected into a sacred text": *Belfast Corporation v. Daly* [1963] N.I. 78, 88, *per* Black L.J. For byelaws made by non-elected bodies see *Cinnamond v. British Airports Authority* [1980] 1 W.L.R. 582; *British Airways Authority v. Ashton* [1983] 3 All E.R. 6; *R. v. British Airways Authority, ex p. Wheatley* [1983] R.T.R. 466, C.A.

[60] *Burnley B.C. v. England* (1978) 76 L.G.R. 393, 77 L.G.R. 227; *Startup v. Solihull M.B.C.* [1979] R.T.R. 228.

[61] *Sparks v. Edward Ash Ltd* [1943] 1 K.B. 222, C.A.; *Taylor v. Brighton B.C.* [1947] K.B. 737, C.A. In *Maynard v. Osmond* [1977] Q.B. 240 the Court of Appeal rejected a claim that a ministerial regulation was unreasonable: hence the question of invalidity on that ground did not arise. See further A. Wharam, "Judicial Control of Delegated Legislation: the Test of Reasonableness" (1973) 36 M.L.R. 611; J. P. Casey, "Ministerial Orders and Review for Unreasonableness" [1978] P.L. 130.

[62] *ante*, para. 23–024 and para. 29–004.

[63] *R. v. Immigration Appeal Tribunal, ex p. Begum, The Times*, July 24, 1986.

[64] D. J. Hewitt, *Natural Justice* (1972); Paul Jackson, *Natural Justice* (2nd ed., 1979); H. H. Marshall, *Natural Justice* (1959); G. P. Flick, *Natural Justice: Principles and Practical Application* (2nd ed., 1984).

number of fundamental principles which are said to underlie the common law[65] but in these pages attention will be directed to natural justice in its narrower sense.

The principles of natural justice were originally applied to the process by which courts themselves made their decisions. A breach of natural justice was one of the grounds on which the decision of a lower court could be upset by a higher court. In the course of time these principles came to be applied to administrative authorities.

There is authority for regarding the requirements of "natural justice" as a special part of the *ultra vires* rule, on the ground that a decision made contrary to the principles of natural justice, when the rights of particular individuals are adversely affected, is no decision within the terms of the enabling Act.[66]

1. *A man may not be a judge in his own cause*[67]

The law relating to disqualification for bias—or the appearance of bias— **31–014** extends beyond the ground covered by the maxim that a man may not be a judge in his own cause to cover any circumstances where the facts may lead to a real likelihood of bias. Previous case law must now be read in the light of the decision of the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)*[68] and of the Court of Appeal in *Locabail (UK) Ltd v. Bayfield Properties Ltd.*[69] Formerly the distinction was drawn between financial interest, where it was said that any interest, however small, entailed automatic disqualification on the ground of bias[70] and allegations of bias on other grounds where it was necessary to demonstrate the requisite degree of likelihood or danger of bias. In *Pinochet (No. 2)*, *however*, the House of Lords explained that financial interest was only one way in which a judge might be regarded as being personally involved in the case before him. A similar, automatic disqualification would arise wherever a judge had a strong personal interest in the case before him.

Not every financial interest leads to automatic disqualification. An interest can be disregarded if it is *de minimis* or nominal and indirect.[71]

Cases not involving automatic disqualification may arise where a judge is said to have preconceived notions on the merits of a claim, acquaintance with one of the parties or for any reason has given cause to doubt his ability to determine the case before him with judicial impartiality. No doubt to discourage future litigation the Court of Appeal in *Locabail (UK) Ltd* expressly stated that it could not envisage circumstances in which a challenge on the ground of partiality could

[65] *Ong Ah Chuan v. Public Prosecutor* [1981] A.C. 648.

[66] *Spackman v. Plumstead District Board of Works* (1885) 10 App.Cas. 229, *per* Lord Selbourne L.C.; *Errington v. Minister of Health* [1935] 1 K.B. 249, 268, *per* Greer L.J., and p. 279, *per* Maugham L.J. *cf. General Medical Council v. Spackman* [1943] A.C. 627, 640, *per* Lord Wright; *White v. Kuzych* [1951] A.C. 585 (P.C.) *per* Viscount Simon at p. 600.

[67] See D. E. C. Yale, "*Iudex propria causa*, an historical excursus" (1974) 33 C.L.J. 80.

[68] [2000] 1 A.C. 119.

[69] [2000] Q.B. 451, CA.

[70] *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L. Cas. 759. (Decree of Lord Cottenham L.C. set aside when it was discovered that he was a shareholder in the company involved in the litigation before him.)

[71] *Locabail (UK) Ltd v. Bayfield Properties Ltd, supra. R. v. Mulvihill* [1990] 1 W.L.R. 438, CA (Judge not disqualified from presiding at trial of person accused of robbing a branch of a bank of which the judge was a shareholder).

succeed which was based on the religion, ethnic national origin, gender, age, class, means or sexual orientation of the judge. Nor, ordinarily, could an objection be based on the judge's social or educational or service or employment background or history.[72]

In cases alleging non-automatic bias the claimant must satisfy the court that the facts establish a real danger of bias: *R. v. Gough*.[73] The court will not set aside a decision on the basis of "mere vague suspicions of whimsical, capricious and unreasonable people . . . mere flimsy elusive morbid suspicions."[74]

31–015 In some cases a decision may be quashed not because of the likelihood or reasonable suspicion of bias but on the principle enunciated by Lord Hewart C.J. in *The King v. Sussex Justices, ex p. McCarthy*.[75] The conviction of McCarthy for a motoring offence was quashed because the clerk to the justices, a member of a firm of solicitors who were to represent the plaintiff in civil proceedings arising out of the collision in connection with which McCarthy was charged, retired with the justices, although in fact he did not give them any advice on the conviction. Lord Hewart L.C.J. said in that case: "A long line of cases shows that it is not merely of some importance, but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done." Where a social worker involved in adoption proceedings retired with the justices their determination was quashed because justice had not been seen to be done.[76]

2. *"Audi alteram partem"*

31–016 Each party must have reasonable notice of the case he has to meet: and he must be given an opportunity of stating his case, and answering (if he can) any arguments put forward against it. In criminal cases this elementary principle of justice is expressed in the saying that "no one ought to be condemned unheard." As was quaintly stated in *Dr Bentley's Case* (1723)[77]: "Even God himself did not pass sentence upon Adam before he was called upon to make his defence."

The maxim *audi alteram partem*, where it applies, does not mean that a person is entitled to be heard orally.[78] Nor does the maxim necessarily mean that a person has the right to have his case determined by the person who heard the evidence at first instance. Thus in *Local Government Board v. Arlidge*[79] the House of Lords refused a house owner's application to quash a decision of the Local Government Board confirming a closing order made by a borough council, although he had not been told which members of the Board gave the decision.

[72] p. 480.
[73] [1993] A.C. 646.
[74] *R. v. Queen's County JJ.* [1908] 2 I.R. 285, 294 *per* Lord O'Brien C.J.
[75] [1924] 1 K.B. 256, 259; *R. v. Lower Munslow Justices, ex p. Pudge* [1950] 2 All E.R. 756. See also *R. v. East Kerrier Justices, ex p. Minns* [1952] 2 Q.B. 719; *Practice Note (Justices' Clerks)* [1953] 1 W.L.R. 1416; [1953] 2 All E.R. 1306; *Metropolitan Properties v. Lannon* [1969] 1 Q.B. 577; *R. v. Altrincham Justices, ex p. Pennington* [1975] Q.B. 549.
[76] *Re B (Adoption by Parents)* [1975] Fam. 127.
[77] *R. v. Chancellor of Cambriage University* (1716) 1 Str. 557. R. F. V. Heuston has pointed out that divine punishment may be administered without a preliminary hearing: *Belshazzar's Feast, Dan v. Essays in Constitutional Law* (2nd ed., 1964) p. 185.
[78] *Board of Education v. Rice* [1911] A.C. 179 HL. *per* Lord Loreburn L.C. And see *Lloyd v. McMahon* [1987] A.C. 625, HL; *R. v. Army Board, ex p. Anderson* [1992] Q.B. 169.
[79] [1915] A.C. 120.

and had not been given an oral hearing by the Board or allowed to see the report of the inspector. It would, in the view of the House of Lords, be unrealistic and impracticable to expect a large department of state to deal with each case before it in the way in which a court might be expected to.[80] Natural justice requires adequate warning of a hearing and details of the charges to be met in order to allow a party to prepare his case properly.[81] Legal representation is not necessarily essential to a fair hearing. None the less the gravity of a charge, or the consequences of an adverse decision, may require a tribunal to allow legal representation. The question must turn, in each case, on the exercise by the tribunal concerned of a genuine discretion as opposed to the application of an inflexible rule.[82] Nor does natural justice require that reasons for decisions should be given.[83] The giving of reasons, however, may be required by resort to the concept of fairness.[84]

The importance of natural justice in administrative law lies in the wide range of administrative powers which must be exercised in accordance with the two principles discussed in the previous pages. In *Board of Education v. Rice*[85] Lord Loreburn said that to "act in good faith and fairly listen to both sides ... is a duty lying upon everyone who decides anything." Throughout succeeding years in this century, however, the courts took a more cautious view and only required public bodies to observe the rules of natural justice when they were acting "judicially," a concept which was interpreted restrictively. A decisive change in judicial attitude occurred in *Ridge v. Baldwin*.[86] Under the Municipal Corporations Act 1882, s.191(4) a Watch Committee was empowered at any time to suspend or dismiss any borough constable whom the Committee thought to have been negligent in the discharge of his duty or otherwise unfit to carry out his duty. The Chief Constable of Brighton had been acquitted at the Old Bailey on charges of corruption, but the judge in the trial of two of his subordinates cast aspersions on his leadership of the force, and remarked that a new chief constable was needed. The Watch Committee then dismissed him for neglect of duty, but without formulating any specific charge or giving him an opportunity to be heard except that his solicitor addressed the Committee at one of two meetings. The House of Lords, reversing a unanimous Court of Appeal, gave judgment for the Chief Constable. Their Lordships held that the rules of natural justice applied, so that the Watch Committee ought to have informed him of the charges and given him an opportunity to be heard. Merely to describe a statutory function as "administrative," "judicial," "quasi-judicial," said Lord Reid, is not in itself enough to settle the requirements of natural justice. Where officials and others

31–017

[80] But see *post* para. 31–019 on sub-delegation. The question, in the case of statutory bodies, is one of statutory interpretation.

[81] *Sloan v. General Medical Council* [1970] 1 W.L.R. 1130; *R. v. Thames Magistrates' Court, ex p. Polemis* [1974] 1 W.L.R. 1371.

[82] *R. v. Board of Visitors of H.M. Prison, The Maze, ex. p. Hone* [1988] A.C. 379, HL.

[83] *R. v. Gaming Board for Great Britain, ex p. Benaim* [1970] 2 Q.B. 417, CA.

[84] *R. v. Home Secretary, ex p. Doody* [1994] 1 A.C. 531, HL. See too *R. v. Secretary of State for the Home Department, ex p. Faved* [1998] 1 W.L.R. 763, CA. The uncertain scope of this requirement is clear from the decision in *R. v. Higher Education Funding Council, ex p. Institute of Dental Surgery* [1994] 1 W.L.R. 242. In further consideration of the requirement the Privy Council drew attention for the future to the importance of Art. 6(1) of the E.C.H.R: *Stefan v. G.M.C.* [1999] 1 W.L.R. 1293.

[85] [1911] A.C. 179, 182.

[86] [1964] A.C. 40.

have power to make decisions affecting the rights of individuals, the rules of natural justice must be observed.

31–018 In *Schmidt v. Secretary of State for Home Affairs*[87] Lord Denning M.R. extended the scope of natural justice to decisions involving *legitimate expectations*. In subsequent cases the House of Lords has contrasted legitimate expectations in the sphere of public law with rights in the private sphere.[88] A legitimate expectation can arise from past conduct, *e.g.* regularly granting a hearing before issuing licences,[89] or an assurance, *e.g.* that any illegal immigrant who gives himself up to the authorities will not be deported without being given a hearing.[90] There seems no reason why a legitimate expectation cannot exist in the private sphere. A non-statutory body which governs a sport may be bound to grant a hearing to an applicant for a licence if it has done so in the past: *McInnes v. Onslow Fane*.[91] Whether a legitimate expectation exists is a question for the court to determine. The hope of a prisoner that the existing rules for granting parole will not be altered does not amount to a legitimate expectation that the Secretary of State will not change them in the exercise of his statutory powers: *In Re Findlay*.[92] An expectation created by an assurance can be terminated by notice.[93]

Particularly in the context of legitimate expectations the courts, following the lead of Lord Diplock in the *GCHQ* case,[94] increasingly refer to *procedural impropriety* rather than breach of natural justice. It has been objected that it is "hard on that old faithful friend [Natural Justice] which has rendered such signal service, if it is now to be cast aside."[95] The new phrase, however, seems to provide grounds of review going beyond what traditionally had been regarded as constituting breaches of natural justice. Lord Diplock in the *GCHQ* case included within procedural impropriety breach of statutory rules of procedure which did not necessarily amount to a breach of natural justice. Later cases suggest the phrase can cover various forms of "unfairness," such as going back on an

[87] [1969] 2 Ch. 149, 170. In *Kioa v. West* (1985) 62 A.L.R. 321 Brennan J. said the seed planted by Lord Denning in *Schmidt* had subsequently grown luxuriantly. (The judgments in *Kioa v. West* offer exhaustive analyses of the concept of legitimate expectation.) See further, P. Cane, "Natural Justice and Legitimate Expectation" (1980) 54 A.L.J. 546; S. Churches, "Justice and Executive Discretion in Australia" [1980] P.L. 397; K. Mackie, "Expectations and Natural Justice" (1985) 59 A.L.J. 33.

[88] *O'Reilly v. Mackman* [1983] 2 A.C. 237; *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.

[89] *O'Reilly v. Mackman, supra* (Hearings normally granted to prisoners before revoking remission—to which there is no right—for misconduct.); *Council of Civil Service Unions v. Minister for Civil Service supra, per* Lord Diplock; *R. v. Wear Valley D.C., ex p. Binks* [1985] 2 All E.R. 699; noted (1986) 102 L.Q.R. 24.

[90] *Att.-Gen. of Hong Kong v. Ng Yuen Shiu* [1983] 2 A.C. 629, P.C. noted (1983) 99 L.Q.R. 499; *R. v. Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299.

[91] [1978] 1 W.L.R. 1520.

[92] [1985] A.C. 319. Followed, *R. v. Minister of Defence, ex p. Walker* [2000] 1 W.L.R. 806: "The ministry was entitled to change its policy; see *In Re Findlay, per* Lord Hoffmann at p. 815. See also *R. v. Secretary of State for the Home Dept., ex p. Hindley* [2001] 1 A.C. 410, HL. Nor can landowners rely on the more generous terms of treaty when land is compulsorily acquired under the less generous terms of legislation: an "elementary fallacy" that treaties give rise to rights enforceable in British courts: *Wintal Enterprise HK Co Ltd v. Att.-Gen. of Hong Kong* [1985] A.C. 733. (The full background is to be found in [1983] H.K.L.R. 211; [1984] H.K.L.R. 32.)

[93] *Hughes v. D.H.S.S.* [1985] A.C. 776.

[94] *Council of Civil Service Unions v. Minister for the Civil Service, supra.*

[95] H. W. R. Wade, (1985) 101 L.Q.R. 153, 155. Lord Scarman described the new terminology as "a humdrum modernism for breach of natural justice": [1990] P.L. 490.

assurance,[96] giving misleading advice on the grounds on which a minister exercises his discretion[97] or the unreasonable manner in which a decision is reached.[98] In this "developing field of law"[99] the courts are now prepared to talk of substantive legitimate expectations where public bodies might have so acted that it would be unfair to go back on the decision challenged.

Sub-delegation of powers[1]

The prima facie rule is that a person or body to whom powers are entrusted may not delegate them to another, *delegatus non potest delegare*[2]—unless expressly or impliedly authorised to do so.[3] Thus in *Allingham v. Minister of Agriculture*[4] a Divisional Court held that the Bedfordshire War Agricultural Committee, to which the Minister of Agriculture had validly delegated his power under Defence Regulations to give directions with respect to the cultivation of land, and which had decided that sugar beet should be grown on eight acres of the appellant's land, had no power to delegate to their executive officer the power to specify the particular field to be cultivated. On the other hand, in *Smith v. London Transport Executive*[5] the Executive was validly acting as delegate of the British Transport Commission in operating a bus service. Certain powers, such as that conferred by Defence Regulations on the Home Secretary to intern persons of hostile origin or association,[6] must be exercised by the Minister personally; but generally it is contemplated that a Minister may authorise civil servants in his department to perform routine administrative functions on his behalf.[7] This is not delegation in the strict sense, for the act of the official is really the act of the Minister, who retains control and responsibility. In *Wooliett v. Minister of Agriculture and Fisheries*,[8] where members of an agricultural land tribunal were to be appointed by the Minister, it was held that they could be appointed by X on behalf of the Minister, but not by X in his capacity as the secretary of the tribunal. In *Vine v. National Dock Labour Board*,[9] where the Board had purported to delegate its disciplinary powers to a committee, the House of Lords said that both the nature of the duty and the character of the person to whom it is entrusted have to be considered. Judicial authority cannot normally be sub-delegated; administrative powers sometimes may but often may not be sub-delegated; as regards

31–019

[96] *R. v. I.R.C., ex p. Preston* [1985] A.C. 835.
[97] *R. v. Home Secretary, ex p. Asif Khan* [1984] 1 W.L.R. 1337, ("Bad and grossly unfair administration . . . positively cruel"): *per* Parker L.J. at p. 1348.
[98] *Wheeler v. Leicester City Council* [1985] A.C. 1054.
[99] *R. v. North and East Devon Health Authority, ex p. Coughlan* [2001] Q.B. 213, 242 *per* Lord Woolf M.R. See Søren Schønberg, *Legitimate Expectations in Administrative Law* (Oxford, 2000).
[1] See D. Lannan, "Delegation and the Alter Ego Principle," (1984) 100 L.Q.R. 587.
[2] *Delegata potestas non potest delegari*: 2 Co.Inst. 597.
[3] Building Act 1984, s.13, for example, expressly provides that the Secretary of State may delegate to "a person or body" his powers under s.12 to approve particular building materials as satisfying statutory requirements.
[4] [1948] 1 All E.R. 780, DC. And see *Ellis v. Dubowski* [1921] 3 K.B. 621.
[5] [1951] A.C. 555, HL.
[6] See *Liversidge v. Anderson* [1942] A.C. 206, HL.
[7] *Carltona Ltd v. Commissioners of Works* [1943] 2 All E.R. 560 (requisitioning of land); *R. v. Skinner* [1968] 2 Q.B. 700, CA (approval of breathalyser); *Re Golden Chemical Products Ltd* [1976] Ch. 300 (presentation of winding-up petition under s.35 of the Companies Act 1967); *R. v. Secretary of State for the Home Department, ex p. Oladehinde* [1991] 1 A.C. 254, HL. (Home Secretary entitled to authorise senior officials in his department to make decisions to depart on his behalf.)
[8] [1955] 1 Q.B. 103.
[9] [1957] A.C. 488; approving *Barnard v. National Dock Labour Board* [1953] 2 Q.B. 18, CA.

the disciplinary powers in this case, whether called judicial or quasi-judicial, their Lordships held that they could not be sub-delegated.[10]

When a power has been validly delegated by one authority to another, the exercise of the power by the latter must be within the power delegated by the former,[11] and any conditions attached to the delegation must be complied with.[12]

Estoppel

31–020 The converse of the problem discussed in the preceding sections is that which arises where an individual maintains that a public body's exercise of a statutory power is valid while the authority concerned seeks to challenge its validity. A dispute of this nature raises the question of the extent to which the doctrine of estoppel is applicable to public authorities.[13] It might seem unjust that a citizen who has erected a building in the belief, induced by an official of a planning authority, that everything was in order should have to demolish that building because the authority alleges that the official had no power to grant permission.[14] On the other hand, to apply the doctrine of estoppel to public bodies might be thought to destroy the *ultra vires* doctrine by allowing them to extend their powers by making representations which would bind them by estoppel.[15] Recent developments in judicial review have suggested a solution to the dilemma. For a public body to attempt to go back on a decision which it has made might be "unfair" and judicial review would be available where the action in question would have been equivalent to a breach of a representation giving rise to an estoppel in the case of a private individual: *R. v. Inland Revenue Commissioners, ex p. Preston*.[16] Another way of reaching a similar result is to say that the re-opening of a decision is "unreasonable" or "irrational": *R. v. West Glamorgan C.C., ex p. Gherssary*.[17] The limits to this new approach are, at present, unclear. It could hardly be applied where a public body had attempted to do what it had no power to do at all.[18] In some cases it might be reasonable (or rational or fair) for a public body to go back on its previous decision after informing the person

[10] See also *Re S (A Barrister)* [1970] 1 Q.B. 160; *R. v. Race Relations Board, ex p. Selvarajan* [1975] 1 W.L.R. 1686; Paul Jackson (1974) 90 L.Q.R. 158; (1975) 91 L.Q.R. 469. For valid subdelegation of an administrative power see *Meaden v. Wood, The Times*, April 30, 1985, DC (Home Secretary as police authority, entitled to delegate regulation of street collections under statutory powers to Commissioner of Metropolitan Police).

Smith v. London Transport Executive, ante.

[11] *Blackpool Corporation v. Locker* [1948] 1 K.B. 349, CA. Minister delegated to local authorities power to requisition houses, subject to making provision for disposal of furniture; requisition *ultra vires* because conditions not complied with.

[12] For the position of the Crown, see *post*, para. 33–016.

[13] *Wells v. Minister of Housing and Local Government* [1967] 1 W.L.R. 1000; *Lever Finance v. Westminster L.B.C.* [1971] 1 Q.B. 222. See also *H.T.V. v. Price Commission* [1976] I.C.R. 170; *Re Liverpool Taxi Owners Association* [1972] 2 Q.B. 299.

[14] *Minister of Agriculture and Fisheries v. Mathews* [1950] 1 K.B. 148; *Rhyl U.D.C. v. Rhyl Amusements* [1959] 1 W.L.R. 465; *Southend-on-Sea Corporation v. Hodgson (Wickford)* [1962] 1 Q.B. 416, DC; *Western Fish Products Ltd v. Penwith D.C.* [1981] 2 All E.R. 204; (1978) 77 L.G.R. 185, CA; *Rootkin v. Kent C.C.* [1981] 1 W.L.R. 1186, CA. See further P. P. Craig, "Representations by Public Bodies" (1977) 93 L.Q.R. 398; G. Ganz, "Estoppel and *Res Judicata* in Administrative Law" [1965] P.L. 237; M. A. Fazal, "Reliability of Official Acts and Advice" [1972] P.L. 43.

[15] [1985] A.C. 835, HL.

[16] *The Times*, December 18, 1985.

[17] *e.g.* purporting to create a lease when the authority concerned had no power to do so: *Minister of Agriculture and Fisheries v. Mathews, supra*.

affected of its wish to do so and affording a full hearing before reaching a new conclusion.

II. Private Law: Ordinary Judicial Control

Where a tort or breach of contract has been committed by a public authority, its liability may be said to be prima facie the same as that of a private individual. The authority is moreover responsible for the torts and contracts of its employees and agents in the same way as an ordinary individual or corporation. This presumption, however, is subject to certain important qualifications. The great difference between public authorities and private individuals is that the former have so many and various *powers* conferred on them which ordinary individuals or corporations do not have, and which may cause harm to private citizens but the proper exercise of which does not entitle an injured person to a right of action. Local authorities, for example, have power to order houses to be demolished, to acquire land compulsorily, and to do works which would ordinarily constitute nuisances. These powers are given because the authority is acting on behalf of the public, and where public and private interests conflict, policy generally requires that the former must prevail. **31–021**

On the other hand, public authorities are mostly the creations of statute, and have only such powers as are expressly conferred by statute. The citizen may therefore find that a contract which he thought he had entered into is void as being beyond the power of the authority to make.

Further, when the citizen has a remedy he may find that it does not lie against the public authority, but only against the person who appeared to be (but who in law was not) the servant of that authority.

Lastly, the fact that a public authority has failed to perform some duty does not necessarily mean that a citizen can take proceedings against it either to compel it to perform the duty or for damages for failing to do so.

Liability in contract

Statutory public authorities, such as local authorities and public corporations, have a general power to make contracts in the discharge of their functions. They may have specific contractual powers as well. If a public authority enters into a contract in relation to some matter that is beyond its powers—a question of statutory interpretation—the contract is *ultra vires* and void.[19] For *intra vires* contracts, public authorities are generally liable in the ordinary way, *e.g.* a contract by a local authority to sell coke (*Bradford Corporation v. Myers*[20]). **31–022**

Some countries, such as France, have a theory of "administrative contracts," whereby many of the contracts made by public authorities are governed by different rules from private-law contracts.[21] English law has no theory of "administrative" or "public" contracts, but a public authority cannot by contract bind itself not to exercise powers conferred on it by statute (*Ayr Harbour*

[19] *Rhyl U.D.C. v. Rhyl Amusements* [1959] 1 W.L.R. 465; [1959] 1 All E.R. 257. But see *ante*, para. 31–020 as to the effect of estoppel.

[20] [1916] 1 A.C. 242, HL.

[21] H. Street, *Governmental Liability*, pp. 81–84; L. N. Brown and J. Bell, *French Administrative Law* (5th ed., 1998), Chap. 8. French public authorities may also enter into private-law contracts, *e.g.* a commercial lease.

Trustees v. Oswald[22]). The exact scope of this principle is not clear. It has been suggested that the underlying principle is that of governmental effectiveness, so that "no contract would be enforced in any case where some essential governmental activity would be thereby rendered impossible or seriously impeded."[23] Such a contract, it is suggested, is not void if it is the kind of contract that the authority has power to make, but it is not specifically enforceable. This leaves open the question of compensation to the other contracting party, which is due in justice but for which the common law does not seem to make provision. If this suggestion is sound, it applies to public authorities generally the principle of Crown contracts stated in the *Amphitrite* case.[24]

Agreements between public bodies and private individuals which appear to possess the characteristics of a contract may be held not to constitute a contract when the agreement is one where the terms are determined by statute.[25]

Liability for nuisance

31–023 There is a presumption that statutory powers are not intended to be exercised in such a way as to cause a nuisance, *e.g.* that the power of a local authority to build hospitals does not authorise the erection of a small-pox hospital in a residential area. If the power is *imperative*, *i.e.* imposes a duty to perform some act in a certain manner, so that it appears expressly or by necessary implication that it cannot be performed without causing a nuisance, then a nuisance may be committed[26] but if the power is expressly or impliedly *permissive*, *i.e.* the performance of the act is merely rendered not illegal in itself, then ways and means must be found to prevent its causing a nuisance. The burden of proving that the power is imperative rests on the party purporting to act thereunder (*Metropolitan Asylum District v. Hill*[27]). Similar considerations arise where fumes from a power station injure neighbouring property (*Corporation of Manchester v. Farnworth*[28]).

A nuisance may be caused either by an act or an omission, so that where this tort is committed the distinction between misfeasance and non-feasance, is irrelevant (*Pride of Derby Angling Association Ltd v. British Celanese Ltd*[29]).

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[22] (1883) 8 App.Cas. 623, HL, *per* Lord Blackburn at p. 634. And see *York Corporation v. Henry Leetham & Son* [1924] 1 Ch. 557; *Birkdale District Electricity Supply Co v. Southport Corporation* [1926] A.C. 355, *per* Lord Birkenhead at p. 364; *William Cory & Son Ltd v. City of London Corporation* [1951] 1 K.B. 8; *Dowty Boulton Paul v. Wolverhampton Corporation* [1971] 1 W.L.R. 204; *Triggs v. Staines U.D.C.* [1969] 1 Ch. 10; *Leicester (Earl of) v. Wells-next-the-Sea U.D.C.* [1973] Ch. 110; *Cudgen Rutile (No. 2) Ltd v. Chalk* [1975] A.C. 520; *Royal Borough of Windsor and Maidenhead v. Brandrose Investments* [1983] 1 W.L.R. 509.

[23] J. D. B. Mitchell, *The Contracts of Public Authorities* (1954), p. 7. And see Mitchell, "Limitations on the Contractual Liability of Public Authorities" (1950) 13 M.L.R. 318, 455; "Theory of Public Contract Law" (1951) 63 Jur.Rev. 60.

[24] *Rederiaktiebolaget Amphitrite v. The King* [1921] 2 K.B. 500; *post*, para. 33–006.

[25] *W. v. Essex C.C.* [1999] Fam. 90, CA, following *Norweb Plc v. Dixon* [1995] 1 W.L.R. 636. See further [1972] P.L. 97.

[26] See *Department of Transport v. N. W. Water Authority* [1984] A.C. 336, HL; *Allen v. Gulf Oil Refining Ltd* [1981] A.C. 1001, HL.

[27] (1881) 6 App. Cas. 193, HL, *cf. Hammersmith and City Ry v. Brand* (1869) L.R. 4 H.L. 171; *Edgington v. Swindon Corporation* [1939] 1 K.B. 86; *Marriage v. East Norfolk Rivers Catchment Board* [1950] 1 K.B. 284.

[28] [1930] A.C. 171, HL. See also *R. v. Epping (Waltham Abbey), ex p. Burlinson* [1947] 2 All E.R. 537, DC.

[29] [1953] Ch. 149, CA.

Liability for negligence

31–024 Even where a statutory power is bound to interfere with private rights to some extent, the power must be exercised with due care towards those likely to be affected. The leading case is the decision of the House of Lords concerning one of the first large public corporations. *Mersey Docks and Harbour Board v. Gibbs*,[30] where the Board was held liable to the owners of a ship and her cargo for damage caused by its negligence in leaving a mud bank at the entrance to the docks.[31]

So local authorities have been held liable for damage caused by negligence due to leaving a heap of stones unlighted on the highway (*Foreman v. Corporation of Canterbury*[32]), due to failing to detect a leak in the water supply system (*Corporation of Manchester v. Markland*[33]), and to carelessly inserting or failing to maintain a traffic stud (*Skilton v. Epsom and Ewell Urban District Council*[34]).

Nonetheless, the application of the law of negligence to public bodies can give rise to particular problems. Thus the status of the defendant as a public body may be a relevant consideration in determining whether it would be "fair, just and reasonable" to impose a duty of care.[35] In the case of actions against the police the courts have progressed from refusing to find a duty of care to individual citizens owed by police investigating crimes[36] to the existence of an immunity from action in such circumstances.[37] (Further litigation is likely in these areas, following the Human Rights Act and the decision of the European Court on Human Rights in *Osman v. United Kingdom*[38]).

The difficulty of establishing negligence against public authorities is illustrated by *Stovin v. Wise*[39] where a road accident had occurred as the result of a highway authority's failure to remove, under its statutory powers, a large bank of earth which obscured the view of users of the highway. The speech of Lord Hoffmann, speaking for the three law lords constituting the majority, expressed serious doubts about imposing liability in negligence on a public body for failure to *exercise* a statutory power, as opposed to cases involving damage arising from a defective use of a statutory power.[40]

[30] (1866) L.R. 1 H.L. 93. And see *Geddis v. Proprietors of the Bann Reservoir* (1878) 3 App. Cas. 430.

[31] *post*, para. 32–021.

[32] (1871) L.R. 6 Q.B. 214.

[33] [1934] 2 K.B. 101.

[34] [1937] 1 K.B. 112.

[35] *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605, HL; *X (Minors) v. Bedfordshire C.C.* [1995] 2 A.C. 633, HL; *Barrett v. Enfield L.B.C.* [1999] 3 W.L.R. 79, HL; [1999] L.G.R. 475.

[36] *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, HL. (The Yorkshire Ripper: no duty owed to relatives of victims of the killer.)

[37] *Ancell v. McDermott* [1993] 4 All E.R. 355, CA. (No liability to road user injured by hazardous conditions when the police had failed to place warning signs, although aware of danger); *Osman v. Ferguson* [1993] 4 All E.R. 344, CA. (Action alleging negligent failure to protect young boy from injury at hands of man known to the police to be obsessed with the boy, struck out.) Contrast *Swinney v. Chief Constable of Northumbria Police* [1996] 3 All E.R. 449, CA. (Action for failing to protect confidentiality of police informant. CA refused to strike out claim in negligence.)

[38] [1999] Fam.Law 86. See *Barrett*, *supra* n. 35, *per* Lord Browne-Wilkinson at pp. 84–85.

[39] [1996] 2 A.C. 923, HL.

[40] The *East Suffolk Catchment Board v. Kent* [1941] A.C. 74, HL returns to judicial favour after a period in the wilderness following *Anns v. Merton L.B.C.* [1978] A.C. 728, HL. For a critical comment on *Stovin*, see R. A. Buckley, "Negligence in the Public Sphere: Is Clarity Possible?" (2000) 51 N.I.L.Q. 25. See also, S. H. Bailey and M. J. Bowman, "Public Authority Negligence Revisited", (2000) 59 Camb L.J. 85.

Failure to perform statutory duties

31–025 Whether a public authority is liable for damages to a private individual for injury caused by the failure to perform a statutory duty, depends on the facts of the case and the interpretation of the statute imposing the duty. The plaintiff has to show that the duty was owed to himself and not merely to the public generally, that Parliament intended to confer on members of the class to which he belongs a private right of action, that the damage he suffered was caused directly by the breach of duty, and that the damage was of the kind contemplated by the statute.[41] The provision of some other remedy, such as complaint to the Minister, will often be held to exclude an action for damages. The House of Lords reviewed the earlier authorities in *X (Minors) v. Bedfordshire C.C.*[42] where Lord Browne-Wilkinson said that the principles applicable in determining whether such statutory cause of action exists are now well established, "although the application of those principles in any particular case remains difficult."[43]

Authorities such as Coke, Hawkins and Blackstone asserted that failure to perform a statutory duty constituted an indictable misdemeanour. Disobedience to the words of a statute constituted a form of contempt, punishable by the King's justices. This doctrine of contempt of statute was held by the Divisional Court in *R. v. Horseferry Road Justices, ex p. Independent Broadcasting Authority*[44] to be no more than a rule of statutory construction. In modern statutes, at any rate, very clear words would be required before the court would hold that a breach of statutory duty constituted a crime.

[41] *Groves v. Lord Wimborne* [1898] 2 Q.B. 402, 415, *per* Vaughan Williams L.J., *Cutler v. Wandsworth Stadium Ltd* [1949] A.C. 398, *cf. Gorris v. Scott* (1874) L.R. 9 Exch. 125.

[42] [1995] 2 A.C. 633, HL.

[43] At p. 731.

[44] [1986] 3 W.L.R. 132; claim that I.B.A. had failed to carry out its duty under Broadcasting Act 1981, s.4(3) to prevent transmission of images for such a short duration that they could influence television viewers without their realising what had been done. The complainant alleged that during a programme called "Spitting Image" an image of his face had been briefly transmitted superimposed on the body of a naked woman.