CHAPTER 32

JUDICIAL CONTROL OF PUBLIC AUTHORITIES: II. REMEDIES

32–001 The legality of acts and decisions of public bodies may be challenged directly by recourse to the supervisory jurisdiction of the High Court, that is by seeking to show that a decision has been vitiated by one or more of the factors considered in the previous chapter such as unreasonableness or breach of natural justice. The challenge may, however, arise in the course of an action in tort or contract or criminal proceedings. The owner of property may, for example, after it has been demolished by a local authority bring an action in trespass which, if he is to be successful, involves establishing that the decision to demolish lacked legal authority because it had been reached without giving him a hearing.[1] A tenant who believes that his local authority has unlawfully increased his rent may refuse to pay the increase and when, sued for possession, raise the invalidity of the decision as a defence.[2] Yet another possibility is to seek an injunction to restrain a public body from acting unlawfully[3] or a declaration that it has so acted.[4] Until recent reforms in the law of remedies the choice of the remedy was in the hands of the individual claiming to be aggrieved. In 1977, however, a new procedure—application for judicial review—was introduced by adding a new Order 53 to the Rules of the Supreme Court and subsequently given statutory recognition by the Supreme Court Act 1981, section 31. Judicial interpretation of the new procedure established a distinction, as we have seen earlier, between public and private law rights and duties. In the former case a plaintiff had to proceed by way of an application for judicial review: he could no longer choose to challenge the act of a public body in the course of litigation begun in the normal way by writ. In certain cases, discussed later in Part III of this chapter, decisions of ministers and tribunals are subject to statutory rights of appeal.

Following more recent changes to civil procedure and the adoption of new Civil Procedure Rules (CPR) Order 53 became, from October 2, 2000, Part 54 of the new rules. As will become obvious throughout this chapter, there have been a number of changes in wording, new names, for example, being given to old remedies.[5]

I. SUPERVISORY JURISDICTION OF THE HIGH COURT

32–002 "Prerogative writs" were writs brought by the King against the officers to compel them to exercise their functions properly or to prevent them from abusing their powers. They could be issued at various periods of their history either out

[1] *Cooper v. Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180.
[2] *Wandsworth London Borough Council v. Winder* [1965] A.C. 461.
[3] *e.g. Boyce v. Paddington Corporation* [1903] 1 Ch. 109, CA.
[4] *e.g. Vine v. National Dock Labour Board* [1957] A.C. 488, HL.
[5] M. Fordham, "Judicial review: the new rules" [2001] P.L. 4; T. Cornford and M. Sunkin, "The Bowman Report" [2001] P.L. 11.

of the Court of King's Bench or the Court of Chancery, or both. The term "prerogative writ" was applied to habeas corpus in the reign of James I; but it is not until Lord Mansfield[6] and Blackstone that we find it grouped with certiorari, prohibition and mandamus as "prerogative writs" because they were not directed immediately to the tribunal or person concerned but were supposed to issue from the King to a royal officer, such as the sheriff.[7] The chief prerogative writs were habeas corpus, prohibition, certiorari, mandamus and *quo warranto*; but of these only the first remains as a writ,[8] the last has been abolished, and the others are now orders.[9] Part 54 now speaks of the remedies of mandatory, prohibiting or quashing orders. The old names, however, cannot be abandoned because they are embedded in hundreds of years of case law.

Before the reforms of 1977 litigants who resorted to the supervisory jurisdiction of the High Court had to choose which order they wished to seek. A prerogative order could not be sought together with or as an alternative to other remedies such as damages or an injunction. The ambit of certiorari and prohibition was limited to bodies performing judicial functions, a concept of uncertain width. Other characteristics (and defects) of the orders led litigants increasingly to prefer the remedies of the injunction and the declaration.[10] Following various proposals for reform,[11] the Rules of the Supreme Court were amended in 1977 to provide a procedure known as the application for judicial review which enables a litigant to seek relief while leaving to the court the decision as to which particular remedy is appropriate.[12]

32–003 A litigant may proceed by way of a claim for judicial review where the remedy sought is (i) an order of certiorari, prohibition or mandamus or (b) a declaration or injunction. The latter remedies may be granted on an application for judicial relief if the court considers it just and convenient to do so having regard (a) to the nature of the matters in respect of which relief may be granted by way of certiorari, prohibition or mandamus, and (ii) the nature of the persons and bodies against which relief may be granted by such orders. An application for judicial review cannot be made without the leave of the Court. The first request for leave can be dealt with by a judge on the basis of the written application and he need not sit in open court. If leave is refused a second application may be made to a judge sitting in open court (or in certain cases to a Divisional Court of the Queen's Bench). A claim for damages may be included in a claim for judicial review. Where the court considers that the proceedings should have been commenced by writ it may order them to continue as if so commenced.[13] To be entitled to seek judicial review the claimant must have what the court considers

[6] *R. v. Cowle* (1759) 2 Burr. 834, 835.

[7] For an account of their origin and development, see S. A. de Smith, "The Prerogative Writs" (1951) 11 C.L.J. 40; D. C. M. Yardley, "The Scope of the Prerogative Orders in Administrative Law" (1957–1958) 12 N.I.L.Q. 78; de Smith, *Judicial Review of Administrative Action*, Appendix 1.

[8] For habeas corpus, see *ante*, para. 24–034 *et seq.*

[9] Administration of Justice (Miscellaneous Provisions) Acts 1933 and 1938.

[10] See G. J. Borrie, "The Advantages of the Declaratory Judgment in Administrative Law," (1955) 18 M.L.R. 138.

[11] *Remedies in Administrative Law: Law Com. Report No. 73*, Cmnd. 6407 (1976). See H. W. R. Wade, "Remedies in Administrative Law," (1976) 92 L.Q.R. 334.

[12] See now also Supreme Court Act 1981, s.31.

[13] There is no provision for the converse situation but Woolf L.J. has said that there is no obstacle in an appropriate case for the court to give leave then and there in an action before it begun by writ: "Public Law—Private Law: Why the Divide" [1986] P.L. 220, 232.

to be a "sufficient interest" in the matter to which the application relates. An application, or claim in the new terminology, for judicial review must normally be brought within three months of the decision complained of.[14] but the court has a discretion to allow applications outside the time limit.[15]

A. The Remedies

Order 53 and Section 31 of the Supreme Court Act 1981 did not introduce new remedies but a new, general procedure for applying for a group of remedies. Hence the old law relating to the scope of the individual remedies remains relevant, except where changed by the reforms.[16] Part 54 similarly has not affected the substantive law.

1. Certiorari (Quashing Order)[17]

32–004 This is an order issued to an "inferior court" or a person or body exercising what the High Court regards as a "judicial" or "quasi-judicial" function, to have the record of the proceedings removed into the High Court for review, and (if bad) to be quashed.

What is an "inferior court" for this purpose, or whether a person or body exercises powers of a "judicial" or "quasi-judicial" nature, is a question for the High Court to decide. The former *locus classicus* was the dictum of Atkin L.J. in *R. v. Electricity Commissioners*[18]: "Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division, exercised in these writs" (*i.e.* certiorari and prohibition). It was made clear in *Ridge v. Baldwin*[19] (a declaratory action) that authority to determine questions affecting the rights of subjects and the duty to act judicially are not two separate requirements: the latter is not additional to the former. Certiorari has been held to lie against a county court judge, a coroner, the Patents Appeal Tribunal, the Medical Appeal Tribunal, a local valuation court, rent tribunals, a Minister holding a public inquiry and a

[14] The apparently inconsistent provisions of 0.53 r.4 and s.31(6) Supreme Court Act 1981 were reconciled in *R. v. Dairy Produce Tribunal ex p. Caswell* [1990] 2 A.C. 738, HL. It is not thought that Pt 54 has effected any change in the position.

[15] *R. v. Criminal Injuries Board ex p. A* [1992] 2 A.C. 330, HL (Leave granted after delay of 10 months; delay not in itself ground for refusing relief at substantive hearing).

[16] For example a generalised test of "sufficient interest" has replaced the former rules relating to *locus standi*: *post* para. 32–010.

[17] The former writ of certiorari appears first to have been used against the Commissioners of Sewers charged by a statute of 1531 to see to the repair of sea walls, but most of the earlier cases were against justices. For the history, see Holdsworth, *History of English Law*, Vol. X, pp. 199–206; D. C. M. Yardley, "The Grounds for Certiorari and Prohibition" (1959) 37 Can.Bar Rev. 294; and *R. v. Northumberland Compensation Appeal Tribunal ex p. Shaw* [1951] 1 K.B. 711, *per* Lord Goddard L.C.J.; [1952] 1 K.B. 338 *per* Denning L.J.

[18] [1924] 1 K.B. 171.

[19] [1964] A.C. 40, *per* Lord Reid; *cf. per* Lord Hewart C.J. in *R. v. Legislative Committee of the Church Assembly ex p. Haynes-Smith* [1928] 1 K.B. 411. Atkin L.J.'s dictum is too wide as regards certiorari and ecclesiastical law; *post*, para. 32–005, n.38.

local election court.[20] By statute, certiorari lies to the Crown Court except in relation to that Court's jurisdiction in matters relating to trials on indictment.[21] In *Board of Education v. Rice*[22] certiorari and mandamus were granted against the Board of Education because, in a dispute between the managers of a school and the local education authority, they had not decided the question which the statute directed them to decide. In *R. v. Manchester Legal Aid Committee ex p. Brand*[23] Parker J. concluded that a legal aid committee, being unconcerned with questions of policy and having to decide wholly on the facts of a particular case solely on the evidence before them, "must act judicially, not judiciously," and was therefore subject to certiorari.

Scope of certiorari

32–005 The grounds on which certiorari lies are:

(i) *Want or excess of jurisdiction* For this reason certiorari was granted against a licensing authority which had given permission to open a cinema on Sunday, whereas this was prohibited by statute[24]; and against a legal aid committee which had granted a legal aid certificate to a trustee in bankruptcy on the basis of the means of the bankrupt instead of the means of the trustee (*R. v. Manchester Legal Aid Committee, ante*[25]).

(ii) *Denial of natural justice*[26] Certiorari has been issued at the instance of a ratepayer to quash the decision of a rural district council permitting a certain development of land, since one of the councillors who voted on the resolution was interested in the use of the land[27]; and to quash a decision of the General Medical Council removing a doctor's name from the medical register, because the Council had refused to hear certain evidence which it ought to have heard (*General Medical Council v. Spackman*[28]). In *R. v. Barnsley M.B.C. ex p. Hook*[29] the Court of Appeal granted certiorari to quash a decision of a committee of the defendant corporation on the ground of bias.

(iii) *Error on the face of the record* It was commonly thought at one time that certiorari was limited to cases of jurisdiction and natural justice, but the Court of Appeal held in *R. v. Northumberland Compensation Appeal Tribunal ex p.*

[20] *R. v. Worthington-Evans ex p. Madan* [1959] 2 Q.B. 145, DC; *R. v. Hurst (Judge), ex p. Smith* [1960] 2 Q.B. 133, DC; *Pearlman v. Keepers and Governors of Harrow School* [1979] Q.B. 56; *R. v. Greater Manchester Coroner ex p. Tal* [1985] Q.B. 67, DC; *Baldwin and Francis Ltd v. Patents Appeal Tribunal* [1959] A.C. 663, HL; *R. v. Medical Appeal Tribunal ex p. Gilmore* [1957] 1 Q.B. 574, CA; *R. v. East Norfolk Local Valuation Court* [1951] 1 All E.R. 743; *R. v. Fulham Rent Tribunal* [1951] 2 K.B. 1; *R. v. Paddington Rent Tribunal ex p. Bell Properties* [1949] 1 K.B. 666; *Errington v. Minister of Health* [1935] 1 K.B. 249; *K. v. Cripps ex p. Muldoon* [1984] Q.B. 686, CA.

[21] Supreme Court Act 1981, s.29(3); *re Smalley* [1985] A.C. 622, HL; *R. v. Central Criminal Court ex p. Raymond* [1966] 1 W.L.R. 710, DC. See also, *R. v. D.P.P. ex p. Kebilene* [2000] 2 A.C. 362, HL.

[22] [1911] A.C. 179, HL.

[23] [1952] 2 Q.B. 413, DC.

[24] *The King v. London County Council ex p. Entertainments Protection Association* [1931] 2 K.B. 215.

[25] [1952] 2 Q.B. 413. See also *R. v. Fulham Rent Tribunal* [1951] 2 K.B. 1, on review of jurisdictional facts.

[26] For the principles of natural justice, see *ante*, para. 31–010 *et seq.*

[27] *The King v. Hendon Rural District Council, ex p. Charlev* [1933] 2 K.B. 696.

[28] [1943] A.C. 627, HL.

[29] [1976] 1 W.L.R. 1052.

Shaw[30] that this remedy is also available where an interior tribunal has issued a "speaking order" (*i.e.* an order showing the reasons on which it is based), and an error of law appears on its face. In that case the applicant complained that the tribunal had made an error in computing the compensation to which he was entitled by statute for loss of employment on the nationalisation of the health service. The award set out the manner in which the sum was computed, and this enabled the court to hold that the computation was not in accordance with the statutory regulations and that the decision must be quashed. Error on the face of the record renders a decision voidable. There was usually no obligation on a tribunal to make a "speaking" or reasoned order before the Tribunals and Inquiries Act 1958, replaced by section 10 of the 1992 Act.[31]

"Record" was defined by Denning L.J. (as he then was) in *Ex p. Shaw* as including the document initiating the proceedings, the pleadings, if any, and the adjudication but not the evidence and not the reasons for the decision unless incorporated into adjudication by the tribunal. In *Baldwin & Francis v. Patents Appeal Tribunal*[32] Lord Denning said the record also included all documents which appear from the formal order of the tribunal to constitute the basis of its decision. In *R. v. Southampton Justices ex p. Green*[33] the Court of Appeal held that affidavits from justices as to their reasons for a decision constituted part of the record and revealed an error of law on the face of the record.

A record may be written or oral under section 10 of the Tribunal and Inquiries Act 1992. The courts cited that section to justify a liberal approach to the meaning of "record" in cases outside the scope of the Act: *R. v. Knightsbridge Crown Court ex p. International Sporting Club (London) Ltd.*[34] Following Order 53 and *O'Reilly v. Mackman* the court should not, according to Woolf J. "be shackled and prevented from doing justice by restrictive historical decisions."[35] **32–006**

Following *Anisminic*, however, this learning, at least in English courts, is of historic interest only and all errors of law, whether on the record or not are likely to be treated as going to jurisdiction.[36]

Certiorari does not lie to review subordinate legislation.[37] It does not lie against ecclesiastical courts, because ecclesiastical law is a different system of law from that administered in the High Court,[38] or against voluntary (*i.e.* non-

[30] [1952] 1 K.B. 338; confirming Divisional Court at [1951] 1 K.B. 711; following *Walsall Overseers v. London and North Western Ry* (1879) 4 App.Cas. 30, HL and *R. v. Nat Bell Liquors Ltd* [1922] 2 A.C. 128, HC.

And see *R. v. Patents Appeal Tribunal ex p. Swift & Co* [1962] 2 Q.B. 647, DC; *R. v. Medical Appeal Tribunal ex p. Gilmore* [1957] 1 Q.B. 574, DC, *per* Denning L.J.

[31] *ante*, para. 30–023.

[32] [1959] A.C. 663; the other members of the House expressly refused to consider what documents, if any, other than the actual order of the tribunal, constituted the record. Lord Denning's definition was followed in *Ex p. Swift, ante, cf. Belsheld Court Construction Co. v. Pywell* [1970] 2 Q.B. 47, pleadings not part of arbitrator's award.

[33] [1976] 1 Q.B. 11.

[34] [1982] Q.B. 304, DC (Quashing of oral judgment).

[35] *R. v. Knightsbridge Crown Court ex p. The Aspinall Curzon Ltd, The Times*, December 16, 1982. (Affidavit evidence could be treated as part of the record.)

[36] *R. v. Greater Manchester Coroner ex p. Tal* [1985] Q.B. 67.

[37] *R. v. Legislative Committee of the Church Assembly ex p. Haynes-Smith* [1928] 1 K.B. 411.

[38] *The King v. Chancellor of St. Eamunasoury and Ipswich Diocese* [1948] 1 K.B. 195, *cf.* prohibition.

statutory) domestic tribunals,[39] nor does it lie for dismissal of a person under an ordinary contract of employment.[40]

2. Prohibition (Prohibiting Order)

32–007 The former writ of prohibition issued out of the King's Bench or other superior court directing the judge and parties to a suit in any inferior court to cease from the prosecution thereof on the ground that the cause did not belong to that jurisdiction.[41] The penalty for disobedience is committal for contempt. It was mainly by this writ that the common law courts in earlier days contested the jurisdiction of the Admiralty and ecclesiastical courts.

The order of prohibition issues to *prevent* an inferior court or tribunal from exceeding or continuing to exceed its jurisdiction or infringing the rules of natural justice. Prohibition is governed by similar principles to certiorari, except that it does not lie when once a final decision has been given. It will issue to prevent magistrates exceeding their jurisdiction[42] and to prevent a Board of Prison Visitors from hearing a charge which they were not entitled to deal with.[43] In *R. v. Liverpool Corporation ex p. Liverpool Taxi Fleet Operators' Association*[44] it was granted to prohibit a local authority from acting on a resolution with regard to the number of taxicab licences to be issued, without first hearing representations on behalf of interested persons.

Prohibition has been granted against Electricity Commissioners to prevent them from holding an inquiry with a view to bringing into force an *ultra vires* scheme for the supply of electricity (*R. v. Electricity Commissioners*[45]); and against Income Tax Commissioners, an assessment committee and rent tribunals.[46] But it was decided in *The King v. Legislative Committee of the Church Assembly ex p. Haynes-Smith*,[47] where application was made for an order to prohibit the Church Assembly from proceeding further with the Prayer Book Measure 1927, that it would not issue against a legislative or deliberative body. Nor will prohibition be issued to a military tribunal administering martial law (*Re Clifford and O'Sullivan*[48]).

[39] *R. v. National Joint Council for the Craft of Dental Technicians ex p. Neste* [1953] 1 Q.B. 704, DC; *R. v. Post Office ex p. Byrne* [1975] I.C.R. 221. This limit on the availability of certiorari was overlooked by the Divisional Court in *R. v. Aston University Senate ex p. Roffrey* [1969] 2 Q.B. 538; criticised on that ground, *Herring v. Templeman* [1973] 3 All E.R. 569, 585 *per* Russell L.J. *cf. R. v. Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 Q.B. 864, CA; certiorari may be issued against a public body set up by prerogative as part of an administrative scheme approved by both Houses and financed by parliamentary funds. See also *R. v. Panel on Takeovers and Mergers ex p. Datafin* [1987] Q.B. 815.

[40] *Vidyodaya University of Ceylon v. Silva* [1965] 1 W.L.R. 77; [1964] 3 All E.R. 865, PC; dismissal of university professor. The remedy is an action for damages if the dismissal was in breach of contract.

[41] Bl.Comm. iii. 105. See D. C. M. Yardley, "The Grounds for Certiorari and Prohibition" (1959) 37 Can.Bar Rev. 294.

[42] *e.g. R. v. Horseferry Road Justices ex p. L.B.A.* [1986] 3 W.L.R. 132.

[43] *R. v. Board of Visitors of Dartmoor Prison ex p. Smith* [1986] 3 W.L.R. 61, CA.

[44] [1972] 2 Q.B. 299, CA.

[45] [1929] 1 K.B. 171, *per* Atkin L.J. Certiorari was refused in that case.

[46] *Kensington Income Tax Commissioners v. Aramayo* [1916] 1 A.C. 215; *R. v. North Worcestershire Assessment Committee ex p. Hadley* [1929] 2 K.B. 397; *R. v. Tottenham and District Rent Tribunal ex p. Northfield* [1957] 1 Q.B. 103.

[47] [1928] 1 K.B. 411. The House of Commons rejected the Prayer Book Measure.

[48] [1921] 2 A.C. 570, HL.

Where a final decision has been made by the inferior court prohibition is obviously useless, but certiorari is available to enable the High Court to review and, if necessary, to quash the decision. Thus prohibition was the appropriate remedy to prevent the Minister of Health from proceeding to confirm an *ultra vires* housing scheme (*R. v. Minister of Health ex p. Davis*[49]), but certiorari was appropriate when an *ultra vires* scheme had already been approved by the Minister (*Minister of Health v. R. ex p. Yaffe*[50]). Certiorari and prohibition may be granted together, for example, to quash a decision already made by a rent tribunal and to prevent it continuing to exceed or abuse its jurisdiction (*R. v. Paddington Rent Tribunal, ex p. Bell Properties Ltd*[51]). **32–008**

Prohibition and mandamus were issued together in *R. v. Kent Police Authority ex p. Godden*[52] where, on the compulsory retirement of a police chief inspector on the ground that he was permanently disabled, it was held that the chief inspector's medical advisers were entitled to see all the material placed before the medical practitioner appointed to make the decision about disablement.

Since the introduction of Order 53 there is little significance in any distinction between prohibition and the injunction in cases relating to public law.

3. Mandamus (Mandatory Order)

The order of mandamus may be issued to any person or body (not necessarily an inferior court) commanding him or them to carry out some public duty. **32–009**

Mandamus has been issued to compel the hearing of an appeal by a statutory tribunal,[53] the determination of a dispute between a local education authority and school managers (*Board of Education v. Rice*[54]), to procure the production of a local authority's accounts for inspection,[55] against a returning officer to declare a councillor elected,[56] against an electoral registration officer to correct the register of electors[57] against a county court judge to make a legal aid order,[58] and against the Board of Trade requiring them to investigate the affairs of the applicant company under the Companies Act.[59] Mandamus was not granted to compel the College of Physicians to admit an applicant (*R. v. Askew*[60]), to order a magistrate to hear a case covered by parliamentary privilege,[61] or to compel the Chairman of Convocation of London University to call a meeting, as the matter could have been put to the Visitor (*R. v. Dunsheath ex p. Meredith*[62]).

Mandamus is not available against the Crown itself, nor against a servant of the Crown to enforce a duty owed exclusively to the Crown (*R. v. Secretary of*

[49] [1929] 1 K.B. 619.
[50] [1931] A.C. 494.
[51] [1939] 1 K.B. 666.
[52] [1951] 2 Q.B. 662, CA.
[53] *The King v. Housing Tribunal* [1920] 2 K.B. 334.
[54] [1911] A.C. 179.
[55] *R. v. Beawellty U.D.C., ex p. Price* [1934] 1 K.B. 333.
[56] *R. v. Soothill ex p. Ashdown, The Times*, April 2, 1955.
[57] *R. v. Calderwood ex p. Manchester Corporation, The Times*, February 27, 1974.
[58] *R. v. Judge Fraser Harris ex p. The Law Society* [1955] 1 Q.B. 287.
[59] *R. v. Board of Trade ex p. St. Martin's Preserving Co.* [1965] 1 Q.B. 603, DC.
[60] (1768) 4 Burr. 2186.
[61] *R. v. Graham-Campbell, ex p. Herbert* [1935] 1 K.B. 594; *cf. R. v. Ogden ex p. Long Ashton R.D.C.* [1963] 1 W.L.R. 274; [1963] 1 All E.R. 574, DC.
[62] [1931] 1 K.B. 127. And see *Sammy v. Birkbeck College, The Times*, November 3, 1964, and May 20, 1965, CA (mandamus refused).

State for War.[63] *The Queen v. Lords of the Treasury*[64]), because a third party cannot require an agent to perform a duty which he owes solely to his principal. But mandamus may be issued against Ministers or other Crown servants to enforce a statutory duty owed to the applicant as well as to the Crown (*The Queen v. Special Commissioners for Income Tax*[65]). In *Padfield v. Minister of Agriculture, Fisheries and Food*[66] the House of Lords held that where a minister had by statute an unfettered discretion whether or not to refer a complaint to a committee, he must consider only relevant matters and exclude irrelevant ones, and that even where he gave no reasons for not referring the matter to the committee he should be required by mandamus to consider the complaint lawfully.

4. Injunction and Declaration

32–010 Where the right claimed by a litigant is a public law right these remedies must be sought by means of an application for judicial review.[67] The substantive rules relating to these remedies are discussed later in Part V which deals with private law remedies.

An injunction is a court order requiring the defendant to do or refrain from doing an act while a declaration (or declaratory judgment) declares what the law is. Although, as will be seen in Part V, the declaratory judgment is not available to answer hypothetical questions, recent developments in the public law sphere establish that it is not confined to disputes relating to decisions of public bodies. In appropriate cases the court has jurisdiction to declare that a ministerial circular is or is not based on a mistaken view of the law[68] or that an intended payment by a local authority, if made, would be *intra vires*.[69] The prospect of obtaining a declaration that an intended course of action would or would not be criminal is extremely remote.[70]

B. Sufficient Interest

32–011 A claimant for judicial review must satisfy the court that he has a sufficient interest in the matter to which the application relates.[71] This general requirement replaces the rules relating to locus standi which formerly applied to each individual remedy. Then, as now, a member of the public had no right to impugn the legality of a decision taken by a public body unless he could establish an individual right or claim of some kind. The test to be satisfied was defined (or

[63] [1891] 2 Q.B. 326.
[64] (1872) L.R. 7 Q.B. 387. See E. C. S. Wade, "The Courts and the Administrative Process" (1947) 63 L.Q.R. 164.
[65] (1889) 21 Q.B.D. 313. And see *R. v. Board of Trade ex p. St. Martin's Preserving Co. supra.*
[66] [1968] A.C. 997.
[67] *O'Reilly v. Mackman* [1983] 2 A.C. 237 was an unsuccessful attempt to obtain a declaration without using the procedure of judicial review; *Cocks v. Thanet DC* [1983] 2 A.C. 286, an unsuccessful attempt to obtain an injunction.
[68] *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112.
[69] *R. v. Bromley L.B.C. ex p. Lambeth L.B.C., The Times*, June 16, 1984.
[70] *Imperial Tobacco Ltd v. Att.-Gen.* [1980] 1 W.L.R. 322, HL.
[71] Supreme Court Act 1981, s.31(3).

described) in varying terms in relation to particular remedies. It was possible for an applicant to satisfy the requirement of locus standi in relation to one remedy but not to another.[72]

The meaning of "sufficient interest" was considered by the House of Lords in *R. v. Inland Revenue Commissioners ex p. National Federation of Self Employed and Small Businesses Ltd.*[73] In line with the current judicial approach to judicial review sufficient interest was given the widest possible meaning while reserving to the court a discretion in particular cases to refuse a hearing or deny a remedy. The House of Lords was reluctant to separate locus standi from the facts and merits of an application. The requirement of standing should, it seems, be looked at twice: first when the applicant applies for leave to seek judicial review. At that stage the court is concerned to do no more than "prevent abuse by busybodies, cranks, and other mischief-makers."[74] If leave is granted, the court may, when the merits of the case are clear to it, revise its initial judgment and conclude that the applicant lacks the necessary interest. The application before the House had been made by an association of taxpayers who wished to challenge the legality of a compromise which the Inland Revenue had made with a group of print-workers who had been defrauding the revenue. The House of Lords held that while it had been correct to grant leave to apply for review, the applicants, on the facts, lacked sufficient interest to challenge the legality of the compromise. The assessment of one taxpayer is no concern of another; indeed, each individual's tax liability is a confidential matter. The Inland Revenue was reasonably trying to carry out its duty to collect taxes. Dicta did envisage the possibility of cases of sufficient gravity where taxpayers might have *locus standi*.[75] The House distinguished the position of the taxpayer from that of the ratepayer. In the latter case assessments of property are a public matter and there is a common fund so that each ratepayer's contribution is affected by the assessment of his neighbour.[76] An individual taxpayer, by contrast, seeking to challenge decisions of the revenue authorities in relation to his own affairs has, without doubt, sufficient interest.[77] In *R. v. H.M. Treasury ex p. Smedley*[78] a taxpayer challenged the legality of a draft Order in Council laid by the Treasury before Parliament.[79] The Court of Appeal decided the substantive question against Smedley and therefore did not have to express a concluded view on whether he has a sufficient interest to apply for judicial review. Slade L.J. emphasised the width of the test laid down in the *Inland Revenue* case, *supra* and indicated that the court would hear an application provided it was satisfied that it was not "of a frivolous nature."

This wide approach to the meaning of sufficient interest has been followed in subsequent cases and, in particular, the courts have recognised that pressure

[72] *e.g. Gregory v. Camden L.B.C.* [1966] 1 W.L.R. 899. But see now *Steeples v. Derbyshire C.C.* [1985] 1 W.L.R. 256.

[73] [1982] A.C. 617.

[74] At p. 653, *per* Lord Scarman.

[75] *e.g.* Allegations of large scale fraud and corruption on the part of the revenue.

[76] So ultimately is each taxpayer's liability affected by his neighbour's contribution. In *Arsenal Football Club Ltd v. Ende* [1979] A.C. 1, (the correctness of which the House was concerned to uphold) the plaintiff was not applying under p. 53 but as a "person aggrieved" under the General Rate Act 1967, s.69; see *post*, para. 32–015.

[77] *e.g. R. v. Special Commissioners ex p. Stupplechoice Ltd* [1985] 2 All E.R. 465, CA.

[78] [1965] Q.B. 857.

[79] *ante* para. 6–016.

groups and organisations of various kinds may have sufficient interest to elucidate the law.[80]

C. The Scope of Judicial Review

32–012 Judicial review is a procedure available only in disputes raising questions of public law. The court must before an application can succeed be satisfied that the respondent is a public authority and that the right at issue is a public right.

Although the courts have not attempted to define what is meant by public authority guidance can be gained from the cases cited in the preceding pages in relation to the particular remedies. Generally it might be said that judicial review is available against any minister or body exercising common law or statutory powers which affects the rights of individuals unless there is a reason to the contrary.[81] Thus it will be available not merely against departments of central and local government but also against the General Medical Council because of its statutory powers of control over the medical profession,[82] and against Boards of Prison Visitors.[83] The new procedure does not, however, give the High Court a jurisdiction which it formerly lacked. Decisions of superior courts are not, therefore, subject to review.[84] Nor is an organisation necessarily a public authority because it has been created by statute. The question is whether the powers it is exercising are of a public law or governmental kind. A commercial decision, for example, by a nationalised industry is unlikely to be subject to judicial review: *R. v. National Coal Board ex p. National Union of Mineworkers*.[85]

In the leading case of *R. v. Panel on Takeovers and Mergers ex p. Datafin*[86] the Court of Appeal held that judicial review was available against a body exercising what might be called *de facto* powers, without a common law or statutory basis when its decisions had wide ranging significance and, in the absence of such a body, Parliament would have had to legislate to establish a body having statutory powers.[87]

D. The Availability of Other Remedies

32–013 The availability of another remedy may be relevant in one of two ways to an application for judicial review.

[80] *R. v. Secretary of State for Social Services ex p. Child Poverty Action Group* [1989] 1 All E.R. 1047; *R. v. Secretary of State for Foreign and Commonwealth Affairs ex p. World Development Movement* [1995] 1 W.L.R. 386.

[81] *R. v. Secretary of State for the Home Department ex p. McAvoy* [1984] 1 W.L.R. 1408: no judicial review of decision taken for "operational and security reasons."

[82] *R. v. G.M.C. ex p. Gee* [1986] 1 W.L.R. 226. Domestic Tribunals exercising a jurisdiction based on contract are outside p. 53: *Law v. National Greyhound Racing Club Ltd* [1983] 1 W.L.R. 1302, CA.

[83] *e.g. R. v. Board of Visitors of Dartmoor Prison ex p. Smith* [1986] 3 W.L.R. 61, CA.

[84] The Crown Court is subject to review except with regard to "matters relating to trial on indictment": Supreme Court Act 1981 s.29(3); *In re Smalley* [1985] A.C. 622, HL; *R. v. Central Criminal Court ex p. Raymond* [1986] 1 W.L.R. 710, DC.

[85] *The Times*, March 8, 1986.

[86] [1987] Q.B. 815. Contrast the old law on certiorari: *ex p. Neate*, *ante* para. 32–005.

[87] See further *R. v. Disciplinary Committee of the Jockey Club ex p. Aga Khan* [1993] 1 W.L.R. 909.

First, the court may decide that the alternative remedy is the exclusive remedy provided by law and there is no jurisdiction to grant review.[88] A recent, unsuccessful, attempt on this ground to deny jurisdiction to the court is to be found in *R. v. Secretary of State for the Environment ex p. Ward*.[89] Section 9 of the Caravan Sites Act 1968 entitled the minister to give directions to local authorities requiring them to provide caravan sites in accordance with their statutory duties: "any such directions shall be enforceable, on the application of the Minister, by mandamus." A local authority was unwilling to carry out its duty and the Secretary of State was unwilling to seek mandamus against them. The applicant, a gypsy, sought judicial review against the local authority and the Secretary of State. Woolf J. held that section 9 did not preclude an application for judicial review although it would have precluded any private law application by an individual litigant.

Secondly, more commonly the existence of an alternative remedy is a factor to be taken into account by the court in deciding whether, in its discretion, to grant relief.

"Judicial review should not be granted where an alternative remedy is available."[90] The courts are particularly reluctant to intervene where Parliament has provided a comprehensive appellate system, for example, in the field of social services: *R. v. Secretary of State for Social Services ex p. Connolly*.[91] Similarly in relation to immigration the Court of Appeal emphasised the undesirability of granting leave to seek judicial review before applicants had exhausted their statutory rights under the Immigration Act 1971: *R. v. Secretary of State for the Home Department ex p. Swati*.[92] On the other hand, an application may be granted if there are special circumstances such as the inordinate delay in the domestic disciplinary process in *R. v. Chief Constable of the Merseyside Police ex p. Calveley*.[93]

E. Discretionary

Judicial review is a procedure in which the court has a discretion whether to grant relief at two stages. First, the claimant must obtain leave to apply. At that stage he must, as we have seen, demonstrate *prima facie* a sufficient interest to be allowed to proceed. He must also give some reason for believing that there is ground for challenging the decision of which he complains and, if there is an alternative remedy available, suggest why that should not prevent leave being granted. It was because the applicant failed to satisfy both these preliminary hurdles that the Court of Appeal refused leave to apply for judicial review of an **32–014**

[88] *Barraclough v. Brown* [1897] A.C. 615; *Pasmore v. Oswaldtwistle Urban District Council* [1898] A.C. 387.

[89] [1984] 1 W.L.R. 834; distinguishing *Kensington and Chelsea L.B.C. v. Wells* [1973] 72 L.G.R. 289, C.A. See generally, *Pyx Granite Co v. Ministry of Housing* [1960] A.C. 260.

[90] *R. v. Inland Revenue Commissioners ex p. Preston* [1985] A.C. 835, 852 *per* Lord Templeman.

[91] [1986] 1 W.L.R. 421.

[92] [1986] 1 W.L.R. 477; See too *R. v. Chief Adjudication Officer ex p. Bland, The Times*, February 6, 1985, DC.

[93] [1986] Q.B. 424, C.A. The judgments contain a useful survey of earlier authorities. See also, *Harley Developments v. Commission of Inland Revenue* [1996] 1 W.L.R. 727, PC.

immigration officer's decision in *R. v. Secretary of State for the Home Department ex p. Swati*.[94] The House of Lords has emphasised the need to have some ground to believe that a decision is subsequently open to challenge before granting leave in *R. v. Secretary of State for the Environment ex p. Pulhofer*.[95] The applicants had been granted leave to challenge a decision of the Hillingdon Council under the Housing (Homeless Persons) Act 1977.[96] The House held that the Council had correctly decided that the applicants were not homeless. It also indicated, however, concern that leave to apply should not be given too easily in future cases. Lord Brightman said that he was

> "troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the 1977 Act. Parliament intended the local authority to be the judge of fact. The Act abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that. Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. . . . Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

32–015 In *R. v. Monopolies and Mergers Commission ex p. Argyll Group plc*[97] the Court of Appeal held that a judge had been right to refuse leave to seek judicial review of a decision taken by the Chairman of the Commission. The decision, in the view of the Court, was outside his statutory powers but equally the Court had no doubt that the Commission itself, which did have the power to decide, would have come to the same conclusion.

Secondly, where leave has been granted and the application for relief has been successful the court still has a discretion with regard to the granting of remedies. The nude sunbathers in *Glynn v. Keele University*,[98] for example, failed to obtain an injunction because of their own behaviour and because, even after a hearing, a similar decision would have been reached. The Court may be concerned about the inconvenience and upheaval that would be caused if it quashed a statutory instrument in reliance on which parties had been acting.[99] In *R. v. Secretary of*

[94] [1986] 1 W.L.R. 477.
[95] [1986] A.C. 484.
[96] See now Housing Act 1985, ss.58–78. *Cocks v. Thanet DC* [1983] 2 A.C. 286, *supra* para. 32–009 had established that decisions under the Act required to be challenged by judicial review.
[97] [1986] 1 W.L.R. 763.
[98] [1971] 1 W.L.R. 487.
[99] *R. v. Secretary of State for Social Services ex p. Association of Metropolitan Authorities* [1986] 1 W.L.R. 1.

State for the Environment ex p. Ward,[1] Woolf J. refused to grant mandamus against the Secretary of State because it could not be said that he had acted improperly or irrationally in reaching the decision which he had and interference would, in the light of the complicated situation, be premature. The learned judge quashed the decisions of the council which had been challenged (by certiorari) but refused to issue injunctions ordering them what to do next.

II. Statutory Rights of Appeal

A right of appeal on a question of law may lie to the High Court from the decision of a tribunal or Minister. The Tribunals and Inquiries Act 1958, s.9 (now s.11 of the 1992 Act) introduced a general right of appeal from a wide range of tribunals listed in Schedule 1 to the Act.[2] In addition rights of appeal are contained in many other statutes. The Acquisition of Land Act 1981 for example provides that any person who wishes to challenge the validity of a compulsory purchase order on the ground that it is *ultra vires* the Act may apply to the High Court.[3] The Town and Country Planning Act 1990 provides for appeals to the High Court against decisions of the Secretary of State (ss.289, 290). **32–016**

Appeals to the ordinary courts may be by an indirect route as for example, in the case of appeals under the Lands Tribunal Act 1949 to the Lands Tribunal, from which an appeal on a point of law lies to the Court of Appeal.

As in the cases discussed in the preceding section an applicant must show that he has the necessary *locus standi* or, in the commonly used statutory words, is a person aggrieved. In *Ex p. Sidebotham*[4] James L.J. said: "A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something." In line with that narrow approach it was held that a landowner had no *locus standi* to appeal against planning permission granted to a neighbouring landowner.[5] In *Arsenal Football Club v. Ende*[6] the House of Lords adopted a more generous approach and held that a ratepayer was entitled to challenge the valuation of any property in his rating area whether or not he could show that the decision challenged had a demonstrable effect on his pocket, rights or interests.

An applicant must also show that his appeal relates to a question of law as opposed to a question of fact, a distinction which it is not always easy to draw.[7] Whether A threw soup over B is clearly a question of fact. A tribunal may, however, in the light of a number of facts relating to the terms and conditions of A's work, have to decide whether A is an employee of B or an independent contractor or whether indeed there is any form of legal relationship between the two at all. If the courts wish to extend their appellate jurisdiction over a particular

[1] [1984] 1 W.L.R. 834.
[2] *ante*, para. 30–021.
[3] See *Smith v. East Elloe Rural District Council*, [1956] A.C. 736; discussed *post*, para. 32–016.
[4] (1880) 14 Ch.D. 458, 465.
[5] *Buxton v. Minister of Housing and Local Government* [1961] 1 Q.B. 278.
[6] [1979] A.C. 1. In *Steeples v. Derbyshire C.C.* [1985] 1 W.L.R. 256 Webster J. said that it would "make an ass of the law" to require in other contexts a stricter test of *locus standi* than that required by Order 53 (Now CPR, Pt 54).
[7] See articles cited *ante*, para. 31–007, n. 33.

type of tribunal they can categorise problems involving the classification of facts—was A an employee—as questions of law.[8] If they wish to avoid interfering with a tribunal's exercise of its jurisdiction they can treat such questions as matters of fact.[9] Or, as a compromise they can say that a question of law arises only when a decision on the application of the law to the facts is such that no tribunal properly instructed could have reached that conclusion.[10]

III. Exclusion or Restriction of the Jurisdiction of the Courts

32–017 Statutes have purported or appeared to exclude judicial review by the courts by the use of various drafting formulae, though with scant success. The Tribunals and Inquiries Act 1992, s.12 (replacing the Act of 1958, s.11) now provides that any provision in an Act passed before August 1, 1958, that any order or determination shall not be called in question in any event, or any provision in such an Act which by similar words excludes any of the powers of the High Court, shall not prevent the use of the remedies of certiorari or mandamus except in the case of Acts making special provision for applications to the High Court within a limited time.

It was held by the Court of Appeal in *R. v. Medical Appeal Tribunal ex p. Gilmore*[11] that a formula like "any such order or decision shall be final" does not bar certiorari: it makes the decision final on the facts, but not final on the law. The formula that an order or rules made "shall have effect as if enacted in this Act" has dicta of the House of Lords both for and against the exclusion of judicial control.[12]

A different kind of provision is that found in some Acts concerning planning and the compulsory acquisition of land, which set a *time limit* (commonly six weeks) in which the validity of the order may be challenged in the High Court, and specifying the permitted grounds of complaint as (a) *ultra vires* or (b) non-compliance with the statutory procedure, and stating that subject to these provisions the order may not be questioned in any legal proceedings. The main purpose of such provision is to limit the time within which an order or decision may be questioned in the courts, so as to ensure that the *title* to land acquired by a public authority for building, etc. should not remain uncertain after a short time. In *Smith v. East Elloe Rural District Council*[13] the House of Lords held, by a majority of three to two, that after the six weeks' period a compulsory purchase order could not be challenged even on the ground that it had been procured by

[8] *Davies v. Presbyterian Church of Wales* [1986] 1 W.L.R. 323, HL (Question whether minister was employee of his church a question of law.)

[9] *O'Reilly v. Trust House Forte plc* [1984] Q.B. 90.

[10] *Edwards v. Bairstow* [1956] A.C. 14.

[11] [1957] 1 Q.B. 574, C.A. See also *South East Angelia Fire Bricks v. Non-Metallic Mineral Products Manufacturing Employees Union* [1981] A.C. 363.

[12] *Institute of Patent Agents v. Lockwood* [1894] A.C. 347, *obiter dicta* that judicial review was excluded; *Minister of Health v. R. ex p. Yaffe* [1931] A.C. 494, *obiter dicta* that judicial review was not excluded; see *R. v. Minister of Health ex p. Yaffe* [1930] 2 K.B. 98, C.A.

[13] [1956] A.C. 736. The plaintiff had previously obtained damages against the council and contractors for trespass, as the continuance of wartime requisition was done in bad faith: *Smith v. East Elloe R.D.C.* [1952] *Current Property Law*. In subsequent proceedings by the plaintiff against the clerk and a representative of the Ministry for damages for conspiracy to injure, Diplock J. held that there was no conspiracy, that damages had already been recovered for trespass, and his Lordship was not satisfied that the clerk had in fact acted in bad faith: *Smith v. Prevett, The Times*, April 29, 1959.

bad faith. It was not necessary to decide whether the order could be challenged for bad faith within six weeks. Of the minority who thought the order could be challenged for bad faith after six weeks, Lord Reid thought this was not excluded by the statute and Lord Somervell thought such remedy lay under general principle. The majority decision was much criticised as offending against the principles of natural justice: but although justice may require compensation for loss brought about by fraud, that does not necessarily mean that an order on which title to land is based should be upset.

32–018 The question was considered by the House of Lords in *Anisminic v. Foreign Compensation Commission*[14] The Foreign Compensation Act 1950, s.4, provided that "the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law": but the House of Lords (reversing the Court of Appeal) held by four to one that this provision did not prevent the court from making a declaration that the Commission's determination was a nullity. Lord Reid said: "It is one thing to question a determination which does exist: it is quite another thing to say that there is nothing to be questioned. . . . It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly. . . . No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. . . . Undoubtedly such a provision protects every determination which is not a nullity." Cases where the decision of a tribunal may be a nullity are: where it had no jurisdiction to enter into the inquiry; where it gave its decision in bad faith; where it made a decision which it had no power to make; where it failed to comply with the requirements of natural justice; where in good faith it decided the wrong question; and where it failed to take account of something of which it was required to take account, or based its decision on a matter which it ought not to have taken into account. Something much more specific than this Act would be required if it is to be held that Parliament intended to exclude the court's jurisdiction on any of these grounds.

The *East Elloe* case (*ante*) was distinguished in the *Anisminic* case. Lord Reid did not regard the former case (in which he had dissented) as very satisfactory. It is not certain, he said, whether the plaintiff was claiming that the authority which made the order had itself acted in bad faith, in which case the order would be a nullity; or whether she was alleging that the clerk had fraudulently misled the council and the Ministry, in which case the result would be quite different.

32–019 In *R. v. Secretary of State for the Environment ex p. Ostler*[15] the Court of Appeal held, for a variety of reasons, that *East Elloe* had not been overruled by *Anisminic* and was applicable to a case involving a six week time limit under the Highways Act 1959. *Anisminic* was distinguished as applying only where there is a complete ouster of the courts' jurisdiction as opposed to an ouster after a time

[14] [1969] 2 A.C. 147. Browne J.'s judgment at first instance, which was upheld by the House of Lords, is reported at [1969] 2 A.C. 223. See H. W. R. Wade, "Constitutional and Administrative Aspects of the *Anisminic* Case" (1969) 85 L.Q.R. 198; B. C. Gould, "Anisminic and Jurisdictional Review" [1970] P.L. 258; D. M. Gordon, "What did the Anisminic Case decide?" (1971) 34 M.L.R. 1; note by S. A. de Smith in [1969] C.L.J. 161.

cf. Foreign Compensation Act 1969, s.3: No determination by the Commission may be called in question in any court of law, except (a) case stated on question of law to Court of Appeal concerning jurisdiction or interpretation of Order in Council and (b) proceedings on ground that determination is contrary to natural justice.

[15] [1977] Q.B. 122.

limit[16]: that it dealt with a determination by a judicial body whereas *East Elloe* dealt with an order of an administrative character: that it dealt with an actual decision whereas *East Elloe* dealt with the validity of the process by which the decision was reached: that it dealt with the ultimate question of jurisdiction as opposed to an attack on the validity of an order made within jurisdiction: and, finally that it dealt with the ultimate question of the payment of compensation as opposed to the validity of a compulsory purchase order.[17]

An exclusion clause which seems to have been drafted with the intention of defeating the reasoning in *Anisminic* is to be found in the Interception of Communications Act 1985. Section 7 "establishes a tribunal to investigate complaints relating to the interception of communications under the Act." Subsection (8) provides that "the decisions of the Tribunal (*including any decisions as to their jurisdiction*) shall not be subject to appeal or liable to be questioned in any court." (Italics added.) An exclusion clause of rather doubtful effect is to be found in the British Nationality Act 1981 s.44. Subsection (1) directs that any discretion vested by or under the Act in the Secretary of State shall be exercised without regard to the race, colour or religion of any person who may be affected by its exercise. Subsection (2) then provides that the Secretary of State shall not be required to give any reason for any decision made under his discretionary powers and any such decision "shall not be subject to appeal to, or review in, any court." Then subsection (3), apparently inconsistently provides that "Nothing in this section affects the jurisdiction of any court to entertain proceedings of any description concerning the rights of any person under any provision of this Act". Has subsection (1) given applicants a right not to be discriminated against?

32–020 In various contexts statutes[18] may provide that the issuing of a certificate is conclusive evidence that the requirements of an Act have been complied with[19] or that certain facts have occurred. In an earlier chapter reference was made to the conclusive effect of the Speaker's certificate issued under the Parliament Act 1911.[20] In the following chapter it will be seen that a Secretary of State may issue conclusive certificates under sections 10 and 40 of the Crown Proceedings Act 1947.[21] Such a form of ouster clause leaves little scope for judicial review, unless the validity of the certificate itself is attacked, for example on the ground of forgery. In *R. v. Registrar of Companies, ex p. Central Bank of India*[22] the Court of Appeal refused to inquire into whether the requirements of the Companies Act 1948 had been complied with in the light of a certificate that they had, such certificate being "conclusive evidence" under the Act. Lawton L.J. said that Parliament, by making the certificate conclusive evidence had excluded not the jurisdiction of the court but the admission of evidence.

32–021 Apart from directly excluding judicial review statutes may restrict the jurisdiction of the courts by conferring powers on ministers in subjective terms: the

[16] *per* Lord Denning, citing H. W. R. Wade, *Administrative Law* (3rd ed.), pp. 151–153. See (4th ed.) pp. 579–582.

[17] See J. Alder, "Time Limit Clauses and Judicial Review—*Smith v. East Elloe Revisited*" (1975) 38 M.L.R. 274; J. Alder, "Time Limit Clauses and Conceptualism: A Reply," (1960) 43 M.L.R. 670; L. H. Leigh, "Time Limit Clauses and Jurisdictional Error," [1980] P.L. 34.

[18] The courts themselves have recognised the conclusive effect of certificates in the sphere of foreign affairs: *ante* para. 15–023.

[19] *e.g. Ex p. Rinyer* (1909) 25 T.L.R. 718, DC.

[20] *ante* para. 8–036.

[21] *post* para. 33–033 and para. 33–012.

[22] [1986] Q.B. 1114. The current legislative provision is s.401 of the Companies Act 1985.

minister may act "if satisfied." In such cases the courts may accept that they can only enquire if the minister was satisfied, not if he had reasonable grounds to be so.[23] Lord Salmon accurately, if unhelpfully, summarised the case law when he said, "[Those words] *may* confer an absolute discretion on the Executive. Sometimes they do, but sometimes they do not."[24] The courts have had to consider the scope of its jurisdiction where statutes use subjective language in two cases in the controversial area of relations between central and local government. The Education Act 1944, section 68 provides that the Secretary of State may give directions to a local education authority if he is satisfied that it had acted or was proposing to act "unreasonably." In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*[25] the House of Lords held that the section required the existence of certain facts, *i.e.* those from which a properly directed minister could conclude the existence of unreasonableness in the *Wednesbury* sense. The evaluation of the facts was a matter for the subjective judgment of the minister; their existence was a matter for the court. (The House held that no facts existed from which an inference of unreasonableness could be drawn.) In *R. v. Secretary of State for the Environment ex p. Norwich County Council*[26] the Council challenged the legality of the Secretary of State using his default powers under the Housing Act 1980 s.23(1) which provided that the Secretary of State could give notice of his intention to exercise his statutory powers "where it appears . . . that tenants . . . have or may have difficulty in exercising the right to buy effectively and expeditiously."[27] The Court of Appeal held that no question of unreasonableness on the part of the Council was involved; unlike the *Tameside* case that word had not been used in the statute. Thus the power of the Minister was wider in the *Norwich* case. The Court held that in exercising his power he must act fairly and reasonably. On the facts he had done so since there was overwhelming evidence that tenants were having difficulty in exercising their rights.

The widest ministerial discretion of all, and the most complete exclusion of judicial control, occurs where the courts conclude that a particular issue is "non-justiciable." We have seen earlier that the courts are willing to recognise that Acts of State may be acts over which they have no jurisdiction[28] and in the GCHQ case, while asserting the right of review over powers derived from the Royal Prerogative, the House of Lords admitted that the exercise of certain prerogative powers would continue to fall outside the scope of judicial review.[29]

IV. Private Law Remedies Against Public Authorities

1. Action for damages

When an injury is done to a citizen's person or property by a public authority acting *ultra vires* or in abuse of power, an action for damages may be brought in 32–022

[23] See *ante*, para. 19–043.
[24] *Att.-Gen of St. Christopher, Nevis and Anguilla v. Reynolds* [1980] A.C. 637, PC.
[25] [1977] A.C. 1014. See too *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455.
[26] [1982] Q.B. 808.
[27] See now Housing Act 1985, s.164.
[28] *Nissan v. Att.-Gen.* [1970] A.C. 179.
[29] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.

circumstances where an action would lie against a private individual. The actions most commonly brought are for trespass,[30] false imprisonment,[31] negligence,[32] and nuisance.[33] It has been suggested that in cases not falling within the limits of established torts there may be a liability in damages for malicious use of statutory powers.[34]

If a public authority commits a breach of contract which it was within the powers of the authority to make, an action for damages will lie.[35]

2. Injunction and specific performance

32–023 Where a public authority threatens to do or to continue to do some unlawful act, such as a nuisance, an action may be brought for an injunction to restrain the authority from doing or continuing to do so. The breach of an injunction amounts to contempt of court. An injunction was originally an equitable remedy. It may be sought in addition to or instead of damages, but will only be granted at the discretion of the court exercised judicially and in the type of cases in which it would lie against a private individual. In *Pride of Derby Angling Association v. British Celanese Ltd*[36] an injunction was granted against the Derby Corporation and the British Electricity Authority to restrain them from continuing a nuisance by polluting a river. Although injunction is discretionary and will not be granted if, for example, damages would be a sufficient remedy, yet there is a prima facie right to an injunction if the defendant threatens to continue the nuisance.

Injunction is the appropriate method for questioning the right of a person to hold a particular office.[37] Proceedings in such a case must be brought by an application for judicial review.[38]

Where an act done by a public authority affects the public generally, the Attorney-General may sue for an injunction on behalf of the public. In some cases he may allow his name to be used at the request ("on the relation") of some individual ("the relator") who is substantially the party affected. This is called a "relator action."[39] A citizen may claim an injunction against a public authority in his own name only where, in addition to the threatened breach of a public right, either some private right of his is affected or he will suffer some damage peculiar to himself (*Boyce v. Paddington Borough Council*[40]; *Gouriet v. Union of Post Office Workers*[41]).

An action for specific performance of a contract may be brought against a public authority in similar circumstances to those in which specific performance

[30] *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. (n.s.) 180; *ante*, para. 32–001.
[31] *Percy v. Glasgow Corporation* [1922] A.C. 299.
[32] *Mersey Docks and Harbour Board v. Gibbs* (1866) L.R. 1 H.L. 93; *ante*, para. 31–024; *Davy v. Spelthorne B.C.* [1984] A.C. 262, HL: private law action for damages available even though negligence alleged occurred in connection with exercise of statutory powers.
[33] *Metropolitan Asylum District v. Hill* (1881) 6 App.Cas. 193.
[34] *Dunlop v. Woollahra Municipal Council* [1982] A.C. 158, PC; *Racz v. Home Office* [1994] 2 A.C. 45, HL; *Three Rivers D.C. v. Bank of England* [2000] 2 W.L.R. 1220, HL.
[35] *Armour v. Liverpool Corporation* [1939] Ch. 422.
[36] [1953] Ch. 149, CA.
[37] Supreme Court Act 1981, s.30. Until its abolition by the Administration of Justice Act (Miscellaneous Provisions) 1938 the procedure in such cases had been by way of *Quo Warranto*.
[38] Supreme Court Act 1981, s.31(Dec).
[39] *Att.-Gen. v. Wimbledon House Estate Co* [1904] 2 Ch. 34; *Att.-Gen. v. Bastow* [1957] 1 Q.B. 514; *Att.-Gen v. Smith* [1958] 2 Q.B. 173.
[40] [1903] 1 Ch. 109.
[41] [1978] A.C. 435.

would be granted against an ordinary corporation or private individual.[42] The contract must, of course, be one of the kind that is on principle enforceable against government authorities.[43]

3. Action for a declaration[44]

32–024 An action for a declaration asks for a "declaration of right." It may be brought in the High Court even though no damages or other relief is claimed. The claim is often brought together with a claim for an injunction, and similar rules apply with regard to suing in the plaintiff's own name or at his relation by the Attorney-General.[45] There must be a justiciable issue,[46] and this remedy cannot be brought in order to ask hypothetical questions.[47] The Court, in its discretion, will not grant a declaration unless the remedy would be of real value to the plaintiff.[48] The Court will not grant declarations "which are academic and of no practical value."[49] A declaratory judgment cannot be directly enforced, but it may be assumed that a public authority will observe the law when the High Court declares what it is.

The action for a declaration has been used to test the validity of delegated legislation, and the *vires* of decisions of tribunals whether statutory or voluntary.[50] But a declaratory judgment cannot quash a decision, and the remedy may not be appropriate where the decision was within jurisdiction but there is error on the face of the record.[51] Since the adoption of the application for judicial review it will not, of course, be possible to apply for a declaration by writ if the issue is one of public law.[52]

[42] *Crook v. Corporation of Seaford* (1871) L.R. 6 Ch. 551; *cf. Crampton v. Varna Ry* (1872) 7 Ch.App. 562.

[43] See *ante*, para. 31–021.

[44] I. Zamir, *The Declaratory Judgment* (2nd ed., 1993, Lord Woolf and J. Woolf, eds.); E. Borchard, *Declaratory Judgments* (2nd ed., 1941), especially pp. 875–926.

[45] *ante*, para. 18–011.

[46] *Cox v. Green* [1966] Ch. 216: a question of professional etiquette is not justiciable. But *cf. Pharmaceutical Society of Great Britain v. Dickson* [1970] A.C. 403.

[47] *Re Barnato, Ioel v. Sanger* [1949] Ch. 258, *Mellstram v. Garner* [1970] 1 W.L.R. 603, *cf. Hampshire County Council v. Shonleigh Nominees* [1970] 1 W.L.R. 865.

[48] *Bennett v. Chappell* [1966] Ch. 391, CA.

[49] *Williams v. Home Office (No. 2)* [1981] 1 All E.R. 1211, 1248 *per* Tudor Evans J. (Appeal dismissed on procedural grounds: [1982] 2 All E.R. 564, CA.)

[50] *Davis v. Carew-Pole* [1956] 1 W.L.R. 833; [1956] 2 All E.R. 524; *Ceylon University v. Fernando* [1960] 1 All E.R. 631, PC.

[51] *Punton v. Ministry of Pensions and National Insurance (No. 2)* [1964] 1 W.L.R. 226; CA decision of National Insurance Commissioner. But see P. Cane, "A Fresh Look at Punton's Case," (1980) 43 M.L.R. 266.

[52] Even before the decision in *O'Reilly v. Mackman* [1983] 2 A.C. 237 the courts could, and did, refuse to hear applications for declarations where they thought that the procedure under Order 53 would be more appropriate: *e.g. Bousfield v. North Yorkshire C.C.* [1982] 44 P. & C.R. 203; *sub nom Re Tillmire Common*, [1982] 2 All E.R. 615. (Dillon J. refused to hear a summons for a declaration that a decision of a Commissioner under the Commons Registration Act 1965 was voidable for error of law on the face: proceedings in the Chancery Division were "misconceived and an abuse of process.")

CHAPTER 33

CROWN PROCEEDINGS

I. LIABILITY OF THE CROWN

Introduction[1]

33–001 Two ancient and fundamental rules of English constitutional law were abolished by the Crown Proceedings Act 1947. The first, that proceedings against the Crown for breach of contract or restitution of property could only be taken after obtaining a *fiat* by the inconvenient procedure of petition of right, was due to the principle that the King could not be impleaded in his own courts.[2] The second, that the Crown could not be proceeded against at all in tort, was due to the same principle coupled with the doctrine that "the King could do no wrong." No action lay at common law against the Sovereign personally, whether for public or private acts. Also—contrary to the law of agency and of master and servant—no action lay against the Sovereign for breach of contract or torts committed by Ministers, other officers or departments acting as servants or agents of the Crown. In certain cases, however, a petition of right would lie. The maxim "the King can do no wrong" meant not only that the King could not be made liable by action, but also that wrong could not be imputed to the King, and therefore he could not be said to have authorised another to commit a wrong. This ruled out the maxim *qui facit per alium facit per se* where the Crown was the employer. As there is no concept of the state in English law, and as government departments are merely groups of Crown servants, this meant that the citizen could not claim satisfaction out of public funds for torts committed by the Crown.

The immunity of the Crown at common law, subject to the limited and inconvenient procedure by petition of right, became increasingly serious in modern times owing to the growth of state activity, for the Crown had become the largest employer, contractor and occupier of property in the country. The grievance that it was necessary to apply to the Home Secretary for a *fiat* before bringing a petition of right was more a matter of form than of substance, for in practice the Attorney-General always recommended that the *fiat* should be granted where there was any sort of prima facie case against the Crown. On the other hand, the personal liability incurred by Crown servants for torts committed in their official capacity often failed to satisfy injured parties, who might not even know which individual was responsible; while the practice whereby the Treasury, in what it considered appropriate cases, paid ex gratia compensation where

[1] Gleeson E. Robinson, *Public Authorities and Legal Liability* (1925); C. S. Robertson, *Civil Proceedings by and against the Crown* (1908). For the history, see Holdsworth, *History of English Law*, Vol. IX, pp. 7–45; "The History of Remedies against the Crown" (1922) 38 L.Q.R. 141, 280.

[2] A privilege probably peculiar to the Sovereign and not an incident of feudal lordship. The immunity of the ordinary lord from actions in his own courts is anyway doubtful: Paul Jackson, "Sovereign Immunity: A Feudal Privilege?" (1975) 91 L.Q.R. 171; S. F. C. Milsom, *The Legal Framework of English Feudalism* (1976), pp. 80 *et seq.*

Crown servants were unsuccessful defendants was illogical, arbitrary and probably unlawful.

33–002 Matters came to a head at the end of the Second World War in two cases of persons injured by the condition of premises occupied by the Crown. In *Adams v. Naylor*[3] two boys pursued a ball into a minefield which was negligently marked and fenced. One of the boys was killed, the other injured. An action was brought against an officer of the Royal Engineers, whose name had been supplied by the War Department as the responsible officer. It was not known who was personally responsible for the state of affairs at the time of the accident, and the House of Lords criticised *obiter*[4] the practice of government departments putting up "nominated" or "nominal" defendants as whipping-boys. Soon afterwards the Court of Appeal in *Royster v. Cavey*[5] felt constrained to follow the considered dicta of the House of Lords, where an employee in a Ministry of Supply ordnance factory, who had received personal injuries while so employed, wished to bring an action for negligence at common law and for breach of statutory duty under the Factories Act 1937. The plaintiff was supplied by the Treasury Solicitor with the name of the superintendent of the factory, but the latter had no connection with the factory at the time of the accident. The court held that it had no jurisdiction to try an action against him, as he was neither the occupier of the factory nor the plaintiff's employer.[6]

A comprehensive Crown Proceedings Bill[7] was then introduced by the Lord Chancellor, Viscount Jowitt. The Bill was privately examined by an informal committee of Law Lords and others, presided over by Viscount Simon, while the Lord Chancellor consulted all the other available judges. Lord Jowitt could therefore fairly claim that the Bill received "the unanimous approval of the entire Bench of Judges."

Crown Proceedings Act 1947[8]

33–003 The main objects of the Act were, as far as practicable, to make the Crown liable in tort in the same way as a private person, and to reform the rules of procedure governing civil litigation by and against the Crown, especially by allowing an action without a *fiat* where the petition of right previously lay. The Act adopts the Anglo-American principle of treating the state (or "the Crown") for the purpose of litigation as nearly as possible in the same way as a private citizen, instead of borrowing the Continental idea of a separate system of

[3] [1946] A.C. 543.

[4] The case was decided on the Personal Injuries (Emergency Provisions) Act 1939.

[5] [1947] 1 K.B. 204. For a more recent attempt to resurrect John Doe as a defendant in an action against a government department see *Barnett v. French* [1981] 1 W.L.R. 848: "On the Demise of John Doe." (1983) 99 L.Q.R. 341. For the statutory solution to the problem see Regd. Traffic Regulation Act 1984, s.130.

[6] *Lane v. Cotton* (1701) 1 Ld.Raym. 646.

[7] Based partly on a draft Bill of 1927 (Cmd. 2842) prepared by a committee under two earlier Lord Chancellors, Birkenhead and Haldane. The delay was due largely to the misgivings of the Service Departments and the Post Office (then a government department).

[8] R. McM. Bell, *Crown Proceedings* (1948); *J. R. Bickford Smith, The Crown Proceedings Act*, 1947 (1948); Glanville L. Williams, *Crown Proceedings* (1948); Sir Carleton Allen, *Law and Orders* (3rd ed., 1965), Chap. 10; H. Street, "Crown Proceedings Act, 1947" (1948) 11 M.L.R. 129–142; Sir Thomas Barnes, "The Crown Proceedings Act, 1947" (1948) 26 Can.Bar Rev. 387; G. H. Treitel, "Crown Proceedings: Some Recent Developments" [1957] P.L. 321.

For comparative surveys, see H. Street, *Governmental Liability* (1953); B. Schwartz and H. W. R. Wade, *Legal Control of Government* (1972); L. Neville Brown and J. Bell, *French Administrative Law* (5th ed., 1998); P. W. Hogg, *Liability of the Crown* (2nd ed., 1989).

administrative law. The effect is to bring English constitutional law nearer in one way to the conception of "the rule of law" than it was when Dicey wrote.

Part V applies the Act with appropriate modifications to Scotland,[9] and section 53 provided for the extension of the Act by Order in Council to Northern Ireland with any necessary modifications.

The Act is only concerned with the liability of the Crown in respect of the government in the United Kingdom (section 40(2)). A certificate of a Secretary of State to the effect that any alleged liability of the Crown arises otherwise than in respect of Her Majesty's Government in the United Kingdom shall, for the purposes of the Act be conclusive as to the matter certified (section 40(3)).[10] As a result of such a certificate being issued, Sir Robert Megarry V.-C. held that he had no jurisdiction under the Act to hear a case relating to alleged tortious acts committed by British forces in Berlin.[11] (Apart from the Act no proceedings lay because the Crown is not otherwise liable in tort and the Attorney-General could not be sued because he has no responsibilities or functions outside England, Wales and Northern Ireland.)[12]

Right to sue the Crown in contract, etc.

33–004 "Section 1. Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, or might have been enforced by a proceeding provided by any statutory provision repealed by this Act, then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act."

This section gives the individual a right to sue the Crown without any *fiat* in cases where, if the Act had not been passed, he could (i) bring a petition of right or (ii) take any proceedings under special statutory provisions repealed by the Act, *e.g.* War Department Stores Act 1867. Proceedings by way of petition of right were abolished by section 13.

Most of the actions in contract brought against the Crown since the Act came into force have been settled out of court. Disputes over building contracts with the government usually go to arbitration.

Section 1 did not create a new cause of action, and so the limitations on the scope of the former petition of right continue to apply to this right of action.

Scope of petition of right[13]

33–005 The theory of the petition of right was that as the King was the fountain of justice, he would cause justice to be done as soon as the matter was brought to

[9] J. R. Bickford Smith, *The Crown Proceedings Act, 1947* (1948), pp. 49–58 (by K. W. B. Middleton); Fraser, *Outline of Constitutional Law* (2nd ed.), Chap. 11; J. D. B. Mitchell, *Constitutional Law* (2nd ed., 1968), Chap. 17.

[10] *R. v. Secretary of State for Foreign and Commonwealth Affairs ex p. Trawnik, The Times*, April 18, 1985, DC (Certificate not reviewable unless a nullity, *i.e.* not a genuine certificate, or on its face it had been issued outside the statutory power. The Court "would not use the *Anisminic* principle to trespass on the royal prerogative.")

[11] *Trawnik v. Lennox* [1965] 1 W.L.R. 532.

[12] So held by the Court of Appeal, reversing the Vice Chancellor on this second point: [1985] 1 W.L.R. 544.

[13] Clode, *Petition of Right* (1887); Holdsworth, *History of English Law*, Vol. IX, 7–45.

his notice. Petition of right lay first for the recovery of land of which the Crown had wrongly taken or retained possession, and for the recovery of chattels real and probably chattels personal. It also apparently lay for certain cases of damage caused by undue user of Crown property, such as the wrongful assertion of an easement causing damage.[14] When the law of contract developed, a petition of right came to be granted for breach of contract, at first for debt or liquidated damages (*e.g.* on a contract for goods supplied), and later for unliquidated damages.[15] In *Thomas v. The Queen*[16] it was held that Thomas, an engineer, was entitled to bring a petition of right claiming a reward and his expenses in respect of an artillery invention in accordance with an agreement with the Secretary of State for War. The remedy was also available to recover liquidated or unliquidated sums due under a statute where no other remedy was provided (*Attorney-General v. De Keyser's Royal Hotel Ltd*[17]) and was probably available in quasi-contract.[18]

There were four limitations or exceptions to the availability of a petition of right:

(i) Owing to the prerogative immunity in tort, a petition of right did not lie for a pure tort, that is, a tort unconnected with the wrongful taking of property, such as negligence or trespass. Thus in *Viscount Canterbury v. Attorney-General*,[19] an ex-Speaker failed in his claim for compensation from the Crown for damage done to his furniture by the negligence of certain Crown servants who, by burning an excessive quantity of old Exchequer tallies, caused a fire which destroyed the Houses of Parliament in 1834. Similarly, in *Tobin v. The Queen*[20] the owners of a ship trading in palm oil off the coast of Africa failed in their claim for compensation from the Crown for the destruction of the ship and cargo by the captain of *H.M.S. Espoir*, who had falsely assumed that she was engaged in the slave trade which he had statutory authority to suppress. The same rule would apply to false imprisonment, conversion and libel.

(ii) Contracts of service with members of the armed forces are controlled by the prerogative.[21] The position of civilian officers and civil servants is in some respects not free from doubt.[22]

(iii) Contracts that fetter future executive action. During the First World War **33–006**
the Swedish (neutral) owners of *S.S. Amphitrite* were induced to send the ship to a British port by a letter from the British Legation at Stockholm stating that she would be released if she proceeded to the United Kingdom with a cargo of approved goods. The ship did so but was nevertheless refused a clearance, and

[14] *Tobin v. The Queen* (1864) 16 C.B.(N.S.) 310, *per* Erle C.J. at pp. 363–365.
[15] *The Bankers' Case* (1700) 14 St.Tr. 1.
[16] (1875) L.R. 10 Q.B. 31.
[17] [1920] A.C. 508, HL. And see *Commercial and Estates Co of Egypt v. Board of Trade* [1925] 1 K.B. 271 (angary: compensation payable by international law).
[18] *cf. Brocklebank Ltd v. R.* [1925] 1 K.B. 52. Since the Crown Proceedings Act, if not before, the question of waiver of tort is irrelevant. See further, Street, *Governmental Liability*, pp. 125–127; A. W. Mewett, "The Quasi-Contractual Liability of Governments" (1959–60) 13 U.T.L.J. 56.
[19] (1843) 1 Phillips 306; (1843) 12 L.J.Ch. 281.
[20] (1864) C.B.(N.S.) 310; *ante*. The judgment of Erle C.J. suggests that an action would have lain against the captain.
[21] *ante*, para. 19–005. And see Z. Cowen, "The Armed Forces of the Crown" (1950) 66 L.Q.R. 478.
[22] *ante*, para. 18–026.

the owners brought a petition of right for damages for breach of contract: *Rederiaktiebolaget Amphitrite v. The King*.[23] Rowlatt J. gave judgment for the Crown, on the ground that there was no enforceable contract. "It is not competent for the Government," said his Lordship, "by enforceable contract to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State." The judgment was an unconsidered one and no authorities were cited, but it is generally taken as an authority for the principle stated above. On the facts of the case it would have been sufficient to hold that the letter from the British Legation was merely an expression of present intention of what the government would do, and that the Crown did not intend to enter into contractual relations.[24] Rowlatt J. distinguished "commercial" contracts, on which the Crown can be made liable. Otherwise the limits of the supposed rule are uncertain,[25] and in fact no subsequent English decision has been based on it.[26] The common law makes no provision for compensation in such cases.

(iv) Contracts dependent on grant from Parliament. In *Churchward v. R.*[27] Churchward contracted with the Admiralty Commissioners to maintain a mail service between Dover and the Continent for eleven years, expressly in consideration of an annual sum to be provided by Parliament. The Admiralty terminated the contract in the fourth year, and the Appropriation Act of that year provided that no part of the sum appropriated towards the post office packet service should be paid to Churchward after a certain date. Churchward naturally failed in his petition of right for breach of contract, but dicta in that case have led to the view that the provision of funds by Parliament is an implied precedent condition for the liability of the Crown on its contracts, and even for the validity of Crown contracts.[28] There is no good reason, however, why funds should be antecedently or specifically appropriated by Parliament in order that the Crown may make contracts through responsible Crown servants in the course of their

[23] [1921] 3 K.B. 500.

[24] This reasoning was approved by Denning J. in *Robertson v. Minister of Pensions* [1949] 1 K.B. 227, 231. And see *Australian Woollen Mills Ltd v. Commonwealth of Australia* [1956] 1 W.L.R. 11; [1955] 3 All E.R. 711, PC.

[25] See Holdsworth in (1929) 45 L.Q.R. 166 for a strong criticism of the rule. According to one view, the *Amphitrite* case, if kept within due limits, supports the general principle of "governmental effectiveness": J. D. B. Mitchell, *The Contracts of Public Authorities*, pp. 27, 52 *cf.* Street, *op. cit.* p. 98.

[26] *cf. The Steaua Romana* [1944] p. 43. The *Amphitrite* case was followed by the High Court of Southern Rhodesia in *Waterfalls Town Management Board v. Minister of Housing* [1956] Rhod. and Ny. L.R. 691. It was not referred to in *Board of Trade v. Temperley Steam Shipping Co* (1927) 27 Ll.L.R. 230 where the Court of Appeal held that the implied obligation of a party to a contract not to interfere with the performance of the contract did not apply to prevent a Crown servant exercising his statutory powers so as to interfere with a contract to which the Crown was a party. It was referred to by Devlin L.J. in *Crown Land Commissioners v. Page* [1960] 2 Q.B. 274, where it was held that the Crown as lessor was not prevented by implied covenant for quiet enjoyment from exercising a statutory power to requisition from one of its tenants, and in *Dowty Boulton Paul Ltd v. Wolverhampton Corporation* [1971] 1 W.L.R. 204 where, however, Pennycuick V.-C., in interlocutory proceedings, thought that it would not avail to release the Corporation from contractual liabilities. See further *Cudgen Rutile (No. 2) Ltd v. Chalk* [1975] A.C. 520, PC; C. Turpin, *Government Contracts* (1972), pp. 19–25; Rogerson, "On the Fettering of Public Powers" (1971) P.L. 288; *ante*, para. 31–022.

[27] (1865) L.R. 1 Q.B. 173; 6 B. & S. 807.

[28] (1865) L.R. 1 Q.B. 173, 209, *per* Shee J.; *cf. per* Cockburn C.J. at pp. 200–201.

official duties. Enforceability, on the other hand, is a different matter from validity, and the other party cannot obtain satisfaction from the Crown if parliamentary funds are not available when the time arrives for payment.[29]

33–007 The Petitions of Right Act 1860 provided a simpler procedure than that which existed at common law, following complaints by Army contractors during the Crimean War about the difficulty of recovering debts from the War Department.

A Crown servant is not personally liable at common law for the breach of a contract entered into by him in his official capacity. Thus in *Macbeath v. Haldimand*[30] the King's Bench held General Haldimand, Governor of Quebec, not liable for stores ordered by him from Macbeath for the Fort of Michilimakinac. The plaintiff knew that the goods were for government use, and that the defendant was not contracting personally. Thus stated, it is merely an application of the general law of agency. It is now clear that a petition of right would have lain before 1948 in the circumstances of this case.[31]

There were some statutory exceptions. Parliament occasionally used language referring to the bringing of actions by or against a government department or Minister in his official capacity, with or without incorporating that department or Minister. The effect of such language and the extent (if any) of liability to be sued depended on the interpretation of the words used in the particular statute. The matter was reviewed by the Court of Appeal in *Minister of Supply v. British Thomson-Houston Co.*,[32] where it was held that the War Department Stores Act 1867 rendered the Minister of Supply liable to be sued on official contracts concerning military stores. The Ministry of Transport Act 1919 expressly made the Minister officially liable in tort as well as contract.

Liability of the Crown in tort

33–008 "Section 2(1). Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:

(a) in respect of torts committed by its servants or agents;

(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and

(c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property . . . "

[29] *Commercial Cable Co v. Government of Newfoundland* [1916] 2 A.C. 610, 617, PC *per* Viscount Haldane; *Mackay v. Att.-Gen. for British Columbia* [1922] 1 A.C. 457, 461, *per* Viscount Haldane; *Commonwealth of Australia v. Kidman* (1926) 32 A.L.R. 1, 2–3, PC *per* Viscount Haldane; *New South Wales v. Bardolph* (1934) 52 C.L.R. 455, 474, *per* Evatt J.: and see *per* Dixon J. *cf. Att.-Gen. v. Great Southern and Western Ry of Ireland* [1925] A.C. 754, 773, 779, HL. See further, Colin Turpin, *op. cit.*

[30] (1786) 1 T.R. 172.

[31] *Thomas v. R.* (1875) L.R. 10 Q.B. 31. Few petitions of right on contracts were brought from the time of the Restoration, when the Sovereign came to rely almost entirely on parliamentary grants to finance the government of the country, until the Crimean War.

[32] [1943] K.B. 478.

This is the most important section, which provided the *raison d'être* of the Act. The marginal note reads: "Liability of the Crown in tort," but the Act does not make the Crown liable generally in tort: subsection (1) makes the Crown liable in three classes of case:

(a) *Vicarious liability to third parties for torts,* such as negligence or trespass committed by servants in the course of their employment, and for the authorised or ratified torts of independent contractors.

At common law actions in tort could not be brought against government departments, for they are not legal entities but consist of a number of individual Crown servants. Nor could the injured party sue the head of the department or other superior officer of the Crown servant who committed the tort, because they are fellow servants of the Crown and do not stand to each other in the relation of master and servant[33]; unless the superior officer actually ordered or directed the commission of the tort, in which case it would also be his act.[34] The general rule was therefore that the action had to be brought against the actual wrongdoer or wrongdoers, and it had to be brought against them personally and not as servants or agents of the Crown or of the department, nor as a department. Thus in *Raleigh v. Goschen*[35] an action for trespass to land brought against Goschen (First Lord of the Admiralty), the Lords Commissioners of the Admiralty and the Director-General of Naval Works was dismissed on the ground that it should have been brought against the engineer employed by the Admiralty and/or the two marines who actually committed the trespass with him, and/or against such (if any) of the defendants personally as had actually ordered or directed the trespass.

33–009 A proviso to section 2(1) adds that the Crown shall not be liable unless, apart from the Act, an action in tort would have lain against the servant or agent. This may be intended to preserve such defences as act of state or acting under prerogative or statutory powers (which in any case is provided for by section 11); but is has the effect of exempting the Crown in any exceptional cases which might arise where an ordinary employer might be held liable even though the servant who actually committed the tort could not for some reason be sued.[36]

In *Dorset Yacht Co Ltd v. Home Office*,[37] where the plaintiff's yacht was damaged by Borstal trainees who had escaped from a nearby camp where they were under the control of Borstal officers, the House of Lords held as a preliminary issue that the Home Office owed a duty of care to the plaintiffs capable of giving rise to liability in damages if negligence could be proved. Lord Denning M.R. in the Court of Appeal said that the Crown would be similarly liable if it

[33] *Bainbridge v. Postmaster-General* [1906] 1 K.B. 178; *Town Investments v. Department of the Environment* [1978] A.C. 359, HL.

[34] *Lane v. Cotton* (1701) Ld.Raym. 646.

[35] [1898] 1 Ch. 73; the Admiralty wanted the land at Dartmouth in order to build a naval college. See also *Madrazo v. Willes* (1820) 3 B. & Ald. 353, and *Walker v. Baird* [1892] A.C. 491 (naval captains liable for wrongful damage to property inflicted in the supposed course of duty).

[36] e.g. *Smith v. Moss* [1940] 1 K.B. 424. And see *Twine v. Bean's Express Ltd* [1946] 1 All E.R. 202, 204.

[37] [1970] A.C. 1004. In *Greenwell v. Prison Commissioners* (1951) 101 L.J. 486; (1952) 68 L.Q.R. 18 the plaintiffs obtained damages in a county court for damage to their vehicle caused by boys who had escaped from an "open" Borstal. See C. J. Hamson, "Escaping Borstal Boys and the Immunity of Office" (1969) 27 C.L.J. 273. See too *Writtle (Vicar of) v. Essex C.C.* (1979) 77 L.G.R. 656 (The case of the infant arsonist). The limitations to *Dorset Yacht* in the context of general principles of tortious liability are discussed in *King v. Liverpool C.C.* [1986] 1 W.L.R. 890, CA.

negligently permitted prisoners to escape and they commit foreseeable damage.[38]

The tortious acts of prison staff to prisoners may also give rise to cases of vicarious liability.[39]

(b) *Breach of common law duties owed by an employer to his employees, viz.* to supply proper plant, to provide a safe system of working and to select fit and competent fellow-servants.[40]

(c) *Common law liability attaching to the ownership, occupation, possession or control of property.* This would include liability for nuisance; the rule in *Rylands v. Fletcher*[41]; liability for dangerous chattels, etc. The right to sue under section 2 is implied, for *ubi jus ibi remedium*.[42] **33–010**

Section 2(2) provides that, in those cases where the crown is bound by *statutory duties* which are also binding on persons other than the Crown and its officers, the Crown shall be liable in tort for breach of such statutory duties if private persons are so liable.[43] In order to make the Crown liable under this subsection it must be shown, first, that the Crown is *bound* by the statute, the presumption against this[44] being preserved by section 40(2); secondly, that other persons (including local authorities or public corporations) are also bound by the statute; and thirdly, that other persons can be made liable in tort for such breach.

Where functions are conferred by law directly on an officer of the Crown, he is regarded for the purpose of this section as if he were acting as an agent under instructions from the Crown (subs.(3)). The Crown has the benefit of any statute regulating or limiting the liability of a government department or Crown officer (subs.(4)).

Subsection 5 excludes proceedings against the Crown for acts done by any person "while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process".[45] Thus if judges, magistrates or constables exceed the limits of their immunity, they do not—even if they are regarded as Crown servants or agents[46]—render the Crown liable for torts committed while discharging or purporting to discharge their judicial functions. An initial decision that a claimant is or is not entitled to a social security benefit

[38] See *Greenwell v. Prison Commissioners, ante.*

[39] *Morgan v. Att.-Gen.* [1965] N.Z.L.R. 134; *Ferguson v. Home Office, The Times*, October 8, 1977. A claim in negligence failed in *Ellis v. Home Office* [1953] 2 Q.B. 135 where the Home Secretary successfully claimed that Crown Privilege entitled the withholding of documents vital to the plaintiff's case. A claim alleging assault and trespass against a prison doctor failed in *Freeman v. Home Office (No. 2)* [1984] Q.B. 524.

[40] *Joseph v. Ministry of Defence, The Times*, March 4, 1980, CA. (Unsuccessful claim by employee of Ministry of Defence for illness allegedly caused by breach of employer's duty.)

[41] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

[42] *Ashby v. White* (1703) 1 Smith L.C. (13th ed.), p. 251; 2 Ld.Raym. 320, 938.

[43] *cf. Royster v. Capey* [1947] K.B. 204; *Cooper v. Hawkins* [1904] 2 K.B. 164.

[44] *ante*, para. 15–019.

[45] See A. Rubinstein, "Liability in Tort of Judicial Officers" (1963) 15 U.T.L.J. 317.

[46] *cf.* Holdsworth, "The Constitutional Position of the Judges" (1932) 48 L.Q.R. 25–26; *Lewis v. Cattle* [1938] 2 K.B. 454 (police constable).

is, on the other hand, an administrative not a judicial function. A judicial element would arise at the appeal stage, heard before a tribunal.[47]

Officers (*i.e.* Ministers and other servants: section 38(2)) who may render the Crown liable under section 2 are limited to those appointed directly or indirectly by the Crown and paid wholly out of the Consolidated Fund or moneys provided by Parliament, or holding an office which would normally be so paid (subs.(6)). This provision, which is narrower than the vague common law definition of a Crown servant,[48] covers unpaid temporary civil servants, but not police or other public officers forming part of the government of the country who are appointed or paid by local or other public authorities.[49]

33–011 Many actions against the Crown in tort have been commenced in the High Court and county court, but most have been settled.[50] A number of writs have been in running-down cases, involving the negligence of drivers of government-owned vehicles.[51]

Where the Crown is liable under Part I of the Act, section 4 applies to the Crown the law relating to indemnity and contribution between tortfeasors and contributory negligence.[52] It is presumed that the Crown is bound by certain statutes reforming the law of tort, whether passed before or after the Crown Proceedings Act, even though the intention to bind the Crown does not appear either in the Crown Proceedings Act or expressly or by necessary implication in such statutes themselves. Section 10 of the Crown Proceedings Act (*infra*) seems to imply that the Fatal Accidents Act 1846 (compensation for dependants of deceased) and the Law Reform (Miscellaneous Provisions) Act 1934, s.1 (survival of causes of action on death) apply to the Crown.[53] But nothing is said about the Crown, for instance, in the Defamation Act 1952, which Act put the defendant in a better position than he was at common law.[54]

Section 3 makes the Crown liable if it authorises a servant or agent to infringe a patent, trademark or design or copyright.[55] The statutory right of the Crown is

[47] *Jones v. Dept of Employment* [1989] Q.B.1., CA. *Welsh v. Chief Constable of Merseyside Police* [1993] 1 All E.R. 692 (Failure to pass on information to court by CPS: not a judicial act within s.2(5)).

[48] *Bank voor Handel en Scheevbaart N.V. v. Administrator of Hungarian Property* [1954] A.C. 584, HL. See also *Ranaweera v. Ramachandran* [1970] A.C. 962, PC at 972–975, *per* Lord Diplock.

[49] See now Police Act 1996, s.88 for vicarious liability of Chief Constables; *ante* para. 21–011. For a successful claim in negligence see *Rigby v. Chief Constable of Northamptonshire* [1985] 1 W.L.R. 1242. *Stanbury v. Exeter Corporation* [1905] 2 K.B. 838 (agricultural inspector); *Tamlin v. Hannaford* [1950] 1 K.B. 18 (British Transport Commission).

[50] See, *e.g. Churchill v. Foot, The Times*, January 28, 1968; *Freshwater Biological Association v. Ministry of Defence, The Times*, December 14, 1970.

[51] In *Browning v. War Office* [1963] 1 Q.B. 750, CA, where a member of the United States Air Force was injured through the negligence of a driver of a British army lorry, the question in issue was the measure of damages. See also *Brazier v. Ministry of Defence* [1965] 1 Lloyd's Rep. 26; *The Tramontana II v. Ministry of Defence and Martin* [1969] 2 Lloyd's Rep. 94; *Bright v. Att.-Gen.* [1971] 2 Lloyd's Rep. 68, CA.

[52] In particular, the Law Reform (Married Women and Tortfeasors) Act 1935 and the Law Reform (Contributory Negligence) Act 1945.

[53] In *Levine v. Morris* [1970] 1 W.L.R. 71, CA the personal representatives of a man killed in a motor accident successfully sued the Ministry of Transport as well as a private driver for negligence.

[54] See G. H. Treitel, "Crown Proceedings: Some Recent Developments" [1957] P.L. 321, 322–326.

[55] The infringement of a patent copyright is not properly classified as a tort, but it was held in *Feather v. Reg.* (1865) 6 B. & S. 257 that a petition of right was not appropriate.

preserved to use patents on paying compensation assessed by the Treasury,[56] as are rights of the Crown under the Atomic Energy Act 1946.

There are certain matters where the analogy between the Crown and the subject breaks down, for in these spheres the functions of the Crown involve responsibility of a kind which no subject undertakes. Examples are the defence of the realm and the maintenance of the armed forces.[57]

Provisions relating to the armed forces

33–012 Section 10(1) of the 1947 Act provided that members of the armed forces could not bring actions in tort against other members of the armed forces or the Crown in relation to injuries or death arising from anything suffered while on duty as a member of the armed forces or (whether on duty or not) while on any land or premises or vehicle for the time being used for the purposes of the armed forces, provided that the Secretary of State certified that the injury or death would be attributable to armed service for the purposes of the awarding of a pension. Section 10(2) in similar terms excluded liability on the part of the Crown for injuries or death arising from the nature or condition of any land, premises or vehicles being used for the purposes of the armed forces.

Apart from the question whether a pension could provide comparable compensation to that obtainable in an action in tort, the courts held that the immunity conferred on the Crown operated if a certificate were issued, even if a pension were not subsequently paid.[58]

Increasing dissatisfaction with the provisions of section 10 led to litigation and some judicial ingenuity in construing the section.[59] A lengthy Parliamentary campaign finally led to the enactment of a Bill, introduced by Mr Winston Churchill, as the Crown Proceedings (Armed Forces) Act 1987.

33–013 Section 1 of the 1987 Act repeals section 10 but section 2 empowers the Secretary of State to revive section 10 when there is imminent national danger or a great emergency has arisen or for the purposes of warlike activities outside the United Kingdom or other operations in connection with warlike activity.

After the repeal of section 10 a member of the armed forces who wishes to sue for injuries sustained in military service must of course succeed in showing that the act complained of was negligent. Sir Hartley Shawcross, in the Second Reading of the 1947 Bill, had pointed out that service life inevitably involves highly dangerous activities which, if done by private citizens would be extremely blameworthy. The difficulty facing such a litigant, at least in relation to activities occurring in the heat of battle is illustrated by *Mulcahy v. Ministry of Defence*.[60] The Court of Appeal struck out an action based on injuries allegedly suffered when the plaintiff was "in a war zone taking part in warlike operations ... a member of a gun crew ... engaged in firing shells on enemy targets". The Court held that in such circumstances it would not be fair just and reasonable to impose on the Crown a duty to maintain a safe system of work. Reference was also made

[56] Since the Patent Act 1907 patents are effective against the Crown, but the Crown has a right to use patents on paying compensation. See *Pfixer Corporation v. Ministry of Health* [1965] A.C. 512, HL, use of patented drugs by hospital under National Health Service. See now, Patents and Design Act 1977, ss.55–59.

[57] Also formerly the Post Office, *ante*, para. 28–012.

[58] *Adams v. War Office* [1955] 1 W.L.R. 1116.

[59] *Bell v. Secretary of State for Defence* [1986] Q.R. 322, CA; disapproved, *Pearce v. Secretary of State for Defence* [1988] A.C. 755. See too, *Brown v. Lord Advocate* 1984 S.L.T. 146.

[60] [1996] Q.B. 732, CA.

to *Burmah Oil Co v. Lord Advocate*[61] and *Shaw Savill & Albion Co v. Commonwealth*[62] as justifying the immunity of the Crown from liability. In more mundane circumstances, the widow of a deceased sailor who asphyxiated on his vomit when drunk, failed to establish a duty of care owed by senior officers to prevent servicemen drinking to excess: *Barrett v. Ministry of Defence*.[63]

Acts done under prerogative or statutory powers

33–014 Section 11 states that nothing in the above provisions shall extinguish or abridge the prerogative or statutory powers of the Crown: in particular, the powers exercisable by the Crown, whether in peace or war, for the defence of the realm or the training or maintenance of the armed forces. Among prerogative powers not mentioned are those relating to the treatment of aliens, the employment of Crown servants and the principle of the *Amphitrite* case.[64] Statutory powers would include the billeting of soldiers.

A Secretary of State, "if satisfied" as to the facts, may issue a conclusive certificate that the act was necessarily done in the exercise of the prerogative, for example that it was necessary for the sake of practice to fire guns that have broken windows or kept people awake at night. It remains the function of the court to decide whether, and to what extent, the alleged prerogative exists.[65] This section is of fundamental importance for the word "prerogative" has a very wide range.

No such certificate may be made in the case of statutory powers, and indeed their express preservation was not necessary.

The Queen in her private capacity

33–015 The Act does not apply to proceedings by or against, nor does it authorise proceedings in tort to be brought against, the Queen in her private capacity (section 40(1)), or in right of the Duchy of Lancaster or Cornwall (section 38(3)). This preserves the Queen's personal immunity in tort; but it is uncertain whether for breach of contract (*e.g.* sale of groceries to Buckingham Palace) or wrongful detention of property by the Queen personally the subject can still proceed under the Petitions of Right Act 1860, or whether he is thrown back on the ancient common law petition of right.[66] There are in fact no reported instances of petitions of right against a Sovereign in his private capacity, but the doubt as to procedure is inconvenient as Her Majesty might legitimately wish to deny liability or dispute the amount.

Estoppel

33–016 The arguments for and against applying the doctrine of estoppel to public bodies generally have been discussed earlier.[67] The same arguments apply to the Crown in its public capacity and there is judicial authority for the view that the

[61] [1965] A.C. 75, HL.
[62] (1940) 66 C.L.R. 344. See Hogg, *op. cit.* 135 *et. seq.*
[63] [1995] 1 W.L.R. 1217, CA. (Duty of care, however, arose on taking responsibility for deceased once he had lost consciousness. Damages recoverable reduced by two-thirds to reflect deceased's contributory negligence.)
[64] *Rederiaktiebolaget Amphitrite v. The King* [1921] 3 K.B. 500; *ante*, para. 33–006.
[65] *Case of Monopolies* (1602) 11 Co.Rep. 84b; *Case of Proclamations* (1610) 12 Co.Rep. 74; *Att.-Gen. v. De Keyser's Royal Hotel Ltd* [1920] A.C. 506, HL; *Burmah Oil Co v. Lord Advocate* [1965] A.C. 75, HL.
[66] See *post*, para. 33–019.
[67] *ante*, para. 31–020.

same answer applies to the Crown.[68] In *Laker Airways Ltd v. Department of Trade*[69] Lord Denning M.R. said, "The underlying principle is that the Crown cannot be estopped from exercising its powers, whether given in a statute or by common law, when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to a private individual. . . . It can, however, be estopped when it is not properly exercising its powers, but is misusing them; and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without any countervailing benefit for the public."[70]

II. Civil Proceedings by and Against the Crown[71]

Jurisdiction and procedure

33–017 The Crown Proceedings Act 1947 provides that the civil proceedings[72] by and against the Crown which are allowed by Part I of the Act shall be heard in the High Court (section 13) or the county court (section 15) as in actions between subjects and in accordance with rules of court, and similar principles apply to appeals (section 22).

The Treasury is required to publish a list of authorised government departments, and proceedings are to be instituted by or against the appropriate department, or—if there is, or appears to be, no appropriate department—the Attorney-General (section 17). It will be noticed that proceedings under the Act are not taken by or against either the Queen or the ministerial head of the department.

Section 21 of the Crown Proceedings Act prohibits the granting of an injunction or specific performance against the Crown or against an officer of the Crown if the effect of the order would be to give any relief against the Crown which could not have been obtained directly in proceedings against the Crown. The meaning of the section was subjected to elaborate (but probably not final) analysis in *Re M.*[73] The Secretary of State, Kenneth Baker, had rejected a claim to asylum by M who was subsequently deported from the United Kingdom in

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[68] *e.g. Robertson v. Minister of Pensions* [1949] 1 K.B. 227; In *Re 56 Denton Road Twickenham* [1953] Ch. 51. But see *Howell v. Falmouth Boat Construction Co Ltd* [1951] A.C. 837, 845 *per* Lord Simonds. The application of estoppel by representation was discussed, but not decided, in *Territorial and Auxiliary Forces Association v. Nichols* [1944] 1 K.B. 35, CA.

[69] [1977] Q.B. 643.

[70] See further, H. Street, *Governmental Liability* (1953), p. 156; P. W. Hogg, *Liability of the Crown* (2nd ed., 1989), p. 189. There seems to be no doubt that the Crown is bound by equitable proprietary estoppel: *Plimmer v. Mayor of Wellington* (1884) 9 App.Cas. 699; *Att.-Gen. to Prince of Wales v. Collom* [1916] 2 K.B. 193.

[71] R. M. Bell, *Crown Proceedings* (1948); J. R. Bickford Smith, *The Crown Proceedings Act 1947* (1948); Glanville L. Williams, *Crown Proceedings* (1948); Carleton Allen, *Law and Orders* (3rd ed.), Chap. 10; S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed., 1968); H. Street, *Governmental Liability* (1953).

[72] The Act does not apply to criminal or Prize proceedings; nor does it affect proceedings on the Crown side of the Queen's Bench Division, *e.g.* habeas corpus, certiorari, prohibition and mandamus (s.38(2)).

[73] [1994] 1 A.C. 377.

circumstances which were alleged to constitute a contempt of court by the Home Secretary. The Court of Appeal held that the Home Secretary had been guilty of contempt in defying an injunction issued by the High Court. In the House of Lords it was argued that contempt proceedings do not lie against the Crown, a department of state or a minister of the Crown acting in his capacity as such. That in turn involved a consideration of the jurisdiction of the court to issue injunctions against those parties. Lord Woolf, in the leading speech, emphasised the personal liability of ministers for acts constituting private law wrongs, as a consequence of the constitutional principle that the Crown can do no wrong.[74] Nothing in the section took away existing rights: it was part of legislation intended to make it easier for proceedings to be brought against the Crown.[75] Thus, at most section 21 appears to prevent injunctions being granted against "the Crown" where that term is used in a general sense, which in the case of statutory duties is unlikely to occur. In public law proceedings under the Supreme Court Act 1981, s.31 Lord Woolf demonstrated again that injunctions were available against ministers contrary to the view mistakenly expressed by Lord Bridge in *R. v. Secretary of State for Transport ex p. Factortame Ltd.*[76]

The availability of the declaration against the Crown in the sense of ministers and departments has been established since *Dyson v. Attorney-General.*[77]

33–018 If the Crown seeks an injunction it may, since 1947, be required to give an undertaking in damages as a condition of its being granted, as in the case of a private litigant. Where the injunction is sought, not to enforce a proprietary of contractual right of the Crown, but to restrain a breach of the law in the public interest the court has a discretion not to require such an undertaking.[78]

The remedies provided by the Act do not limit the discretion of the Court to grant mandamus in cases where that might have been granted before the commencement of the Act, *i.e.* (semble) where a duty is owed to a citizen.[79]

An action may be brought against the Attorney-General or (since the Crown Proceedings Act) against the appropriate authorised department, asking the court to declare what the law is on a given point where the Crown or servants of the Crown threaten to do something which is thought to be illegal. This remedy against the Crown originated in the Court of Exchequer.[80] In *Dyson v. Attorney-General*[81] the Court of Appeal held that this was a proper procedure where the plaintiff contended that a threat by the Inland Revenue Commissioners to impose a pecuniary penalty for neglecting to make certain returns within a specified time

[74] *Feather v. The Queen* (1865) 6 B. & S. 257, 296 *per* Cockburn C.J.

[75] See similarly, *British Medical Association v. Greater Glasgow Health Board* [1989] A.C. 1211, HL. In the view of Lord Woolf, *Merricks v. Heathcoat-Amory* [1955] Ch. 567, where an injunction to prevent a minister laying draft regulations before Parliament was refused, was correctly decided but dicta of Upjohn J. suggesting an injunction could never be obtained against a minister in his official capacity were incorrect.

[76] [1990] 2 A.C. 85. See Wade, "Injunctive Relief against the Crown" (1991) 107 L.Q.R. 4.

[77] [1991] 1 K.B. 410.

[78] *Hoffman La Roche & Co v. Secretary of State for Trade and Industry* [1975] A.C. 295; *Kirklees M.B.C. v. Wickes Building Supplies Ltd* [1993] A.C. 227.

[79] See *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *ante*, para. 32–008.

[80] *Pawlett v. Att.-Gen.* (1668) Hardr. 465. See *Tito v. Waddell (No. 2)* [1977] Ch. 106, 256.

[81] [1911] 1 K.B. 410; discussed by the House of Lords in *Gouriet v. Union of Post Office Workers* [1978] A.C. 435. See also *Hodge v. Att.-Gen.* (1839) 3 Y. & Co.Ex. 342; *Esquimalt and Nenaimo Ry v. Wilson* [1920] A.C. 358, PC.

was illegal and *ultra vires* the Finance Act 1910.[82] The action cannot be brought where a petition of right was formerly appropriate, *e.g.* for a money claim against the Treasury.[83]

Certain existing procedures which were already working satisfactorily were retained, *e.g.* relator actions, and proceedings by or against the Public Trustee, Charity Commissioners and Registrar of the Land Registry (section 23). Proceedings against the Crown by petition of right and *monstrans de droit* were abolished, and the Petitions of Right Act 1860 was wholly repealed.[84]

Statutes relating to the limitation of actions now generally bind the Crown.[85]

Proceedings against the Sovereign in her private capacity

33–019 The Petitions of Right Act 1860 contemplated that petitions of right could be brought against the Sovereign in her private capacity, for section 14 distinguished these from petitions relating to any public matter. In the case of public matters the Treasury were authorised to pay out of moneys legally applicable thereto or voted by Parliament for that purpose, while in the case of private matters the amount to which the suppliant was entitled was to be found out of such moneys as Her Majesty should be graciously pleased to direct. At first sight section 29(1) and the Second Schedule to the Crown Proceedings Act appear to repeal the Petitions of Right Act completely; and as section 40(1) of all the Crown Proceedings Act provides that "nothing in this Act shall apply to proceedings by or against, or authorise proceedings in tort to be brought against, His Majesty in His private capacity," it would seem that a citizen in proceeding against the Queen in her private capacity (*e.g.* for groceries supplied to her at Buckingham Palace), is thrown back on the old common law procedure by petition of right—for it cannot be contemplated that the Act intended to render the subject altogether remediless in such cases. On the other hand, the saving clause in section 40(1) above and the expression "subject to the provisions of this Act" in sections 1 and 13 could be held to mean that neither the abolition of petitions of right nor the repeal of the petitions of Right Act applies to proceedings against Her Majesty in her private

[82] See also *Gillick v. West Norfolk and Wisbeck Area Health Authority* [1986] A.C. 112; *ante* para. 32–009.

[83] *Bombay and Persia Steam Navigation Co v. Maclay* [1920] 3 K.B. 402, 408. Nor can the court make an interim (interlocutory) declaration against the Crown in such cases: *Underhill v. Ministry of Food* [1950] 1 All E.R. 591. CPR r.25(1)(6) seems to envisage a general power to award interim declarations but the rule may be *ultra vires* in the light of *Riverside Mental Health NSA Trust v. Fox* [1999] F.L.R. 614, CA (Interim declaration, "a creature unknown to English law"). See further *Civil Procedure* (The White Book) Vol. 1 (Spring 2001), para. 25.113. An interim injunction may, of course, be available since *R. v. Secretary of State for Transport ex p. Factortame (No. 2)* [1991] A.C. 603, HL.

[84] *cf. Franklin v. Att.-Gen.* [1974] Q.B. 185 where claims to interest on Rhodesian government stock under the Colonial Stock Act 1877 were brought under the old common law procedure governing petitions of right. See also *Franklin v. Att.-Gen. (No. 2)* [1974] Q.B. 205, CA; *Barclays Bank v. The Queen* [1974] Q.B. 823.

The following proceedings by the Crown were also abolished: Latin and English informations; writs of *capies ad respondendum, subpoena ad respondendum*, and appraisement; writs of *scire facies*; writs of extent and of *diem clausit extremum*; and writs of summons under Pt V of the Crown Suits Act 1865.

[85] Limitation Act 1980, s.37. But special periods may apply to claims by the Crown, *e.g.* to recover land or foreshore: Limitation Act 1980, Sched. 1, Pt II.

capacity. The latter is probably the better interpretation, although the draftsman has gone a clumsy way about it.[86]

Judgments and execution

33–020 The Crown is put in the same position as subjects with regard to interest on debts, damages and costs (section 24). The Act requires the appropriate department to pay any damages and costs certified in the order of the court; but no execution can be levied against the Crown,[87] and no person is individually liable under any order for payment by the Crown (section 25).[88] On the other hand, the Crown relinquished its former prerogative modes of execution; and it lost its special rights to imprison for debt, except in two cases where the person would already have had the money, *viz.* failure to pay death duties or purchase tax (section 26).[89] The procedure for enforcing payment of fines—*e.g.* for smuggling, is retained.

Creditors are entitled to attach moneys owing to their debtors by the Crown in the same way as if the Crown were a subject, except for (a) wages and salaries payable by any officer of the Crown and (b) any money which by law is exempted from being taken in execution or assigned (section 27).

Discovery and interrogatories

33–021 The Crown Proceedings Act allowed the court for the first time to require the Crown, *in civil proceedings to which the Crown is a party*, to make discovery of documents and to answer interrogatories (section 28(1)). Discovery (as formerly known) is the disclosure which one party to an action commenced by writ is generally required to make to the other party of relevant documents which are, or have been, in his possession, custody or power. In exceptional cases a court order for discovery is necessary. Certain documents are privileged from production.[90] Interrogatories are written questions relevant to the action which a party may administer to his opponent to be answered on affidavit. Leave of the Master is required, and privilege may be claimed on the same grounds as in discovery of documents.

Crown Privilege and Public Interest Immunity

33–022 The proviso to section 28(1) preserves the rule—*applying also to actions to which the Crown is not a party*, and covering the trial as well as interlocutory proceedings—which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be *injurious to the public interest*. The objection to such disclosure or answer is usually made by the head of the department concerned.

Subsection (2) goes further by providing that any rules of court made for the purpose of section 28 shall secure that the *existence* of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to

[86] See further D. B. Murray, "When is a repeal not a repeal?" (1953) 16 M.L.R. 50.

[87] *Wick and Dennis' Case* (1589) 1 Leo. 190.

[88] It is still possible, however, to sue a Crown servant personally for damages in a case like *Raleigh v. Goschen* [1898] 1 Ch. 73 (*ante*, para. 33–008) although there does not seem to be much point in doing so.

[89] The provision relating to purchase tax was repealed by the Finance Act 1972, s.54(8) and Sched. 28, Pt II.

[90] See further CPR 31 and CPR Sched. 1, RSCO 77, r.12(2).

the public interest[91] to disclose the existence thereof. This exception was necessary because the general rules of court require that the documents which the party objects to producing should be set out in the affidavit of documents, and the Crown may wish to claim privilege for the fact that a document exists.

At the time of the passing of the 1947 Act, and for many years afterwards, it was believed to be the law in England, as the result of dicta in *Duncan v. Cammell, Laird*, that the Crown possessed a right to withhold documents on the grounds of public interest in a wide range of cases without such right being, in any real sense, subject to judicial control.[92] However, after criticism of this wide view of "Crown Privilege" in a number of decisions in the Court of Appeal,[93] the House of Lords restated the Law in *Conway v. Rimmer*[94] where it held that the right to determine what the public interest requires is that of the court which is entitled to call for the documents, and decide after inspecting them whether an order for their production to the other party ought to be made. *Duncan v. Cammell, Laird* was not followed, and may be said to have been overruled so far as concerns the inspection by the court of documents in a civil case for which the Crown claims privilege. Otherwise the main effect of *Conway v. Rimmer* was to narrow the ratio of *Duncan v. Cammell, Laird* by holding that Viscount Simon's dicta were too wide, although the actual decision was, on the facts, undoubtedly right.

Lord Reid later in *Conway v. Rimmer* announced that he had examined the documents, and could find nothing in any of them the disclosure closure of which would be prejudicial to the proper administration of the local constabulary or to the general public interest. He was therefore of the opinion that they must be made available in the litigation.[95] **33–023**

Subsequent decisions of the House of Lords have established that the phrase "Crown Privilege," used to describe the withholding of documents on the ground of public interest, is a misnomer for two reasons. First, because the Crown does not have the choice whether or not to withhold the documents in question. Non-production is *required* by the public interest and is a matter which may be raised

[91] The Memorandum accompanying the Crown Proceedings Bill specified "defence, foreign affairs, and related matters." On the second reading, suggestions that "public security," "public safety" or "defence of the realm" should be substituted for "public interest" were not accepted by the government.

For the appalling case of *Odlum v. Stratton* (1946), see Allen, *Law and Orders* (3rd ed.), App. 2.

[92] [1942] A.C. 624. The dependants of sailors who were drowned in a new British submarine, *Thetis*, which sank on her trials just before the beginning of the Second World War had brought an action against the builders of *Thetis*. War had begun when the litigation commenced and the House of Lords upheld the First Lord of the Admiralty's objection to the production of plans of the submarine which were in the possession of the contractors. Captain H. P. K. Oram, one of the four survivors of the disaster, died in June 1986, aged 92.

[93] *Merricks v. Nott-Bower* [1965] 1 Q.B. 57; *Re Grosvenar Hotel, London (No. 2)* [1965] Ch. 1210; *Wednesbury Borough Council v. Ministry of Housing and Local Government* [1965] 1 W.L.R. 261; [1965] 1 All E.R. 186.

[94] [1968] A.C. 910, citing Scottish, Australian and American cases. In *Glasgow Corporation v. Central Land Board*, 1956 S.C., HL 1 the House of Lords had held that *Duncan v. Cammell, Laird* did not represent Scots Law. In *Conway* a former probationary police constable, suing his former superintendent for malicious prosecution, sought production of reports made on him during his probation.

[95] *Conway v. Rimmer* (Note) [1968] A.C. 996; [1968] 2 All E.R. 304n. (Nevertheless, the plaintiff eventually lost his action for malicious prosecution because he failed to prove want of reasonable cause: *The Times*, December 17, 1969.) See also *Norwich Pharmacal Co v. Customs and Excise Commissioners* [1974] A.C. 133; Tapper (1974) 37 M.L.R. 92.

by any party to the litigation or by the court itself."[96] Second, public interest as a ground for non-disclosure of documents is not confined to the functioning of departments or organs of the central government. In so holding, the House of Lords, in *D. v. N.S.P.C.C.*,[97] allowed the respondent society to withhold the sources of information which it received of an alleged instance of cruelty to children.

33–024 The right (or duty) to withhold documents in the public interest is now generally described as *Public Interest Immunity*. Lord Scarman, however, sounded a warning note in *Science Research Council v. Nasse*[98] when he said,

> "I regret the passing of the currently rejected term 'Crown Privilege'. It at least emphasised the very restricted area of public interest immunity . . . [which] exists to protect from disclosure only information the secrecy of which is essential to the proper working of the government of the state. Defence, foreign relations, the inner workings of government at the highest level . . . and the prosecution process in its pre-trial stage are the sensitive areas where the Crown must have the immunity of the government of the nation is to be effectually carried on. We are in the realm of public law, not private right."

Lord Scarman regarded the *N.S.P.C.C.* case as exceptional, turning on the special position of the Society in enforcing the provisions of the Children and Young Persons Act 1969 which was comparable with that of a prosecuting authority in criminal proceedings.

In deciding whether to allow documents to be withheld the courts now try to weigh in the balance the public interest of the nation or the public service in non-disclosure against the public interest of justice in the production of the documents. The balancing of the conflicting claims involved in a claim of privilege will inevitably lead to different conclusions in different cases depending on the weight particular judges give, for example, to the need to protect confidential information or facilitate inquiries into allegations of misconduct. Thus the House of Lords upheld the refusal of an order of discovery in *Lonrho Ltd v. Shell Petroleum*[99] on the ground of the need to guarantee to informants complete confidentiality if a government inquiry were to have any likelihood of success in discovering the truth.

33–025 The difficulty in balancing the conflicting interests and, perhaps, changing judicial attitudes can be seen from various cases concerning documents arising in the course of investigations and complaints relating to allegations of police behavior. In *R. v. Chief Constable of West Midlands Police ex p. Wiley*[1] the House of Lords refused to extend immunity to documents arising out of complaints to the Police Complaints Authority on the ground that they belonged to a class of document the production of which was contrary to the public

[96] *Rogers v. Home Secretary* [1973] A.C. 388; applied, *R. v. Cheltenham Justices* [1977] 1 W.L.R. 95; *Crompton (Alfred) Amusement Machines v. Customs and Excise Commissioners (No. 2)* [1974] A.C. 405; *Air Canada v. Secretary of State (No. 2)* [1983] 2 A.C. 394; *cf. Medway v. Doublelock Ltd* [1978] 1 W.L.R. 710.

[97] [1978] A.C. 171.

[98] [1980] A.C. 1028, 1087.

[99] [1980] 1 W.L.R. 627. ("The circumstances which have given rise to the disputes about discovery are quite exceptional; they are unlikely to recur in any other case and, for that reason, they do not in my view provide a suitable occasion for any general disquisition by this House upon the principles of law applicable to the discovery of documents": *per* Lord Diplock at p. 632.)

[1] [1995] 1 A.C. 274.

interest, overruling a number of earlier authorities.[2] Lord Woolf suggested that in civil litigation the question of the right to require production of documents could often be settled by reference to Order 24 r. 8 (now CPR 31.17) which limits the right to discovery to cases where it is necessary for disposing of a case.

Following the *N.S.P.C.C.* case the confidential nature of information has been recognised as justifying a claim to public interest immunity in *Gaskin v. Liverpool C.C.*[3] but not in *R. v. Bournemouth Justices ex p. Grey*[4] where information obtained by an adoption society in relation to the child of an unmarried couple was held admissible in affiliation proceedings between the same couple. Hodgson J. pointed out that in the *N.S.P.C.C.* case and *Gaskin* the objections to production had not been taken, as here, by a private person, the social worker employed by the agency, but by a public body with statutory duties. In *Campbell v. Thameside M.B.C.*[5] the Court of Appeal held that a teacher who had been attacked by a pupil was entitled, in an action in negligence against the local authority, to see reports made to the authority by psychologists which, she alleged, showed that the pupil was known to be violent. The importance of the documents to the teacher's case and the nature of the action justified distinguishing cases involving issues of wardship, child care and adoption where discovery had been refused. In *Williams v. Home Office*[6] McNeill J. ordered production of Home Office documents relating to the establishment of "control units" in prisons to deal with difficult prisoners because of the importance of the issues involved.

The Courts will not order disclosure where it is sought by a plaintiff who is engaged on a "fishing expedition," hoping to find in documents in the defendant's possession information which might support a case against them for which he has no other evidence.[7] In *Air Canada v. Secretary of State for Trade (No. 2)*[8] the House of Lords refused to inspect documents for which public interest immunity had been claimed when the plaintiff had failed to show that there were reasonable grounds for believing that they contained information likely to help their case or damage their adversary's. **33–026**

A claim to disclosure will also fail if the action to which it is incidental must for some reason be struck out as, for example, in *Buttes Gas and Oil Co v. Hammer (No. 3)*[9] where the House of Lords granted an order staying all proceedings between the parties because they amounted to an attempt to require the courts to adjudicate on transactions between foreign sovereign states. Such matters fall outside the jurisdiction of the English courts.

It now seems that there are no *classes* of document, for example Cabinet minutes or papers, which are always immune from production. In *Burmah Oil Co Ltd v. Bank of England*[10] the appellant company sought discovery of various documents despite a detailed affidavit by the Chief Secretary to the Treasury

[2] *Neilson v. Laugharne* [1981] 1 Q.B. 736, CA; *Makanjuola v. M.P.C.* [1992] 3 All E.R. 617, CA.
[3] [1980] 1 W.L.R. 1549 (Child care service records) Lord Denning M.R. described the plaintiff as "a psychiatric case, mentally-disturbed and quite useless to society." For the plaintiff's side of the story, see James MacVeigh, *Gaskin* (1982). A right of access to information concerning his childhood in care was upheld by the European Court of Human Rights: *Gaskin v. United Kingdom* (1990) 12 E.H.R.R. 36.
[4] *The Times*, May 31, 1986.
[5] [1982] Q.B. 1065.
[6] [1981] 1 All E.R. 1151.
[7] *Gaskin v. Liverpool Corporation* [1980] 1 W.L.R. 1549.
[8] [1983] 2 A.C. 394; T. S. R. Allen, "Abuse of Power and Public Interest Immunity: Justice, Rights and Truth" (1985) 101 L.Q.R. 200.
[9] [1982] A.C. 888.
[10] [1980] A.C. 1090.

objecting to their production on the ground of public interest. The documents included memoranda of meetings attended by Ministers but did not include Cabinet papers. The House of Lords ultimately agreed, after inspecting the documents, that production should not be ordered because disclosure of their contents was not necessary for disposing fairly of the company's case. The importance of the case lies, however, in dicta which suggest that there is no *class* of document which is, in all circumstances, immune from discovery.[11] In each case a claim to immunity must be based on the *contents* of the documents involved.

Despite the new judicial attitude to claims to public interest immunity a claim based on the ground of national security is still unlikely to be questioned.[12]

33–027 The claim of "Public Interest Immunity" is the personal responsibility of the ministerial head of the department, although if it does not appear that he has himself considered the documents he may be given an opportunity to swear a further affidavit.[13] Where the documents are those of a former government the affidavit may properly be sworn by a senior civil servant because "a powerful convention prevents ministers having access to papers of their predecessors."[14]

A claim to public interest immunity raises particularly acute issues in criminal proceedings. As in the *Matrix Churchill* trial, considered at length in the Scott Report,[15] immunity may be claimed by a minister but in many other cases claims may arise at the level of the police, for example, to protect the identity of informants or the secrets of other information gathering procedures.

33–028 The *Matrix Churchill* trial arose out of prosecutions on charges of illegal export of arms to Iraq. Ministers certified that the public interest required the withholding of documents which the accused claimed to be relevant to their defence, the trial judge decided to examine the documents and rejected the claim to immunity. On the basis of the documents the accused were acquitted. It subsequently emerged that one minister who had been unhappy about signing the claim to immunity had been advised that he had no discretion to consider what the public interest required.[16] Exposure of what had happened and criticisms voiced in the Scott Report led to the Attorney General announcing in December 1996 that in future public interest immunity would only be claimed where it was believed that disclosure would cause "real harm" to the public interest.[17]

Apart from the specific doctrine of public interest immunity the more general law relating to the rights of the accused with regard to access to material and information in the hands of the prosecution is placed on a statutory footing by the Criminal Procedures and Investigations Act 1996.

[11] Lord Wilberforce at p. 1113; Lord Edmund-Davies at p. 1127; Lord Keith of Kinkel at p. 1134; Lord Scarman at p. 1144. The opposite view is expressed by Lord Salmon at p. 1121; J. Hannan, "Inspection of Cabinet Documents—To Yield or Not to Yield" (1982) 45 M.L.R. 471. See also Lord Fraser in *Air Canada v. Secretary of State for Trade* (No. 2), *supra*.

[12] *Balfour v. Foreign and Commonwealth Office* [1994] 1 W.L.R. 681, CA (Unfair dismissal claim by member of diplomatic service. Court refused to Inspect documents for which minister claimed privilege on ground of national security).

[13] *Re Grosvenor Hotel (No. 1)* [1964] Ch. 464, CA.

[14] *Air Canada v. Secretary of State for Trade, supra, per* Lord Wilberforce at p. 437.

[15] 1996, H.C. 115; *supra* para. 17–018 and para. 19–046.

[16] A view based on a dictum of Bingham L.J. in *Makanjuola v. M.P.C.* [1992] 3 All E.R. 617 which Lord Woolf in *Wiley* suggested had been taken further than the Lord Justice intended.

[17] For a critical comment see Supperstone and Coppel, "A New Approach to Public Interest Immunity" [1997] P.L. 211.

CHAPTER 34

NON-JUDICIAL REMEDIES

Introduction

34–001 People may wish to resort to non-judicial remedies where they have a grievance to complain of, or a wrong to be righted, for various reasons and in many different circumstances. Where there is a dispute about the law the courts may provide an effective remedy. But even in such cases the Courts may show a reluctance to intervene in disputes concerning the legality of acts of the executive. It is notable that both the Council on Tribunals and the Parliamentary Commissioner were established before the upsurge in judicial activism of the late 1960s and 1970s.[1] In many cases, however, complainants may be unhappy about the way a decision was reached, delays and rudeness on the parts of public officials, for example. There may be no doubt about what the law is: it may, however, be thought that the law should be changed. In some cases people may simply want information; why, for example, did a patient fail to recover after an operation. A decision may be thought to have been reached on a mistaken view of the facts; a compiainant may want to be able to produce new evidence or to have an opportunity to rebut conclusions reached by a public official. In the following Parts of this chapter we shall examine the Council on Tribunals and the Parliamentary Commissioner for Administration and other Commissioners with specialised jurisdictions. Other statutory non-judicial remedies which have been discussed in earlier chapters include the Police Complaints Authority[2] and the Broadcasting Standards Commission.[3]

Apart from procedures and bodies established to deal with complaints relating to specific types of problems, Members of Parliament discharge an important role in offering a means of redress for grievances of every kind.[4] Constituents may, and do, write to their M.P.'s about grievances for which they have found no remedy elsewhere. In some cases it may be appropriate to pass the complaint to the Parliamentary Commissioner for Administration (*infra*, Part II). In others the appropriate action may be a letter to a minister or some public body or a question in the House. The importance of this aspect of the work of M.P.'s has grown steadily in the last thirty years.

I. THE COUNCIL ON TRIBUNALS[5]

34–002 The Franks Report[6] recommended the creation of a Council on Tribunals to exercise various functions in relation to Statutory Tribunals. The Council was

[1] See Chap 32.
[2] para. 21–021.
[3] para. 25–036.
[4] Alan C. Page, "M.P.s and the Redress of Grievances" [1985] P.L. 1.
[5] *Council on Tribunals: Special Report on Functions* (1980) Cmnd. 7805; D. C. M. Yardley, "The Functions of the Council on Tribunals," [1980] Jo. Soc Wel. Law 265; D. G. T. Williams, "The Council on Tribunals: The First Twenty Five Years" [1984] P.L. 73; A. W. Bradley, "The Council on Tribunals: Time for a Broader Role?" [1991] P.L. 6.
[6] (1967) Cmnd. 218.

established by the Tribunals and Inquiries Act 1958 and continues in existence by section 1 of the Tribunals and Inquiries Act 1992. The functions of the Council are

(a) to keep under review the constitution and working of the tribunals specified in Schedule 1,[7] and from time to time to report on their constitution and working;

(b) to consider and report on such particular matters as may be referred to the Council with respect to "tribunals other than the ordinary courts of law," whether or not specified in Schedule 1; and

(c) to consider and report on such matters as may be referred, or as the Council may determine to be of special importance, with respect to administrative procedures involving the holding by a Minister of a statutory inquiry.

The Council consists of 10 to 16 members including the Parliamentary Commissioner for Administration. There is a Scottish Committee of the Council, consisting of two or three members of the Council and three or four other persons appointed by the Secretary of State. The chairmen of the Council and of the Scottish Committee are paid a salary, and the other members may be paid fees.

The Council reports to, and receives references from, the Lord Chancellor and the Secretary of State. The Council is required to make an annual report on its proceedings, and the Lord Chancellor and the Secretary of State are to lay the annual report before Parliament, with such comments (if any) as they think fit.

Work of the Council on Tribunals

34–003 There are more than 2,000 tribunals under the supervision of the Council. The Council not only acts as a "watchdog" but also as a focus of information. It keeps under review the constitution and working of tribunals. With regard to statutory inquiries its function is to consider and report on such matters as may be referred to it by the Lord Chancellor or the Secretary of State, or as the Council may determine to be of special importance. It does not recommend the kinds of person who should be appointed to conduct inquiries. Complaints are digested by a complaints committee. The Council's powers are not executive but advisory, and it does not act as a court of appeal from tribunals. Nor does it seek to impose uniformity on all tribunals.

Although the work of the Council is mainly of a routine nature it has also become involved in controversial cases of notoriety which illustrate the Council's strengths and weaknesses.

The *Chalk Pit* case[8] was the subject of a special report to the Lord Chancellor. Major Buxton, a landowner, complained to the Council[9] about the decision of a Minister to allow a firm to use a gravel pit adjoining his piggeries for the production of chalk. The inspector who conducted the inquiry reported that the production of chalk would result in dust being blown onto adjoining land, with serious detriment to animals and crops. Major Buxton alleged that the Minister

[7] Other tribunals may be added by Statutory Instrument.

[8] See Griffith and Street, *A Casebook of Administrative Law* (1964) pp. 142–174.

[9] He had been unsuccessful in the courts as he was not a "person aggrieved": *Buxton v. Minister of Housing and Local Government* [1961] 1 Q.B. 278; *ante*, para. 32–015.

consulted the Minister of Agriculture privately between the end of the inquiry and the announcement of his decision, thus stultifying the inquiry. The Council made a report to the Lord Chancellor on the problem of handling new factual evidence noted by Ministers after statutory inquiries: with the result that a Statutory Instrument was later issued directing a Minister to re-open an inquiry on request if he disagrees with the inspector on receiving new evidence (including expert opinion) or has considered a new issue of fact not raised at the inquiry.

34–004 The *Packington Estate* case, on which the Council also produced a special report, was interesting not only for the light it threw on the way the Minister of Housing and Local Government (Richard Crossman) dealt with an application by a local authority for planning permission but also for what it revealed of the importance one Minister, at least, attached to the work of the Council. Although the Ministry had agreed to meet members of the Council to discuss the complaints of local landowners about the procedure being followed, the Minister sent a letter to the local authority granting planning permission two days before the date arranged for the meeting with the Council—a procedure which might fairly be described as "a deliberate and blatant attempt to stultify the activities of an independent statutory body established to act as a watchdog. . . . "[10]

Annual reports show that the Council is consulted on rules of procedure for a number of tribunals and for Inquiries. It has made representations about accommodation, public hearings and legal aid. The Council is also consulted on Bills affecting existing or creating new tribunals. Where, however, its views are rejected there is no procedure for making this publicly known.

II. Parliamentary Commissioner for Administration[11] And Others

Maladministration

34–005 Neither courts nor tribunals can offer a remedy when private citizens complain that public authorities, although they have acted within the law, have failed to observe the proper standards of administrative conduct. It is faults of this kind which are often described as *maladministration*. Mr Crossman, in the debate on the Parliamentary Commissioner Bill, gave as examples of such conduct "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness and so on."[12] An example is the *Crichel Down* case,[13] where a landowner complained that the Ministry of Agriculture had refused to hand back to

[10] [1966] P.L. 1, 6.

[11] *The Parliamentary Commissioner for Administration* (1965), Cmnd. 2767; *The Citizen and the Administration*, Part III, A report by *Justice* (Whyatt Report, 1961); *The Ombudsman: Citizen's Defender*, ed. D. C. Rowat (2nd ed., 1968); *Our Fettered Ombudsman, A report by Justice* (1977); Sir Edmund Compton, "Parliamentary Commissioner for Administration" (1969) 10 J.S.P.T.L. 106; Paul Jackson, "The Work of the Parliamentary Commissioner for Administration" [1971] P.L. 39; Sir Alan Marre, "Some Thoughts on the Role of the Parliamentary Commissioner for Administration" (1972) 3 *Cambrian Law Rev.* 54; Sir Cecil Clothier, "The Value of an Ombudsman," [1986] P.L. 204; G. Marshall, *Constitutional Conventions* (1984) Chap. V; F. Stacey, *Ombudsmen Compared* (1978); R. Gregory and P. G. Hutchesson, *The Parliamentary Ombudsman* (1975); P. Giddings, "The Parliamentary Ombudsman: a successful alternative", Chap. VIII of *The Law and Parliament* (eds. D. Oliver and G. Drewry, Butterworths 1998).

[12] 734 H.C. Deb., col. 51.

[13] (1954) Cmd. 9176; C. J. Hamson, "The Real Lesson of Crichel Down" (1954) 32 *Public Administration* 383. *cf.* R. M. Jackson, "Judicial Review of Legislative Policy" (1955) 18 M.L.R. 571.

him after the war part of his land which had been requisitioned during the war and was no longer required by the Ministry for the purposes for which it had been requisitioned. In this particular case the Minister was induced by the outcry to hold a departmental inquiry, which criticised the conduct of certain officials in the Ministry, with the result that the officials were moved to different work and the Minister (although not personally involved) resigned his office. The citizen's only remedies at that time were for his Member of Parliament to ask a question in the House, to raise the matter in the debate on the adjournment or in debates on supply, to correspond with the Minister or to persuade the Minister to hold an *ad hoc* inquiry.

Parliamentary Commissioner for Administration

34–006 For some years there had been discussion on the suggestion[14] that a Parliamentary Commissioner, with an independent status like that of the Comptroller and Auditor-General, should be appointed for this country, whose functions would be similar to those of the Ombudsman known to Scandinavian countries and then recently introduced into New Zealand. Hesitation in the past was due largely to the fear that the appointment of such an independent official would interfere with ministerial responsibility, which is stronger here than in Scandanavia; and to a less extent to the fact that it was difficult to foresee how much work would fall to a Commissioner in a country with a population much greater than that of any of the Scandinavian countries or New Zealand. In 1967 the Parliamentary Commissioner Act was passed.[15]

Appointment

34–007 The Parliamentary Commissioner Act 1967 provides for a Parliamentary Commissioner of Administration to be appointed by letters patent. In 1977 the Government agreed that in future before an appointment was made it would consult the Chairman of the Select Committee on the Parliamentary Commissioner of Administration (see *infra*). His salary is charged on the Consolidated Fund.[16] He may be removed on an address from both Houses, and he is excluded from membership of the Commons. He is an *ex officio* member of the Council on Tribunals, whose functions (as in cases like the *Chalk Pit* case) overlap his own, and in some cases the citizen may choose whether to complain to the Commissioner or the Council. He is also a member of the Commissions for Local Administration (*infra*).

Investigation of complaints

34–008 A person who thinks he has suffered injustice as a result of malad-ministration by a department or authority of the central government may complain to a

[14] The suggestion for an Inspector-General of Administration was originally made by Professor F. H. Lawson in [1957] P.L. 92–95. The Government turned down the suggestion for a Parliamentary Commissioner in 1961: 640 H.C. Deb., cols 1693–1756.

[15] For the geographical spread of the institution in the last few years see *Our Fettered Ombudsman*. A report by *Justice* (1977), App. A. For a comparison of the Parliamentary Commissioner and the French médiateur see L. Neville Brown and P. Lavirotte (1974) 90 L.Q.R. 211; L. Neville Brown and J. Bell, *French Administrative Law* (5th ed., 1998). See too Colin T. Reid, "The Ombudsman's Cousin: The Procuracy in Socialist States" [1986] P.L. 311.

[16] See further, Parliamentary and other Pensions and Salaries Act 1976, s.6.

member of the House of Commons in writing within twelve months from first having notice of the matter. The Commissioner has a discretion whether or not to conduct an investigation.[17] An investigation is conducted in private. The principal officer of the department or authority concerned must be given an opportunity to comment on the allegation. The complainant has no right to appear, but the Commissioner may see him if he thinks fit. The Commissioner has the same powers as the High Court to require a Minister, civil servant or other persons to furnish information or produce documents, excluding proceedings or papers of the Cabinet or a Cabinet committee. There is no Crown privilege[18] at the investigation stage; but a Minister may claim Crown privilege in respect of the *publication* or passing on of documents or information if their disclosure would in his opinion be prejudicial to the safety of the state or otherwise contrary to the public interest. The Official Secrets Act would prevent the Commissioner from including such information in his reports.

Departments and authorities covered

34–009 The departments and authorities in respect of whom the Commissioner may investigate complaints are set out in Schedule 2. They include most of the central government departments, but do not cover local authorities, public corporations, the police or the National Health Service. The list may be added to or reduced by Order in Council, the instrument being subject to annulment by resolution of either House.

Matters excluded from investigation are set out in Schedule 3. The excluded matters are within the functions of the departments listed in Schedule 2, *viz.*: foreign relations; action taken outside the United Kingdom (except by consular officials)[19]; the government of Her Majesty's overseas dominions; extradition, fugitive offenders investigation of crime,[20] and security of the state (including passports); civil or criminal proceedings in any court, court-martial or international tribunal; the prerogative of mercy; medical matters; commercial contracts; personnel matters of the armed forces, civil service, teachers or police; the grant of honours, and royal charters. This list may be reduced by Order in Council.

Devolution

34–010 The Scotland Act 1998 section 91 requires the Scottish Parliament to make provision for dealing with complaints relating to maladministration arising from the exercise of devolved powers. The Parliamentary Commissioner retains his jurisdiction over complaints relating to maladministration in areas of reserved matters wherever they arise. The Government of Wales Act 1998, s.111 appoints a Welsh Administration Ombudsman to deal with maladministration arising from the actions of the new executive.

The jurisdiction of the Parliamentary Commissioner extends to Northern Ireland in the case of complaints relating to actions of the United Kingdom

[17] *Re Fletcher's Application* [1970] 2 All E.R. 527n. (CA. Leave to appeal refused by HL); mandamus does not lie.
[18] *ante*, para. 33–022. For the position of the Local Commissioners, see *post*, para. 34–016.
[19] Parliamentary Commissioner (Consular Complaints) Act 1981.
[20] *i.e.* by or on behalf of the Home Office.

Government Legislation by the Northern Ireland Parliament introduced a Parliamentary Commissioner for Northern Ireland and a Commissioner for Complaints to whom the public had a right of direct access.[21] The latter Commissioner has jurisdiction over personnel matters, which reflects one of the reasons for the creation of the office, a wish to provide a remedy for allegations of discrimination in employment. A person whom the Commissioner finds to have suffered injustice as the result of maladministration may apply to court for damages and the Commissioner may request the Attorney-General to apply for an injunction or other relief where he concludes that a public body is likely to continue in a course of maladministration.

Reports by Commissioner

34–011 Where the Commissioner conducts or decides not to conduct an investigation he must send a report to the member concerned; and when he conducts an investigation he must send a report to the principal officer of the department concerned. If he thinks injustice has been caused, and that it has not been or will not be remedied, he may lay a special report before each House.

The Commissioner must lay a general report annually before each House on the performance of his functions, and he may lay special reports from time to time.

The Commissioner's reports show annually a large percentage—often over 50—of complaints that fall outside his jurisdiction. The proportion of cases investigated in which maladministration is found has risen year by year which suggests more thorough investigations as his staff have become more experienced and, perhaps, a widening view of what constitutes maladministration. One of the most controversial findings of maladministration was made in his Third Report on the *Sachsenhausen* Case.[22] The Commissioner concluded that the Foreign Office had, in determining whether a number of applicants were entitled to be compensated as inmates of German concentration camps as opposed to ordinary prison camps failed to attach due weight to various pieces of evidence. The Foreign Secretary finally accepted the Commissioner's report, while commenting.

> "When the Ombudsman has made enough decisions perhaps we shall have an Ombudsman to look at the Ombudsman's decisions and if he gets 100 per cent. right I shall be surprised."[23]

The *Barlow Clowes Affair*[24] concerned large numbers of investors who lost considerable sums of money which they had entrusted to the firm of Barlow Clowes claimed that the Department of Trade and Industry had been guilty of

[21] Parliamentary Commissioner (Northern Ireland) Act 1969; Commissioner for Complaints (Northern Ireland) Act 1969; K. P. Poole, "The Northern Ireland Commissioners for Complaints" [1972] P.L. 131. See the Commissioner for Complaints (Northern Ireland) Order 1996; Northern Ireland Act 1998, s.78.

[22] (1967–68) H.C. 54. See G. F. Fry, "The Sachsenhausen Concentration Camp Case and the Convention of Ministerial Responsibility" [1970] P.L. 336.

[23] Hansard, H.C. Deb. Feb. 5, 1968.

[24] R. Gregory and G. Drewery, "Barlow Clowes and the Ombudsman" [1991] P.L. 192 and 408.

maladministration in exercising its regulatory powers in relation to Barlow Clowes. The Commissioner found that there had been maladministration and, although the government refused to accept his findings it nonetheless agreed to pay £150m in compensation.[25]

Considerable sums were also obtained for poultry farmers whose birds had been killed following fears about salmonella in eggs. It subsequently emerged that the Ministry of Agriculture had paid compensation at a lower rate than the farmers were entitled to under statutory rules.[26]

More recently the Commissioner exposed maladministration in the DSS and the Benefits Agency when they gave misleading advice about the law relating to the rights of widows and widowers in connection with the SERPS pension scheme. Their rights had been curtailed by the Social Security Act 1986 but official leaflets continued to refer to the more generous rules under earlier legislation. The Commissioner was satisfied that the Departmental response offered a global solution which was fair and satisfactory.[27]

Select Committee on the Parliamentary Commissioner for Administration[28]

A Select Committee of the Commons was set up to deal with complaints by Members of Parliament who think the Commissioner has failed to deal properly with complaints forwarded by them, to consider what remedial action has been taken by the departments, and to recommend changes in the law. The Select Committee does not act as a court of appeal from the Commissioner's findings. In its first two annual reports the Committee criticised the narrow way in which the Commissioner was interpreting his jurisdiction.[29] It recommended an extension of the Commissioner's powers to cases where the departmental procedure for reviewing a rule, or the grounds for maintaining it, could be shown to be defective. The Committee has more than once recommended that the Commissioner should have power to investigate personnel matters and staffing within the Civil Service. In 1984 the Committee recommended that the Commissioner's jurisdiction should be extended to a number of Quangos a proposal which, for once the government was prepared to accept.[30] **34–012**

Judicial Review

Although there is no jurisdiction to order the Commissioner to undertake an investigation,[31] there is jurisdiction to intervene where he has undertaken an **34–013**

[25] *i.e.* from the pockets of tax payers who had been too cautious or too poor to invest in Barlow Clowes.

[26] (1992–93) H.C. 519; H.C. 593.

[27] (1999–2000) H.C. 305; (2000–01) H.C. 271. The original reduction will be phased in over a period of years.

[28] R. Gregory, "The Select Committee on the Parliamentary Commissioner for Administration" [1982] P.L. 49.

[29] (1967–68) H.C. 258; (1967–68) H.C. 350. See Geoffrey Marshall in *The Commons in Transition* (ed. A. H. Hanson and B. Crick, 1970), Chap. 6.

[30] A list of 50 bodies, including the Commission for Racial Equality, the Equal Opportunities Commission, the Arts Council, the Research Councils, Developments Corporations and such other less well known bodies as the Red Deer Commission and The Commissioners of Northern Lighthouses. See H.C. 619, 1983–4; Parliamentary and Health Service Commissioners Act 1987.

[31] *Re Fletcher's Application* [1970] 2 All E.R. 527, CA; *ante* para. 34–008.

investigation[32] and has failed to exercise his discretion in accordance with the standards set by the courts in reviewing the exercise of discretionary powers.[33]

Reform

34–014 To the extent that, in many cases, the Parliamentary Commissioner has achieved redress for individuals where otherwise they would have been left without a remedy, his office must be regarded as fulfilling a useful function. In a number of ways, however, that usefulness might, it is thought, be increased. To allow complaints to be made directly to the Commissioner rather than through Members of Parliament, and to give greater publicity to his activities might help to raise the public standing of the office.

The rule that complaints can only be made through a member has to some extent been circumvented by the practice of forwarding complaints sent to the Commissioner to the complainant's member and seeking his agreement to the Commissioner dealing with it. The exclusion from his jurisdiction of personnel matters in the civil service and the commercial and contractual dealings of the Government has been regularly criticised by the Commissioner and the Select Committee and by Justice.[34] The Government, however, so far remains unmoved.[35]

Health Service Commissioners[36]

34–015 The solution adopted in the Parliamentary Commissioner Act 1967 for dealing with complaints against the administration has been extended by subsequent legislation to the National Health Service. Three Health Service Commissioners for England, Wales and Scotland were established in 1972 and 1973.[37] Since their inception all three posts have been held by the Parliamentary Commissioner for Administration. With some slight variation between the 1972 and 1973 Acts, the Health Service Commissioners may investigate alleged instances of maladministration arising out of the provision of medical services under the National Health Services by a wide range of boards and authorities. Until the legislation of 1996 no action taken solely as a result of a clinical judgment could be investigated. Complaints may be made directly by a person aggrieved and need not be forwarded by a Member of Parliament.

Reports on maladministration within the Health Services have dealt with individual complaints relating to delays in admission to hospital, failure to indicate to patients that they may refuse to be examined in the presence of medical students and allegations of operations carried out without consent, as well as more general matters such as the failure of health departments to issue adequate warnings to doctors and parents on the dangers of whooping cough vaccine.[38]

[32] *R. v. Parliamentary Commissioner for Administration ex p. Dyer* [1994] 1 W.L.R. 621, CA; *R. v. Parliamentary Commissioner ex p. Balchin* [1997] C.O.D. 146.

[33] *ante*, para. 31–008.

[34] *Our Fettered Ombudsman* (1977).

[35] Cmnd. 8274 (1981).

[36] P. Giddings, "The Health Service Ombudsman after twenty five years and The Health Service Ombudsman: reports on clinical failings," [1999] P.L. 200 and 589.

[37] National Health Service (Scotland) Act 1972; National Health Service Re-organisation Act 1973. The current legislation is the Health Service Commissioners Act 1993, as amended by the Health Services Commissioners (Amendment) Act 1996 and the Health Service Commissioners (Amendment) Act 2000.

[38] Parliamentary Commissioner for Administration, 6th report, *Whooping Cough Vaccine* (1977).

Commissions for local administration[39]

34–016 The Ombudsman system was extended to local government by the Local Government Act 1974 which established two Commissions for Local Administration, one for England and one for Wales.[40] The Parliamentary Commissioner is a member of each of the Commissions. The jurisdiction of the Commissions extends to local authorities, police authorities, other than the Secretary of State, and other public bodies. Complaints of maladministration must be referred to the commissioner responsible for the area in question through a member of the authority against which the complaint is made. If, however, a member refuses to refer a complaint the local commissioner may proceed to investigate it—as happened, for example, in *R. v. Local Commissioner for Administration for the North and East Area of England ex p. Bradford Metropolitan City Council*.[41] The requirement of an initial reference to a member of a local authority is justified on the ground that it affords the authority an initial opportunity to remedy an alleged wrong before a commissioner becomes involved. It is also said to protect the commissioners from being overwhelmed by unsubstantial complaints. The Act expressly provides that a local commissioner cannot question the merits of a decision taken without maladministration (section 34(3)). In the *Bradford* Case (*supra*) Lord Denning M.R. said. "Parliament did not define 'maladministration.' It deliberately left it to the ombudsman himself to interpret the word as best he could: and to do it by building up a body of case law on the subject." His Lordship then quoted the list of examples given by Mr Crossman. It was, he added, "a long and interesting list, clearly open-ended, covering the *manner* in which a decision is reached or discretion is exercised: but excluding the merits of the decision itself or of the discretion itself." A Commissioner cannot deal with a complaint relating to any action in respect of which the person aggrieved has a right of appeal or review, whether to the Courts or to a Minister, or any other remedy by way of legal proceedings unless the commissioner is satisfied that it would be unreasonable to expect resort to be had to that right or remedy.

34–017 Initially the effectiveness of local commissioners was limited by the interpretation put by the Courts on section 32(3) of the 1974 Act which allowed local authorities to withhold documents on the ground of public interest.[42] That shortcoming has been remedied by amending legislation.[43] A second weakness (shared by other Commissioners, with the exception of the Commissioner for Complaints in Northern Ireland) is that they have no power to remedy injustices caused by maladministration. Local authorities are merely required to consider any reports submitted to them and notify the appropriate commissioner what action, if any, they propose to take. In a number of cases where commissioners found maladministration local authorities have refused to take any action.[44]

[39] D. Foulkes, "The Work of the Local Commissioner for Wales" [1978] P.L. 264; D. C. M. Yardley, "Local Ombudsmen in England" [1983] P.L. 522; *The Local Ombudsman—a review of the first five years* (Justice Report, 1980).

[40] The Local Government (Scotland) Act 1975 similarly established a Commissioner for Local Administration in Scotland. In Northern Ireland local government is within the jurisdiction of the Commissioner for Complaints. Under the Local Government Act 2000 the power to investigate unethical behaviour which in England is vested in the Standards Board is, in the case of Wales, vested in the Commission for Local Administration, ss.58–74.

[41] [1979] Q.B. 287, CA.

[42] *Re a Complaint against Liverpool City Council* [1977] 1 W.L.R. 995, DC.

[43] Local Government Planning and Land Act 1980, s.184.

[44] 92 cases (out of 1,500) over 10 years.

The Local Government Act 2000, section 92 extends provisions for dealing with maladministration by all owing local authorities to make a payment or provide some other benefit to a person whom they think has been or may have been adversely affected by any action taken by them or on their behalf which may have amounted to maladministration. Thus a complainant may be compensated without approaching the commissions for local administration. The power, here, to compensate relates to being "adversely affected" whereas the commission's jurisdiction relates to "injustice" caused by maladministration, presumably a stricter requirement than that of being adversely affected.

Conclusion

34–018 There can be no doubt of the continuing popularity of the Ombudsman concept. It is offered as a solution to every problem. The banks and insurance companies have, for instance, introduced their own voluntary systems of dealing with complaints by an Ombudsman.

Statutory ombudsmen have been created to deal with complaints in various areas relating to financial services, now under the one umbrella of the Financial Services and Markets Act 2000. The Courts and Legal Services Act 1990 created two ombudsmen, a Conveyancing Ombudsman to deal with complaints about licensed conveyancers and a Legal Services Ombudsman to deal with complaints relating to legal professional bodies. The Pensions Ombudsman created by the Social Security Act 1990 is in fact a tribunal with a power to make legally binding decisions and is subject to the jurisdiction of the Council on Tribunals.[45] The very word is used indiscriminately to describe almost anyone with a power to investigate complaints—for example the non-statutory Independent Complaints Adjudicator to whom prisoners may complain is often so called.[46] To the widespread national adoption of the concept[47] can now be added its adoption by the European Union. The Treaty of Maastricht provided for the appointment of an Ombudsman by the European Parliament: Article 195 [138e]. Citizenship of the Union includes the right to raise complaints with the Ombudsman: Article 21 [8d].

But it should not be overlooked how firmly governments resist attempts to extend the jurisdiction of the Parliamentary Commissioner into the very areas where it might be thought that he could be effective. It is difficult to avoid the feeling that the "filtering" or "screening" of complaints by members of Parliament and councillors has little to do with concern for the best interests of the complainants. Nor should it be forgotten that the provision of a remedy may be a poor substitute for the elimination of a problem.

[45] A. T. Brady [1991] P.L. 7. Pensions Schemes Act 1993, ss.145–151.

[46] *ante*, para. 24–032. A distinct appointment from that of Chief Inspector of Prisons, the first two holders of which office, Judge Stephen Tumin and Sir David Ramsbotham, caused successive governments embarrassment by their damning reports of conditions in prisons.

[47] *ante* para. 34–006 n. 15.

Part VII

The Commonwealth

CHAPTER 35

DEPENDENT TERRITORIES[1]

1. THE BRITISH ISLANDS

THE British Islands consist of the United Kingdom, the Isle of Man and the Channel Islands.[2] The Isle of Man and the Channel Islands are neither part of the United Kingdom nor are they colonies—but they are part of Her Majesty's dominions, and persons born in them are British citizens by birth. For the purposes of the British Nationality Act 1981 they are treated as part of the United Kingdom. **35–001**

The United Kingdom's ratification of the European Convention on Human Rights in 1951 extended to the Channel Islands and the Isle Man. The unwillingness of the Isle of Man to abandon corporal punishment of juvenile offenders despite the decision of the Human Rights Court in *Tyler v. United Kingdom*[3] led to the abolition of the right of individual petition in the case of the island.

The inclusion of the Channel Islands and the Isle of Man in the EEC presented constitutional, administrative and economic difficulties. Accordingly, after consultation with them, the United Kingdom sought for the islands arrangements short of full membership, and proposed a form of association under Article 238 of the Treaty of Rome, now Article 310.

Isle of Man[4]

The Isle of Man was formerly under the suzerainty of the Kings of Norway and Scotland, but Kings of England exercised some degree of control over the island after 1290 (Edward I), and the island finally came into the allegiance of the English Crown in 1399 (Henry IV). It was held more or less independently[5] by the Stanley family (Earls of Derby) as Lords of Man under letters patent until 1736, when it passed to the Duke of Atholl. The Crown bought out the Duke's regalities and customs rights in 1765.[6] To these were added the ecclesiastical patronage and other general manorial rights in 1825.[7] The island has retained its ancient internal constitution as modified by statute,[8] and has legislative autonomy **35–002**

[1] The title to this Chapter is used as a convenient description for a number of territories of different legal status, despite the Government's decision to refer for the future to the remaining colonies as overseas territories rather than dependent territories.

[2] Interpretation Act 1978, s.5 and Sched. 1.

[3] (1978) 2 E.H.R.R 1. See *supra* para. 23–032.

[4] See *The British Commonwealth: Development of its Laws and Constitutions: 1 The United Kingdom*, pp. 485 *et seq.* (by D. C. Holland); *Report of the Commission on the Isle of Man Constitution* (1959) (Chairman, Lord MacDermott); *Report of the Joint Working Party on the Constitutional Relationship between the Isle of Man and the United Kingdom* (1969); *Royal Commission on the Constitution 1969–1973* (Kilbrandon) (1973) Cmnd. 5460, I, Part XI; G. Kinley, "The Isle of Man," *Guardian Gazette*, January 25, 1978.

[5] Although appeal lay to the Privy Council: *Christian v. Corrin* (1716) 1 P.Wms. 329.

[6] Isle of Man Purchase Act 1765.

[7] Duke of Atholl's Rights, Isle of Man, Act 1825.

[8] e.g. Isle of Man Constitution Acts 1961 to 1971, passed by the Manx legislature largely to implement recommendations of the MacDermott Commission (1959).

in most respects. The island is, however, in strict theory subject to the authority of the United Kingdom Parliament, although Westminster legislation relating to the Isle of Man is, in practice, restricted to such matters as defence, postal services, wireless telegraphy, copy-right, merchant shipping and civil aviation.[1] Not being part of the United Kingdom[2] it is not bound by Acts of Parliament except where it is included either expressly or by necessary implication.[3] Statutes may be extended to the Island by Order in Council.

The legislature is known as the Court of Tynwald.[4] Legislation may be initiated in either branch of the legislature—Legislative Council and House of Keys,[5] and is debated in each branch separately, although there are provisions for conferences. Bills are signed in Tynwald at joint sittings of the branches; they require the confirmation of the Sovereign in Council and a declaration of the Royal Assent in Tynwald.[6]

The Queen's representative is the Lieutenant-Governor. A confidential Executive Council was set up in 1961 to advise the Lieutenant-Governor on matters of principle, policy and legislation. The Home Secretary is the main channel of communication between the United Kingdom and the Isle of Man, and advises the Lieutenant-Governor.

The island has its own system of courts. Manx land law is largely Norse in origin and is unique. Appeal lies to the Judicial Committee of the Privy Council from the Staff of Government Division.[7]

The Channel Islands[8]

35–003 The Channel Islands formed part of the Duchy of Normandy, and remained to the King of England when the rest of Normandy reverted to France in the thirteenth century. They are not part of the United Kingdom.[9] The common law

[1] For a recent example see the Isle of Man Act 1979 which deals *inter alia* with law relating to customs and excise. Over 700 statutes which had been repealed in the United Kingdom but, due to oversight, not in the Isle of Man were repealed by the Statute Law Revision (Isle of Man) Act 1991.

[2] *Davison v. Farmer* (1851) 6 Ex. 242.

[3] *Sodor and Man (Bishop) v. Derby (Earl)* (1751) 2 Ves.Sen. 337.

[4] Probably derived from Norse *Thingvollr* or *Thing-Wall* = Parliament field or meeting-place of the assembly.

[5] The original of the term "Keys" is obscure; it is perhaps a corruption of a Manx Gaelic expression meaning "the twenty-four." The earliest use of the word "Keys" seems to have been in 1585.

[6] Before the Acts of Tynwald (Emergency Promulgation) Act 1916, Acts had to be promulgated in English and Manx at Tynwald Hill, St John's, before they became law. Since the Act is 3 they cease to have force if they are not promulgated in the customary manner within 12 months. The Royal Assent was signified in 1982 by the Lieutenant-Governor instead of the Queen in Council as previously.

[7] For the history of appeals, see J. H. Smith, *Appeals to the Privy Council from the American Plantations*, pp. 171–172. For an example, see *Franklana v. The Queen* [1987] A.C. 576, PC.

[8] See L. A. Sheridan, *The British Commonwealth: Development of its Laws and Constitutions: 1 The United Kingdom*, pp. 141 *et seq.*; *Royal Commission on the Constitution 1969–1973* (Kilbrandon), (1973) Cmnd. 5460, I, Pt. XI; *Report of Committee of Privy Council on Proposed Reforms in the Channel Islands* (1947) Cmd. 7074; F. De L. Bois, "Parliamentary Supremacy in the Channel Islands" [1983] P.L. 385; J. H. Le Patourel, *The Medieval Administration of the Channel Islands, 1199–1399*; *Minauriers and Ecrenos Case*, I.C.J. Reports (1953) p. 47.

[9] *Navigators and General Insurance Co v. Ringrose* [1962] 1 W.L.R. 173; [1962] 1 All E.R. 97, CA: (commercial document); *Rover International Ltd v. Cannon Films Sales Ltd* [1987] 1 W.L.R. 1597 at 1603 ("beyond the seas" for the purpose of the Rules of the Supreme Court made under the Civil Evidence Act 1968). In *Re a Debtor ex p. Viscount of the Royal Court of Jersey* [1981] Ch. 384, Goulding J. held that the Royal Court of Jersey is a "British Court elsewhere" for the purpose of the Bankruptcy Act 1914, s.122. In *Chloride Ltd v. F & W Freight Ltd* [1989] 1 W.L.R. 823 the Court of Appeal held that a contract of carriage of goods between Manchester and Jersey was not a contract

of the Channel Islands is still the ancient custom of the Duchy, the principal authority being *Le Grand Coustumier du Pays et Duché de Normandie* which was compiled in the thirteenth century.

The islanders, though loyal to the Crown, affect to recognise the Sovereign only in right of the Duchy of Normandy, and they deny the right of the United Kingdom Parliament or the Queen in Council to legislate for them without the consent of the States (the legislatures) confirmed by registration in the local Royal Court.[18] There is no real doubt of the legislative competence of Parliament, which legislates for the islands in such matters as customs and excise, the armed forces, extradition, fisheries, telegraphs, Post Office, copyright, merchant shipping and civil aviation; but the efficacy of legislation by prerogative Orders in Council is uncertain. In practice, the consent of the States (legislatures) is obtained and the Act or Order is registered, the islanders asserting—contrary to the British view—that it is the local registration which gives it legal effect. Statutes may be extended to the Islands by Order in Council.

The Crown appoints a Lieutenant-Governor for each of the Bailiwicks of Jersey and Guernsey,[19] who summon the States and have powers, subject to the Home Secretary and the Secretary of State for Defence, in relation to the preservation of peace and defence. The Home Secretary was traditionally the channel of communication between the Channel Islands and the Crown, a role recently transferred to the Lord Chancellor's Department.

Appeal lies as of right in civil cases from the courts of Jersey and Guernsey to the Judicial Committee of the Privy Council.[20] There is no appeal to the Judicial Committee as of right in criminal cases; but it was held in *Renouf v. Attorney-General for Jersey*[21] that the prerogative power to grant special leave to appeal had never been relinquished, although special leave would only be granted where there was a grave miscarriage of justice.

Both the Isle of Man and the Channel Islands were named in a report published in June 2000 by the Organisation for Economic Co-operation and Development among a group of 35 tax havens which are alleged to harm international trade and investment by offering shelter to tax dodgers. The United Kingdom government welcomed the report but it is not clear what power it has to force changes.

II. Territories of the Commonwealth[22]

The British Empire

This name has now fallen into disuse. For a long time it was employed to mean all territories over which the Crown exercised or claimed some degree of control. **35–004**

of carriage between two countries for the purposes of the international convention to which effect was given in the United Kingdom by the Carriage of Goods by Road Act 1965. To hold otherwise would make nonsense of the Convention; it was "not helpful" to look at the general law to decide the question: *per* Dillon L.J. at 827.

[18] See further R. E. M., "*The Jersey Incident of 1889: Re Daniel*" (1984) 100 L.Q.R. 41.

[19] Alderney and Sark are dependencies of Guernsey. See A. R. de Carteret, *The Story of Sark* (1956).

[20] For the early history of appeals, see J. H. Smith, *op. cit.* pp. 4 *et seq.*, 63 *et seq.*

[21] [1936] A.C. 445. For later cases, see *Quin v. The King, The Times*, November 8, 1951; *Manley-Casimir v. Att.-Gen. for Jersey, The Times*, February 12, 1965 (Jersey law and practice apply); *Vaudin v. Hamon* [1974] A.C. 569 (application of *La Charte aux Normans* 1314 to law of property in Sark).

[22] See further on general matters, Sir William Dale: *The Modern Commonwealth* (1983). Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) Chaps 1 and 2; S. A. de Smith, *The*

viz. the British Islands (including the United Kingdom), British India, British colonies, protectorates, and those self-governing colonies which in the early part of this century came to be known as the Dominions. The expression probably included protected states but not mandated (later trust) territories.

The sixteenth and seventeenth centuries saw some colonial expansion, mainly for the purpose of trade. English colonial expansion was the result of private enterprise and not government policy. If British subjects took possession of territory by settlement, the authority of the Crown extended to them: if they took by conquest, they acquired for the Crown.[23] The earliest colonial constitutions were letters patent to a proprietor or company, authorising him or it to trade and exercise jurisdiction within the area. "Royal" colonies, in which the direct governmental authority was the Crown, came later, the first being Virginia in 1624. It was clear that Parliament had jurisdiction in settled colonies, and the common law extended to settlers all the constitutional rights of Englishmen. The prerogative was more extensive in conquered colonies, which in the first instance the King could govern as he pleased, but the King could not without Parliament take away constitutional rights that he had granted.[24] Central political control over the colonies was vested in the Privy Council, which formed committees for trade and plantations. Parliament interfered chiefly in revenue matters and the passing of Acts of trade and navigation.

With the American declaration of independence in 1776 Britain lost 13 North American colonies. She learned by this experience, and retained and developed "the second British empire," which expression covers the period from the loss of the American colonies to the development of colonial self-government in the middle of the nineteenth century. The main common law principles relating to colonial government were established by the middle of the eighteenth century in such cases as *Campbell v. Hall*.[25]

The expression "the third British Empire" is sometimes used to describe the period of the development of self-government in certain colonies, *e.g.* in Canada, Australia and New Zealand, from the middle of the nineteenth century to the formal recognition of Dominion status by the Statute of Westminster 1931; and the name "fourth British Empire" has been given to the looser association of the Commonwealth since the end of the Second World War.[26]

Her Majesty's dominions

35–005 These are all territories under the sovereignty of the Crown. A synonym sometimes used is "British territory." The expression would not ordinarily include protectorates[27] or trust territories, although it might do so for the purposes of particular statute.[28]

Vocabulary of Commonwealth Relations (1954). There are statutory definitions for particular purposes of some of the expressions used in this section.

[23] *Campbell v. Hall* (1774) 1 Cowp. 204; (1774) 20 St.Tr. 287, 322–323.

[24] *Calvin's Case* (1609) 7 Co.Rep. 1 at f. 17b. Later this was taken to mean, when representative institutions had been granted.

[25] (1774) 1 Cowp. 204.

[26] *post*, Chap. 36.

[27] *cf.* Roberts-Wray, *op. cit.* p. 23, where sovereignty in the sense of ownership is distinguished from sovereignty in the sense of governmental power. In the latter sense, the Crown may be said to have sovereignty in protectorates.

[28] *e.g.* reciprocal enforcement of foreign judgments.

At common law it was said that the Crown was one and indivisible throughout the Sovereign's dominions, and the King was everywhere present in his dominions.[29] Thus in *Williams v. Howarth*[30] the Privy Council held that the debt due from the Government of New South Wales in respect of the pay of a soldier who had fought in the Boer War (when New South Wales was a colony) was discharged by the payment of a smaller amount from the Imperial Government. But in *R. v. Secretary of State for Foreign and Commonwealth Affairs ex p. Indian Association of Alberta*,[31] the Court of Appeal held that the doctrine of the indivisibility of the Crown no longer represented the law, and hence an English Court could not grant to the Indian peoples of Canada a declaration relating to the treaty obligations entered into by the Crown. In each of its realms the Crown is now answerable only for obligations relating to that realm. Lord Denning M.R. thought that while it had been "a settled doctrine of constitutional law that the Crown was one and indivisible" in the eighteenth and nineteenth centuries,[32] a change had occurred in "the first half of this century—not by statute—but by constitutional usage and practice."[33] The Master of the Rolls referred in particular to the definition of the status of the relationship of the United Kingdom and the Dominions adopted in 1926 at the Imperial Conference. Kerr and May L.JJ. traced the recognition of the divisibility of the Crown to the nineteenth century. In support of their view they relied on the decision of Page-Wood V.-C. in *Re Holmes*[34] that a petition of right relating to land in Canada could not be heard in an English court.

British possessions

They are any parts of Her Majesty's dominions exclusive of the United Kingdom.[35] **35–006**

British colonies

These are any parts of Her Majesty's dominions excluding the British Islands, and excluding independent members of the Commonwealth, their provinces and states.[36] Formerly persons born in a British colony were citizens of the United Kingdom and Colonies by birth. After the coming into effect of the British Nationality Act 1981 such persons become British Dependent Territories citizens or British Overseas citizens.[37] Acquisition of British Dependent Territories citizenship by birth after the commencement of the 1981 Act is limited to the children of a parent already possessing that citizenship or being settled in a **35–007**

[29] See *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920) 28 C.L.R. 129; *Re Bateman's Trusts* (1873) L.R. 15 Eq. 355; *Re Oriental Bank Corpn. ex p. The Crown* (1884) 28 Ch.D. 643. *cf. post*, para. 36–022.

[30] [1905] A.C. 551. See H. V. Evatt, *The Royal Prerogative* (1987) Chap. 9.

[31] [1982] Q.B. 892. CA; pet. dis. 937 [not for] "any technical or procedural grounds [but because of] the accumulated reasons given in the judgment of the Court of Appeal": *per* Lord Diplock. See further, Paul Jackson, "The Crown: Some Recent Proceedings" (1982) 7 *Holdsworth Law Rev.* 91.

[32] At p. 911 and p. 917.

[33] At p. 916.

[34] (1861) 2 John & H. 527. See also *Att.-Gen. v. Great Southern and Western Ry Co of Ireland* [1925] A.C. 754; *R. v. Secretary of State for the Home Department ex p. Bhurosah* [1968] 1 Q.B. 266; *Mellenger v. New Brunswick Corpn.* [1971] 1 W.L.R. 604.

[35] Interpretation Act 1978, s.5 and Sched. 1.

[36] *ibid.*

[37] ss.23 and 26.

dependent territory.[38] Inhabitants of Gibraltar[39] and the Falkland Islands[40] are, exceptionally, entitled to British citizenship.

British protectorates

35–008 These were territories under the protection of the Crown. They were not British territory, and did not form part of Her Majesty's dominions. The Crown was responsible for their defence and external affairs. Internally some were administered in a similar way to colonies ("protectorates" in the strict sense).[41] These are now all independent. Others were administered, with varying degrees of British supervision, by their native rulers ("protected states").[42] They are specified in the British Protectorates, Protected States and Protected Persons Order 1982.[43] Their inhabitants, if they have not acquired the citizenship of an independent Commonwealth country have the status of British Protected Persons.[44]

British trust territories

35–009 These were former mandated territories whose administration was entrusted to the Crown by the allied and associated powers in 1919 to be executed on behalf of the League of Nations. After the last war they were administered under the name of trust territories by the United Kingdom or other Commonwealth governments on behalf of the Crown in accordance with the Charter of the United Nations. Trust territories were not British territory, and did not form part of Her Majesty's dominions.[45] All have now acquired independence. Their inhabitants, unless they have acquired the citizenship of an independent Commonwealth country may have the status of British Protected Persons.[46]

Dependent territories

35–010 This was a non-technical term which came into use to refer to all territories in the Commonwealth which were not independent. It is a convenient way of referring to colonies, protectorates, protected states and trust territories. It has received statutory recognition in the British Nationality Act 1981, s.50(1).[47]

[38] s.15. See similar restrictions on acquisition of British citizenship: *ante* para. 23–007. Restoration of British citizen was promised in a White Paper (Cm 4264) in 1998: *post* para. 35–032.

[39] British Nationality Act 1981, s.5.

[40] British Nationality (Falkland Islands) Act 1983.

[41] Where the Crown had acquired jurisdiction in a foreign country by treaty, grant or other lawful means, this jurisdiction was exercised under the Foreign Jurisdiction Act 1890 (replacing the Foreign Jurisdiction Act 1843): see *R. v. Ketter* [1940] 1 K.B. 787; *Nyali Ltd v. Att.-Gen.* [1956] 1 Q.B. 1, CA; *Ex p. Mwenya* [1960] 1 Q.B. 241, CA. See further Hall, *Foreign Jurisdiction of the British Crown*; Jenkyns, *British Rule and Jurisdiction beyond the Seas*.

[42] *Mighell v. Sultan of Johore* [1894] 1 Q.B. 149; *Duff Development Co v. elantan Government* [1924] A.C. 797, HL; *Sultan of Johore v. Abubakar Tunku Aris Bendahar* [1952] A.C. 318.

[43] No. 1070, made under the British Nationality Act 1981; amended by British Nationality (Brunei) Order 1983, No. 1699.

[44] British Nationality Act 1981, s.38 and s.50(1).

[45] H. Duncan Hall, *Mandates, Dependencies and Trusteeship*; Clive Parry, "The Legal Nature of Trusteeship Agreements" (1950) B.Y.I.L. 164.

[46] Note 44, *ante*.

[47] Sched. 6 lists as British Dependent Territories: Anguilla, Bermuda, British Antarctic Territory, British Indian Ocean Territory, Cayman Islands, Falkland Islands and Dependencies, Gibraltar, Hong Kong, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St Helena and Dependencies, The Sovereign Base Areas of Akrotiri and Dhekelia (as defined in the Cyprus Act 1960, s.2(1)), Turks and Caicos Islands and Virgin Islands.

Dependencies

This too was not a technical term.[48] It was sometimes used in the same sense as "dependent territories" (*ante*), but was not popular there. It is better applied to miscellaneous territories, such as a territory dependent placed under the authority of another (*e.g.* Ascension Island and Tristan da Cunha as dependencies of St. Helena); British possessions which are so small as to be virtually unadministered (*e.g.* the Great and Little Basses and Minicoy); and similar outposts under the jurisdiction of independent members of the Commonwealth. It has received formal recognition by its use in the British Nationality Act 1981. **35–011**

The Commonwealth

In 1884 Lord Rosebery said in a speech in Australia that "the Empire is a Commonwealth of Nations."[49] The name "British Empire" began to fall into disfavour between the Wars in those countries that were acquiring independence, and "the British Commonwealth of Nations"[50] or "British Commonwealth"[51] came into use, either as synonymous with the whole British Empire, or as referring to the independent parts as in "the British Empire and Commonwealth." The "British Commonwealth" then ousted "the British Empire" almost completely in popular usage. The Asian and African members, however, preferred "the Commonwealth"[52] simply and this last name on account of its shortness has come into general favour, except perhaps in the Commonwealth of Australia where it is ambiguous. The term now usually includes dependent territories as well as independent members. **35–012**

Independent members of the Commonwealth[53]

This expression covers—in addition to the United Kingdom—those countries still in the Commonwealth whose "Dominion status" was recognised by the Statute of Westminster 1931 (now Canada,[54] the Commonwealth of Australia[55] and New Zealand); and those former dependent territories that have since been granted independence by special statutes, *e.g.* India, Sri Lanka (Ceylon), Ghana (Gold Coast) and Nigeria, and whose membership has been agreed by the other members of the Commonwealth. Sometimes they are called "members of the Commonwealth" or "Commonwealth countries." Citizens of these countries are Commonwealth citizens under the British Nationality Act 1981, section 3. **35–013**

It also now includes Mozambique and Cameroon which joined the Commonwealth in 1995 without any former links with the Crown.

[48] *Re Marvon-Wilson's Estate* [1912] 1 Ch. 55, 66, *per* Farwell L.J.; *Re Brassey's Settlement* [1955] 1 W.L.R. 192; [1955] 1 All E.R. 577.

[49] "I say that these are no longer colonies in the ordinary sense of the term, but I claim that this is a nation. . . . There is no need for any nation, however great, leaving the Empire, because the Empire is a Commonwealth of Nations": Robert Rhodes James, *Rosebery* (1963), p. 196. Lloyd George also used this expression at the Imperial War Cabinet in 1917.

[50] Anglo-Irish Treaty 1921.

[51] J. X. Merriman (Prime Minister of Cape Colony) in the 1880s; General Smuts at the Imperial War Conference 1917.

[52] Nehru, 1948.

[53] See *post*, Chap. 36.

[54] The provinces of Canada and the states of Australia are *sui generis*: see *Mellenger v. New Brunswick Development Corporation* [1971] 1 W.L.R. 604, CA; *cf.* Canada Act 1982 and Australia Act 1986.

[55] *ibid.*

III. British Colonies[56]

Introduction

35–014 The Crown is immediately related to a colony[57] as Sovereign. Colonies are under the sovereignty of the Crown both in the sense of governmental power and in the sense of ownership or belonging.[58] The duty of the Crown to afford protection to citizens of colonies is one of imperfect obligation and is unenforceable in the courts.[59]

The constitution of a colony is contained in several documents. The basic instrument is usually an Order in Council or letters patent, but sometimes an Act of Parliament. This provides for the government of the colony, and generally includes provisions relating to the composition and powers of the legislative and executive councils and the superior courts. Letters patent constitute the office of Governor and define his duties and powers. Royal instructions, issued from time to time by the Secretary of State, prescribe the manner in which the Governor is to exercise his functions. A Royal Commission appoints the Governor for the time being.

The central purpose of British colonial policy at the end of the last war was stated to be to guide the colonial territories to responsible self-government within the Commonwealth in conditions that ensure to the people both a fair standard of living and freedom from oppression from any quarter. The Secretary of State is ultimately responsible for their government, but this is discharged by a Governor or Administrator working through the civil service. The remaining dependent territories are now few. They include the colonies of Gibraltar,[60] the Falkland Islands,[61] St Helena[62] in the South Atlantic, Pitcairn[63] in the Pacific, and several

[56] Dale, *op. cit.* pp. 305 *et seq.* Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966); *Changing Law in Developing Countries* (ed. J. N. D. Anderson, 1963); Sir Hilary Blood, *The Smaller Territories* (1958); Sir Ivor Jennings, *The Approach to Self-Government* (1956); Sir Keith Hancock, *Colonial Self-Government* (1956); O. Hood Phillips, "The Making of a Colonial Constitution" (1955) 71 L.Q.R. 51.

For the history, see Holdsworth, *History of English Law*, Vol. XI pp. 35–139, 229–267; A. B. Keith, *Responsible Government in the Dominions* (2nd ed. 1928); C. E. Carrington, *The British Overseas* (1950); Sir Alan Burns, *In Defence of Colonies: John Bowle, The Imperial Achievement* (1974); W. D. McIntyre, *The Commonwealth of Nations: Origin and Impact* (1977). See also *Forsyth's Cases and Opinions on Constitutional Law* (1869); *Opinions on Imperial Constitutional Law*, ed., D. P. O'Connell and A. Riordan (Melbourne, 1971). For future developments, see *Partnership for Progress and Prosperity: Britain and Overseas Territories* (1988, Cm. 424).

[57] *ante*, para. 35–007.

[58] See, *e.g. Tito v. Waddell (No. 2)* [1977] Ch. 106 (Megarry V.-C.); obligation of Crown in respect of extraction of phosphates in Ocean Island was governmental, not fiduciary; *Buck v. Att.-Gen.* [1965] Ch. 745, CA: if Crown were a trustee of certain lands in Sierra Leone, such trust could not be enforced in English courts.

[59] *Mutasa v. Att.-Gen.* [1980] Q.B. 114.

[60] Ceded by Spain under the Treaty of Utrecht in 1713. Spain for some years has been agitating for its return.

[61] Sovereignty long disputed by Argentina. The British Government insists that the United Kingdom title is derived from early settlement, reinforced by formal claims in the name of the Crown, and completed by open, continuous, effective and peaceful possession, occupation and administration of the islands since 1833 (save for the 10 weeks of forcible Argentine occupation in 1982). Further, the exercise of sovereignty has consistently been shown to accord with the wishes of the islanders: *Fifth Report from Foreign Affairs Committee*, Session 1983–84; *Falkland Islands: Observations by Her Majesty's Government* (H.M.S.O., 1985).

[62] Settled in 1659; recaptured from the Dutch after short interruption in 1673.

[63] Settled in 1790 by mutineers from *H.M.S. Bounty*.

Caribbean islands acquired in various ways.[64] The total population of all these territories is in the region of 189,000—ranging from over 60,000 in Bermuda to 54 in Pitcairn.

Hong Kong

By contrast, the former colony of Hong Kong had a population of around six million. The territory consisted of land ceded by China in 1842 and 1860 and partly of land leased in 1898 for 99 Years. With the approaching end of the lease negotiations began between China and the United Kingdom over the future of the colony. The agreement between the two states was given effect in the United Kingdom by the Hong Kong Act 1985 under which British sovereignty over the entire territory would end on July 1, 1997.[65] A new type of citizenship—British National (Overseas)—was created for the inhabitants. This citizenship gave no right of abode but it did confer a right to a British passport. Subsequent unease at the plight of certain groups of residents in Hong Kong after the handing-over to China and pressure exerted particularly in the House of Lords led to three further statutes. The British Nationality (Hong Kong) Act 1990 authorised the Secretary of State to register up to 50,000 persons and their dependents as British citizens, on the recommendation of the Governor of Hong Kong. It was hoped, or believed, that the security of possessing British citizenship would encourage this group (whose presence was important for the territory's economic development) to stay in Hong Kong. The Hong Kong (War Wives and Widows) Act 1996 conferred British citizenship on a group of women believed to number between 50 and 60 by virtue of having been married to a husband whose war service would have entitled her to residence in the United Kingdom if still so married. Finally the British Nationality (Hong Kong) Act 1997 conferred British nationality on those British National (Overseas) citizens who failed to acquire Chinese nationality because of their non-Chinese ethnic origins. This group was estimated to number between 5000 and 8000 and it was argued that a moral obligation was owed to them because they were largely descendants of people who had settled in Hong Kong in the service of the Crown as soldiers and civil servants from other parts of what was then the Empire, particularly from India. **35–015**

In pursuance of the dual policy of political advancement and economic development, the United Kingdom Parliament has provided large sums of capital for economic development and social welfare in the colonies and other dependent territories. Political changes in the direction of self-government or independence have indeed been so rapid in recent years that they have outstripped economic and social development: and the constitutions of particular territories are nowadays so transitory that it is impracticable to describe them here individually.

Colonies may be classified according to the manner in which they were acquired, which may have been: (i) by *settlement* in territory where there was no population or indigenous peoples, or (ii) by *conquest or cession* of territory having an organised society. (The terms of any treaty of cession do not give the inhabitants of a colony rights which are enforceable in the local courts or by the

[64] The surviving colonies are described in H. Ritchie, *The Last Pink Bits* (1997).

[65] Reports on the implementation of the Sino British Joint Declaration that led to the present arrangement (One country, Two systems) are made at six monthly intervals to Parliament by the Secretary of State: *e.g.* Cm. 5067, covering July-December 2000.

Privy Council.[66]) This distinction, which came to be recognised in the seventeenth century,[67] affects the constitutional position of the colony, especially the legislative power. It also determines the system of private law that prevails in a given colony. But both the private and the public law are subject to legislative changes, so that this distinction is now largely of historical interest.

A more modern classification is that into (i) colonies *possessing responsible government* (commonly called "self-governing colonies"), and (ii) colonies *not possessing responsible government* ("non-self-governing colonies," formerly known as "Crown colonies"). This distinction rests on whether or not the executive is responsible for most purposes to the colonial legislature (to the lower House if that legislature is bicameral). Any remaining non-self-governing territories would be those with very small populations.

Settled colonies[68]

35–016 Settlement might be by: (i) occupation by British settlers under the authorisation of the Crown, *e.g.* Canada (excluding Quebec and Ontario), the Australian colonies[69] and some of the West Indies; (ii) recognition by the Crown, as British territory, of unauthorised settlements by British subjects, *e.g.* British Honduras, the Pitcairn Islands and Tristan da Cunha; or (iii) formal annexation of uninhabited islands or uninhabitable Arctic or Antarctic areas, *e.g.* some of the Pacific Islands, the Isles of Northern Canada, the Ross Dependency of New Zealand, the Falkland Islands and the British Antarctic Territory.

British settlers took with them the common law of England[70] and the statute law as existing at the time of settlement. Subsequent Acts of Parliament did not apply to the colony unless they were expressed to apply to that colony or to colonies generally.[71] The law, whether enacted or unenacted, that the settlers carried with them was only such as was applicable to their new situation and suitable to the condition of a young colony.[72]

Conquered and ceded colonies[73]

35–017 Cession was usually the result of conquest. The varieties of acquisition by these two means were: (i) conquest only; (ii) conquest on terms of surrender; (iii) cession by treaty with a civilised state, *e.g.* Grenada; (iv) voluntary cession by the inhabitants, *e.g.* Malta, Fiji. The Privy Council in *Sammut v. Strickland*[74] said that colonies acquired by voluntary cession, or by cession after conquest,

[66] *Winfat Enterprise (H.K.) Co. Ltd v. Att.-Gen. of Hong Kong* [1985] A.C. 733, PC.
[67] See, *e.g. Calvin's Case* (1709) 7 Co.Rep. 1; *Blankard v. Galdy* (1693) 2 Salk. 411.
[68] As this topic is now mainly of historical interest, no distinction is made in the examples given between existing colonies and territories that have acquired independence since the last war.
[69] Penal settlements may have constituted a separate kind of colony: see *per* Eggleston J. in *Newbery v. The Queen* [1965] 7 F.L.R. 34, 39; and see (1965) 11 A.L.J. 409 *et seq.*
[70] *Pictou Municipality v. Geldert* [1893] A.C. 524. *Tito v. Waddell (No. 2)* [1977] Ch. 106, 132, *per* Sir Robert Megarry V.-C. "The English concept of perpetuities arrived at Ocean Island with the flag, a blessing that the Banabans may not then have appreciated"; (*ibid.* at p. 220).
[71] *Memorandum* (1722) 2 P.Wms. 74; *New Zealand Loan Co. v. Morrison* [1898] A.C. 349.
[72] *Whicker v. Hume* (1858) 7 H.L.C. 124, 161, *per* Lord Cranworth. In settled colonies where there was a small indigenous population, the native law might still be applied to the natives, *e.g.* the Maoris of New Zealand: see *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* [1941] A.C. 308, PC. New Zealand should perhaps be regarded as having been voluntarily ceded by the inhabitants.
[73] As this topic is now mainly of historical interest, no distinction is made here between existing colonies and territories that have acquired independence since the last war.
[74] [1938] A.C. 678.

were in the same position in British constitutional law as colonies acquired by conquest merely.

In conquered or ceded colonies the existing legal system was retained unless and until it was altered or abrogated by the Crown (*Campbell v. Hall per* Lord Mansfield C.J.[75]). The legal system might, for example, be Roman-Dutch law, customary French law, the Code Napoléon, Hindu law, Mohammedan (Islamic) law or native African custom. Existing laws were abrogated if they were: (i) contrary to Acts of Parliament, whether general or particular, extending to the colony[76]; (ii) contrary to British constitutional principles[77]; or (iii) repugnant to the fundamental religious or ethical principles of Europeans.[78]

English law was introduced by Act of Parliament or local legislation into some colonies acquired by conquest or cession. This refers to the common law and statute law as they existed at the date of the application of English law to the colony or at some specified date.[79]

Legislation by the United Kingdom Parliament

35–018 There has never been any real doubt in British constitutional law about the competence of Parliament to legislate for the colonies, nor, in view of the doctrine of the supremacy of Parliament, are there any legal restrictions on this power. From the middle of the nineteenth century, however, there was a convention against Parliament legislating without their consent for the self-governing colonies that became Dominions in 1931.[80] A similar convention came to apply in the present century to a newer group of self-governing colonies, including Southern Rhodesia, Malta and the Gold Coast (now Ghana). Any doubt there may have been as to how far Acts of Parliament passed after the foundation of a given colony applied to that colony were set at rest by section 1 of the Colonial Laws Validity Act 1865, which states that "an act of Parliament, or any provision thereof, shall . . . be said to extend to any Colony when it is made applicable to such Colony by the *express words or necessary intendment* of any Act of Parliament."

Where parliamentary authority is necessary or desirable for legislation in respect of colonies, Parliament usually prefers to authorise the issue of Orders in Council by the Crown. British Acts are used for matters of general concern, such as Admiralty jurisdiction, aerial navigation, armed forces, copyright, currency, extradition, foreign enlistment, fugitive offenders, international treaties, merchant shipping, nationality and citizenship, official secrets, reciprocal enforcement of judgments, and territorial waters jurisdiction; and also for constitutional changes such as grant of independence or where more than one colony are concerned.

[75] (1774) 1 Cowp. 204 (Grenada); following *Calvin's Case* (1609) 7 Co.Rep. 1 and *Blankard v. Galdy* (1693) 2 Salk. 411.

[76] *Campbell v. Hall* (1774) *ante*.

[77] *Union Government Minister of Lands v. Whittaker's Estate* [1916] App.D.(S.A.) 203.

[78] *Calvin's Case* (1609) 7 Co.Rep. 1a 17; *Blankard v. Galdy* (1693) 2 Salk. 411; *Memorandum* (1722) 2 P.Wms. 75; *Campbell v. Hall, supra*. And see *R. v. Picton* (1804–10) 30 St.Tr. 225, 529, 883–955 (torture in Trinidad); *Fabrigas v. Mostyn* 20 St.Tr. 175, 181; (1773) 1 Cowp. 161 (Minorca); *Khoo Hooi Leong v. Khoo Chong Yeoh* [1930] A.C. 346, PC (legitimacy of children of second wife).

[79] *Att.-Gen. v. Stewart* (1815) 2 Mer. 143, 160; *R. v. Vaughan* (1769) 4 Burr. 2494.

[80] *post*, Chap. 36

Legislation by the Crown

35–019 This may take the form of Orders in Council, proclamations or letters patent. Here it is necessary to distinguish between settled colonies on the one hand and conquered or ceded colonies on the other.

For settled colonies

35–020 The prerogatives of the Crown, and the rights and immunities of British subjects, in colonies established by occupancy and settlement are similar to those that obtain in this country (*Kielley v. Carson*[81]). The Crown may constitute the office of Governor, and an Executive Council; appoint a Governor and issue royal instructions to him; establish courts of justice; and provide for the summoning of a legislature[82] with power to legislate and tax. In this way constitutions were first granted to Bermuda (1620) and most of the early American colonies. Any other form of constitution was thought to require at common law an Act of Parliament, as with the Australian colonies in the early nineteenth century. Apart from its constituent power, the Crown could not at common law legislate for settled colonies.[83]

As the Crown had no direct lawmaking power at common law, legislation by the Imperial Parliament was also necessary to empower the Crown to make laws for such sparsely populated settlements as the Falkland Islands and those on the West Coast of Africa. General statutory powers, exercisable by Order in Council, were given to the Crown for this purpose by the British Settlements Act 1887.[84] The Act applied in effect to settled colonies that had not already been granted representative institutions, such as the Straits Settlements.[85]

For conquered or ceded colonies

35–021 The Crown has a prerogative (common law) power to legislate for conquered or ceded colonies, exercisable by Order in Council, proclamation or letters patent. This includes the power to establish any kind of constitution. When a representative legislature[86] has been granted to a colony, the prerogative power to legislate cannot be exercised while such grant is in force, as that would be repugnant to the grant, unless (as is now almost invariably the case) such power is expressly reserved in the grant.[87] Where the power to amend a colonial constitution by prerogative is reserved, it may be exercised retrospectively.[88] If, however, the representative government is *revoked*, whether by Imperial Act or by a valid exercise of the prerogative (*i.e.* in the latter case, where power to revoke was reserved), the prerogative power to legislate revives, even though such power of resumption has not been expressly reserved.[89]

[81] (1842) 4 Moo.P.C. 63, 84–85 (Newfoundland).

[82] Roberts-Wray, *op. cit.* p. 152, points out that there is little judicial authority for the common opinion that would limit the prerogative to the setting up of a *representative* legislature.

[83] *Re Lord Bishop of Natal* (1865) 3 Moo.P.C.(N.S.) 115, 148, *per* Lord Chelmsford L.C.

[84] Consolidating the Settlements of Coast of Africa and Falkland Islands Act 1843 and the West coast of Africa and Falkland Islands Act 1860, and amended in 1945.

[85] Singapore, Penang and Malacca.

[86] A representative legislature is defined for the purposes of the Colonial Laws Validity Act 1865 as a colonial legislature comprising a legislative body of which (at least) one-half are elected by the inhabitants of the colony.

[87] *Campbell v. Hall* (1774), 1 Cowp. 204; Lofft 655; 20 St.Tr. 239 (K.B., *per* Lord Mansfield C.J.): duty on sugar exported from Grenada, a colony ceded by France

[88] *Abeyesekara v. Jayatilake* [1932] A.C. 260, PC.

[89] *Sammut v. Strickland* [1938] A.C. 678, PC; imposition of customs duties in Malta, a ceded colony, whose representative institutions had been revoked by Act of Parliament. And see *Newbery v. The*

Powers of colonial legislatures

Colonial legislatures are subordinate lawmaking bodies, and their powers depend on the statute, Orders in Council or letters patent granting them. They are invariably given a general power to make laws "for the peace, order and good government" of the colony. A colonial legislature is restricted as to the area of its powers, but within that area it is unrestricted and does not act as an agent or delegate.[90] No decision on the validity of colonial legislation appears to have turned on this expression, and the courts have never analysed the words. The expression is tautologous because "peace" and "order" come under "government," and "good" is not justiciable.[91] Such restrictions as there are on the making of laws with extraterritorial operation[92] are a deduction from the power to make laws "for" the territory, or perhaps for the government "of" the territory.[93] **35–022**

Colonial Laws Validity Act 1865

The early common law rule was the rather vague one that a colonial Act was invalid if repugnant to English law, and so some of the colonial constitutions that were enacted before 1865 provided that the legislative assembly should not pass legislation repugnant to (*i.e.* inconsistent with) the law of England. A controversy arose in the early 1860s when Boothby J. of South Australia passed adverse judgments on certain Acts passed by the South Australian legislature. Some he held contrary to English law, and others invalid because the Governor had not reserved them for the royal pleasure. The two Houses of the South Australian Parliament passed addresses asking for his removal. The matter went, in accordance with constitutional practice, to the Secretary of State for the Colonies, who asked the Law Officers (Sir Roundell Palmer and Sir Robert Collier) to advise. Their opinion was that the colonial Acts were invalid if contrary to United Kingdom Acts; that royal instructions to reserve assent to certain classes of Bills were instructions to the Governor only, not affecting the validity of such Acts if he gave his assent; but that, as regards repugnance to English law, a distinction was to be drawn between the "fundamental" principles and the non-fundamental rules of English law.[94] Such a distinction, if it ever existed, was complicated and no longer practicable. **35–023**

The result was the passing of the Colonial Laws Validity Act 1865, which

Queen [1965] 7 F.L.R. 34: power of Crown to place Norfolk Island under authority of Australia: Norfolk Island was occupied by the inhabitants of Pitcairn Island, who were descended from the mutineers of the *Bounty*.

[90] *Hodge v. R.* (1883) 9 App.Cas. 117, 131 (Ontario); *Powell v. Apollo Candle Co* (1885) 10 App.Cas. 282 (New South Wales); *Bribery Commissioner v. Ranasinghe* [1964] A.C. 172 (PC), *per* Lord Pearce.

[91] *cf. Riel v. R.* (1880) 10 App.Cas. 675 (Canada); *D'Emden v. Pedder* (1904) 1 C.L.R. 91, 109 (Tasmania); *Croft v. Dunphy* [1933] A.C. 156 (Canada); *R. v. Fineberg* [1968] N.Z.L.R. 443 (New Zealand).

[92] *post*, para. 35–026.

[93] See Roberts-Wray, *op. cit.* 369–370.

[94] Keith, *Responsible Government in the Dominions*, I, pp. 339–341. D. P. O'Connell and A. Riordan, *Opinions on Imperial Constitutional Law* (1971), Section IV. Addresses to remove Boothby J. were presented in 1862 and 1866, but the Law Officers did not advise his removal, especially as some of the Acts held invalid by him were so. In 1867 he was removed by the Governor in Council under the Colonial Leave of Absence Act 1782: Keith, *op. cit.* II, pp. 1072–1073.

applied to all Her Majesty's dominions except the Channel Islands, the Isle of Man and India.[95] The Act was intended to be declaratory.

The Colonial Laws Validity Act 1865, s.2, provides that: "Any Colonial Law which is or shall be in any respect repugnant to the provisions of any *Act of Parliament* extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under authority of such Act of Parliament, or having in the Colony the force and effect of such Act, shall be read subject to such Act, Order or Regulation, and shall, *to the extent of such repugnancy, but not otherwise*, be and remain absolutely void and inoperative."

Section 3 provides that: "No Colonial Law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the Law of England unless the same shall be repugnant to the provisions of some such Act of Parliament, Order or Regulation as aforesaid."

A "colonial law" is defined in section 1 as including laws made for a colony by the Queen in Council (whether statutory or prerogative) as well as by the colonial legislature. It will be seen from the words we have put in italics in section 2, that a colonial law is only void for repugnancy if it is repugnant to an Act of Parliament or statutory order, etc. made thereunder, and that it is only void to the extent of such repugnancy. Section 3 makes the matter quite clear by expressing it in a different way.[96]

The validity of colonial laws may be tested in actions brought before the courts of the colony, and on appeal to the Privy Council.[97]

35–024 Section 4 provides that: "No Colonial Law, passed with the concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such law or the subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorising such Governor to concur in passing or to assent to Laws for the peace, order and good government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument." Thus failure to observe royal instructions does not invalidate the Governor's assent to a Bill unless such instructions are actually embodied—not merely referred to—in the principal instrument defining his general legislative authority, so as in effect to form part of the constitution of the colony. Apart from this exception, the Governor's failure to regard royal instructions is a matter between him and the Crown, which—though it might result in his recall—does not affect the validity of colonial laws assented to by him.

Section 5 of the Colonial Laws Validity Act 1865 provides that: "*Every Colonial Legislature* shall have, and be deemed at all times to have had, full power within its jurisdiction to establish *Courts of Judicature*, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein." Such laws must be passed in the

[95] Similar principles applied to India. The Act still applies to the Australian States, although they are no longer colonies.

[96] See *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1.

[97] A colonial legislature may debate, pass and present a Bill to the Governor—without being impeded by declaration or injunction—although it would, if enacted, be void under the Colonial Laws Validity Act as being repugnant to United Kingdom statute: *Rediffusion (H.K.) Ltd v. Att.-Gen. of Hong Kong* [1970] A.C. 1136, PC. See O. Hood Phillips, "Judicial Intervention in the Legislative Process" (1971) 87 L.Q.R. 321.

appropriate manner and form, as mentioned below in connection with constitutional amendments.

Section 5 of the Act further provides that: "Every *Representative* Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the *constitution, powers and procedure of such Legislature*; provided that such Laws shall have been passed *in such manner and form* as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or *Colonial Law* for the time being in force in the said Colony." This part of section 5 applies to a *representative* legislature, which is defined in section 1 of the Act as being "any Colonial Legislature which shall comprise a Legislative Body of which [at least] one half are elected by the inhabitants of the Colony." The expression "constitution" here refers to the composition of the legislature, not the general constitution of the colony. It was held by the Privy Council in *Att.-Gen. for New South Wales v. Trethowan*[98] that a representative colonial legislature can bind its successors. In that case an Act passed by the legislature of New South Wales[99] in 1929 providing that no Bill to abolish the Legislative Council (the upper house) should be presented to the Governor for his assent unless it had been approved by a referendum, and that this provision should apply to any Bill repealing or amending the Act, was effective after a change of government in 1930 to present the abolition of the Legislative Council without a referendum having been held.

35–025 Such a colonial legislature probably has to remain representative.[1] It cannot enlarge its own powers so as to make a unilateral declaration of independence. In *Madzimbamuto v. Lardner-Burke*,[2] an appeal from Southern Rhodesia, (a self-governing colony since 1923), after the Unilateral Declaration of Independence (UDI), the Privy Council stated that: (i) The nature of the sovereignty of the Queen in the United Kingdom Parliament over a British colony must be determined by the constitutional law of the United Kingdom; (ii) the Queen in the United Kingdom Parliament was still sovereign in Southern Rhodesia at the relevant time (1965), and therefore the Southern Rhodesia Act 1965 and Orders in Council passed thereunder were of full legal effect in Southern Rhodesia; and the convention under which the United Kingdom Parliament did not legislate without the consent of the Government of Southern Rhodesia, although important as a convention, had no effect in limiting the powers of the United Kingdom Parliament.

A colonial statute by describing itself as a Constitution Act does not *ipso facto* require any special procedure for its amendment. Thus it was held by the Judicial Committee in *McCawley v. The King*[3] that the Constitution Act 1867, passed by

[98] [1932] A.C. 526; *ante*, para. 4–032. And see *Att.-Gen. (N.S.W.) v. Trethowan* (1931) 44 C.L.R. 394 (High Ct. Austr.) *per* Dixon J., at pp. 425–427; Mr Justice Owen Dixon, "The Law and the Constitution" (1935) 51 L.Q.R. 590, 602–604.

[99] Not a colony then, but still subject to the Colonial Laws Validity Act 1865.

[1] *Taylor v. Att.-Gen. (Queensland)* (1917) 23 C.L.R. 457, 477, *per* Gavan Duffy and Rich JJ.

[2] [1969] 1 A.C. 645. Lord Pearce based his dissenting opinion on the doctrine of "necessity"; *cf. per* Sir Jocelyn Simon P., in *Adams v. Adams (Att.-Gen. intervening)* [1971] P. 188; validity of English woman's divorce in Rhodesia after U.D.I. See Roberts-Wray, *op. cit.* pp. 991–993; L. H. Leigh, "Rhodesia after UDI" [1966] P.L. 148; "Rhodesian Crisis—Criminal Liabilities" by B. A. Hepple, P. O'Higgins and C. C. Turpin [1966] Crim.L.R. 5, and O. Hood Phillips, *ibid.* p. 68. See also Leslie Wolf-Phillips, *Constitutional Legitimacy: a study of the doctrine of necessity*, (Third World Foundation, 1979) pp. 45–69; P. Mirfield, "When is a Judge not a Judge" [1978] P.L. 42.

Southern Rhodesia became the independent Republic of Zimbabwe by the Zimbabwe Act 1979.

[3] [1920] A.C. 691, *per* Lord Birkenhead L.C. See Mr Justice Owen Dixon, "The Law and the Constitution" (1935) 51 L.Q.R. 590, 602–604.

the Queensland legislature under the authority of an Imperial Act, could be amended in the ordinary way and did not require a special Amendment Bill, since it did not prescribe any specific manner or form. The constitutions of the Australian states (formerly colonies) were in this sense "uncontrolled" and not "controlled."

Extra-territorial legislation[4]

35–026 The power of a colonial legislature extends to the making of laws for the peace, order and good government *of the colony*, including its territorial waters. Special powers to legislate beyond these limits are conferred by the United Kingdom Parliament in such matters as defence and merchant shipping. Whether, apart from any special powers expressly conferred by Imperial Act, a colonial law purporting to have extra-territorial effect is for that reason necessarily void is uncertain. The Colonial Laws Validity Act 1865 does not deal with this question. There are dicta by the Privy Council in *Macleod v. Attorney-General for New South Wales*[5] and other cases[6] to the effect that such legislation is void: but some of the later cases, notably *Croft v. Dunphy*[7] throw doubt on the principle thought to have been established in *Macleod's* case.[8]

These Privy Council cases concerned Canada, Australia and New Zealand when they were self-governing colonies progressing towards independence. A similar latitude was allowed to the Indian legislature under the Government of India Act 1935 in *Wallace v. Commissioners of Income Tax, Bombay*,[9] where an Act imposing income tax on income accruing to any company if the greater part of its income arose in British India, was held validly to extend to a company registered in the United Kingdom, apparently on the principle that a subordinate legislature may legislate with extra-territorial effect if there is a sufficient "territorial connection" with the person affected or with a thing in which he is concerned. As regards a person, the territorial connection would extend at least to his presence, residence, domicile or carrying on of business in the legislating territory, but not to the ownership of shares in a foreign company which carried on only part of its business in that country.

[4] See D. P. O'Connell, "The Doctrine of Colonial Extra-Territorial Legislative Incompetence" (1959) 75 L.Q.R. 318; *cf.* Sir John Salmond, "The Limitations of Colonial Legislative Power" (1917) 33 L.Q.R. 117. The question remained of importance also with regard to the Australian states: D. P. O'Connell, "Problems of Australian Coastal Jurisdiction" (1958) 34 B.Y.I.L. 199, 248 *et seq.*

[5] [1891] A.C. 455: New South Wales Act penalising bigamy, "whosoever" and "whatsoever."

[6] *e.g. Ashbury v. Ellis* [1893] A.C. 339 (New Zealand Act allowing judicial proceedings where defendant outside the jurisdiction); *Peninsular and Oriental Steam Navigation Co v. Kingston* [1903] A.C. 471 (Australian Act penalising the breaking of customs seals on the high seas); *Att.-Gen. for Canada v. Cain* [1906] A.C. 542 (Canadian Act impliedly authorising restraint of alien immigrant outside territorial limits).

[7] [1933] A.C. 156: Canadian Act (passed before the Statute of Westminster) defining Canadian territorial waters in case of vessels registered in Canada as extending to twelve marine miles, at a time when according to the English law view of international law territorial waters extended only to three marine miles. Lord Sankey L.C. in *British Coal Corporation v. The King* [1935] A.C. 500, PC referred to the doctrine forbidding extra-territorial legislation as "a doctrine of somewhat obscure extent."

[8] In *R. v. Lander* [1919] N.Z.L.R. 305, the Court of Appeal of New Zealand (Stout C.J. dissenting) followed *Macleod v. Att.-Gen. for New South Wales* in the case of a British subject who, while a member of the New Zealand Expeditionary Force, committed bigamy in England. See D. P. O'Connell, "The Doctrine of Colonial Extra-Territorial Legislative Incompetence" (1959) 79 L.Q.R. 318; O'Connell and Riordan, *op. cit.* section V.

[9] (1948) 75 I.A. 86, PC; *per* Lord Uthwatt.

The Report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926,[10] referred to "the difference between the legislative competence of the Parliament of Westminster and of the Dominion Parliaments, in that Acts passed by the latter operate, *as a general rule*, only within the territorial area of the Dominion concerned." The Report of the Conference on the Operation of Dominion Legislation (1929)[11] said: "It would not seem to be possible in the present state of the authorities to come to definite conclusions regarding the competence of Dominion Parliaments to give their legislation extra-territorial operation."

Rejection, reservation and disallowance

35–027 A colonial Governor, as representative of the Queen and a constituent part of the colonial legislature, has power to *refuse his assent to Bills* submitted to him by the legislature, or may in some cases return Bills to the legislature with proposed amendments. The classes of cases in which the Governor should refuse his assent are commonly set out in his instructions.

A colonial Governor has power to *reserve* Bills submitted to him by the colonial legislature, by withholding his assent until Her Majesty's pleasure be taken thereon. The exercise of this power by the Governor may, according to royal instructions, be either obligatory in the case of certain topics, or discretionary in all cases. Her Majesty's pleasure would be made known on the advice of the Secretary of State.[12]

The Crown, acting on the advice of the Secretary of State, has the power to *disallow* or annul a colonial Act. The power exists at common law, but is embodied in most constituent Acts—especially in non-self-governing colonies—usually with a time limit of one or two years. Modern means of speedy communication have deprived this power of its former usefulness. Its continued existence is inconvenient, as lawyers and others in the colony cannot be certain until the prescribed period has elapsed whether the ordinance will continue in force. The power would rarely, if ever, be exercised in relation to a colony possessing fully responsible government unless general Commonwealth interests were involved.

Composition of colonial legislatures

35–028 There have been colonies with no legislative body, the sole lawmaking power in the colony being vested in the Governor or High Commissioner. Where there is a legislative body—as there will be nowadays if there is a substantial population—it may be composed in varying proportions of one or more of the following elements: *ex officio* members, *i.e.* senior executive officers who are members by virtue of their office; nominated members, official or unofficial, appointed by the Crown or the Governor; elected members, chosen by an electorate whose franchise varies from colony to colony.

There have been almost as many varieties of colonial legislatures as of colonies, and their constitutions have been subject to frequent change. Post-war constitution-making tendencies prior to full self-government have been to confer Legislative Councils on colonies that had no legislative body; to turn official

[10] Cmd. 2768.
[11] Cmd. 3479. Hence section 3 of the Statute of Westminster 1931, relating to the Dominions.
[12] For the Governor's converse "reserved power" of certifying laws against the will of the legislature, see *post*, para. 35–029.

majorities into unofficial majorities, elected minorities into elected majorities, and Assemblies with elected majorities into Assemblies wholly elected; to substitute universal adult suffrage (with racial quotas in mixed populations) for property or educational franchise qualifications; and to confer some degree of responsible government, especially as regards internal affairs, on colonies with wholly or mainly elected Assemblies.

The powers of the Governor

35–029 Executive government in the colonies is carried on in the name of the Crown by Governors.[13] Governors are appointed by the Crown on the advice of the Secretary of State; and they are responsible to the Crown, although in most colonies the executive depends on the local legislature for supply. The powers of Governors vary; but generally they are empowered by their commission, to appoint members of the Legislative and Executive Councils; to issue writs for the election of members to representative bodies, and to summon or dissolve such bodies; to appoint and dismiss Ministers (if any); to appoint officials; to assent or refuse assent to Bills, or to reserve them for the Crown's assent[14]; to authorise the expenditure of public funds; to remit penalties and pardon offenders.[15] If there is no representative government, they initiate taxation and appropriation measures and usually other Bills.

Where the legislature is representative but the colony is not self-governing, the Governor usually has a *reserved power* (commonly known as his "reserve power" or power of "certification"[16]), if he considers it expedient in the interests of public order, public faith or good government that a Bill introduced into the legislature but not passed by it within a reasonable time shall have effect, to declare that such Bill shall have effect as if it had been passed by the legislature. "Public order," etc. is defined to include the responsibility of the colony as a territory within the Commonwealth, and all matters pertaining to public officers. The Governor is required to report to a Secretary of State any such declaration and the reasons therefor, together with any written objections by members of the legislature.

In addition to these powers, commonly granted by the instruments appointing them, Governors have extensive and detailed authority conferred on them by various statutes in respect of customs, defence works, naturalisation of aliens, and many other matters.

The prerogative powers in relation to foreign affairs, war and peace are not delegated to the Governor of a colony.[17] "The prerogative of the Queen, when it has not been expressly limited by local law or statute," it has been stated,[18] "is as extensive in Her Majesty's colonial possessions as in Great Britain."

[13] In some colonies the representative of the Crown is called Lieutenant-Governor or High Commissioner, but for the present purposes it is convenient to describe them all as Governors.

[14] *ante*, para. 35–027.

[15] On this last point, see O. R. Marshall, "The Prerogative of Mercy" [1948] C.L.P. 104, 116–126; Roberts-Wray, *op. cit.* pp. 341 *et seq.* There is statutory authority for the removal of persons sentenced to imprisonment from a colony to the United Kingdom: Colonial Prisoners Removal Act 1884.

[16] No certificate is in fact issued.

[17] See J. E. S. Fawcett, "Treaty Relations of British Overseas Territories" [1949] B.Y.I.L. 86.

[18] *per* Lord Watson in *Liquidators of Maritime Bank of Canada v. Receiver-General of New Brunswick* [1892] A.C. 441.

Executive council and ministers

35–030 Executive Councils consisted at first of officials serving in this capacity *ex officio* or nominated by the Governor. At an early stage of development, nominated unofficial members are introduced. The unofficial element grows, and nomination may be made on the recommendation of the Legislative Council. The functions of an Executive Council in non-self-governing colonies (formerly known as "Crown colonies") is advisory only. The Governor may be required to consult the Council on certain matters, but he is not bound by its advice. When the legislature becomes representative (*i.e.* has an elected majority) the unofficial members of the Executive Council will probably be members of the legislature and leaders of opinion there, so that the Governor will try to avoid acting against their unanimous advice.

The introduction of the ministerial system is the next stage[19] in the development of a colony towards self-government. Departments are assigned by the Governor to unofficial members of the Executive Council as Ministers, who are also elected members of the legislature. The Governor is now instructed to act normally on the advice of the Executive Council, and the elected Ministers will by convention depend on the confidence of the legislature. Certain departments are retained by officials, including defence and external affairs. Finance will tend to be among those departments entrusted to Ministers. The Attorney-General's department and internal security may be retained by officials for a time. The Governor's reserved power in matters involving public order, public faith and good government[20] will be available in an emergency. The leader of the majority in the elected House may now be styled Chief Minister.

Development of internal self-government[21]

35–031 The last transitional stage before independence within (or outside) the Commonwealth is usually internal self-government, the United Kingdom retaining control only over defence and external affairs,[22] and the power to suspend the constitution in an emergency, for which the Secretary of State remains responsible to Parliament. All the other departments are now administered by elected Ministers holding the confidence of the legislature. A Public Service Commission and a Judicial Service Commission will be set up, and provision made for the independence of the judiciary, the Auditor-General and the Director of Public Prosecutions.

The Executive Council now becomes the Council of Ministers or Cabinet, operating as far as possible the conventions of the British Cabinet system, and the Chief Minister is styled Prime Minister. At some stage the Governor no longer summons or presides over the Executive Council.

The description given above must be taken merely as typical. It may not exactly fit any particular territory. These developments in executive government should be considered alongside the typical development of colonial legislatures[23] in order to obtain a general picture of the growth of internal self-government in

[19] Sometimes a "membership system" has intervened, responsibility for certain government departments being assigned to unelected members of the Executive Council.

[20] *ante*, para. 35–029.

[21] See further, S. A. de Smith, *The New Commonwealth and its Constitutions* (1964) Chap. 2.

[22] Responsibility for defence and external affairs may be entrusted to a United Kingdom Commissioner, as in the pre-independence constitutions of Singapore and Malta. Also, a limited treaty-making power may be delegated under the authority of statute to a self-governing colony.

[23] *ante*, para. 35–028.

dependent territories since the Second World War. The chief remaining limitations are the subordination of the colonial legislature to the United Kingdom Parliament, and the lack of international personality.[24]

Future Developments

35–032 A review of the status of the 13 remaining colonies took place, following the volcanic eruption in Montserrat in 1997 when it was complained that the United Kingdom had failed to offer speedy or effective help. A White Paper[25] recommended referring to the 13 areas as "British Overseas Territories", with their own minister in the Foreign Office. An Overseas Territories Council will be established which will meet before each Commonwealth summit.

It is envisaged that British citizenship will be restored to the territories[26] which were deprived of it by the British Nationality Act.

On the other hand the United Kingdom government expects the Overseas Territories to bring their laws into line with the European Convention on Human Rights and, in particular wishes to see the abolition of laws permitting capital punishment and corporal punishment, and of laws prohibiting homosexual acts. Steps must also be taken to ensure effective financial regulation and prevent the use of the Territories for money laundering.

[24] The pre-independence constitutions of Singapore and Malta, although they retained the legal status of colonies, gave them the name of "States"; see O. Hood Phillips, "The Constitution of the State of Singapore" [1960] P.L. 50.

[25] *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (1998, Cm. 4264).

[26] Gibraltar and the Falklands already possess British citizenship: *ante* para. 23–009 and para. 23–010.

CHAPTER 36

INDEPENDENCE WITHIN THE COMMONWEALTH

1. THE DOMINIONS AND THE STATUTE OF WESTMINSTER

Development of Dominion status[1]

36–001 The development of responsible government in the colonies originated in the report sent from North America by Lord Durham in 1839 to the British Government. Upper and Lower Canada already had representative assemblies. The gist of Lord Durham's Report was that it was a necessary consequence of the grant of representative institutions that the Governor should entrust the administration to such men as could command a majority. In other words, responsible Cabinet government should be introduced, and this could be effected simply by a change in the Governor's instructions. Responsible government was accordingly introduced into the united colonies of Ontario and Quebec under Lord Elgin in 1848. Full autonomy in internal affairs was gradually supplemented by a degree of autonomy in external affairs. The British North America Act 1867 implied the existence of responsible government in the new federal Dominion of Canada. The same principles came to be extended to Newfoundland, the Australian colonies (now states), New Zealand and the South African colonies during the latter part of the nineteenth century, to the federal Commonwealth of Australia in 1900, the Union of South Africa in 1909 and the Irish Free State when granted Dominion status in 1922. The autonomy of the Dominions received further impetus by the recognition of Canada, Australia, New Zealand and South Africa as separate members of the League of Nations after the 1914–18 war.

The Balfour Declaration of 1926[2] described the position and mutual relations of the United Kingdom and the Dominions at that time as:

> "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

The principles of equality and similarity appropriate to status, however, did not universally extend to function, *e.g.* diplomacy and defence. The Crown was the symbol of the free association of the members of what was then called the British Commonwealth of Nations, and they were united by a common allegiance to the Crown, based on the common status of British subjects. It was resolved at the

[1] A. B. Keith, *Responsible Government in the Dominions* (2nd ed., 1928); *The Dominions as Sovereign States* (1938); *Speeches and Documents on the British Dominions, 1918–1931*; Dawson, *The Development of Dominion Status, 1900–1936*; R. T. E. Latham, "The Law and the Commonwealth," in Hancock, *Survey of Commonwealth Affairs*, I (1937), pp. 595 *et seq.*; *The Round Table*, No. 240 (Diamond Jubilee Special number, 1970); H. Duncan Hall, *Commonwealth: A History of the British Commonwealth of Nations* (1971); N. Mansergh, *The Commonwealth Experience* (1982); H. H. Marshall, *From Dependence to Statehood*.

[2] *Report of Imperial Conference, 1926*, Cmd. 1768. This has nothing to do with Balfour's statement about Zionism.

Imperial Conference of 1926[3] that a treaty applying only to one part of the Empire should be made on the advice of the government of that part, and should be stated to be made by the Sovereign on behalf of that part. Dominions might have their own seals for authenticating treaties if they wished. The mutual relations among the self-governing members of the Commonwealth were regarded as being governed, not by international law, but largely by conventions whose character was something between international law and constitutional law (the "*inter se* doctrine").[4]

36–002 The principle that a Dominion might exchange diplomatic representatives with a foreign country was recognised in 1920 in the case of Canada and the United States. The Dominions had come to possess their own armed forces. Although a Dominion could not be compelled without its consent to give active assistance in a war in which the Crown was engaged, it was not generally admitted before 1939 that a Dominion could remain technically neutral in such a war.

The Imperial Conferences of 1926 and 1930[5] resolved that the Sovereign should act on the direct advice of the Dominion Ministers in relation to the appointment of the Governor-General, who was the representative of the Sovereign and not of the British Government. The power of reserving Bills of a Dominion legislature, which had been rarely exercised, ought not to be exercised against the wishes of that Dominion. The power of disallowing Dominion legislation was by convention not exercised.

Conventions were formulated that any alteration in the law touching the succession to the Throne or the Royal Style and Titles should require the assent of the Parliaments of all the Dominions as well as of the Parliament of the United Kingdom[6]; and that laws thereafter made by the United Kingdom Parliament should not extend to any of the Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.[7] Further, uniformity of legislation as between the United Kingdom and the Dominions in such matters as the law of prize, fugitive offenders and extradition, could best be secured by the enactment of reciprocal statutes based on consultation and agreement.[8]

The Statute of Westminster 1931[9]

36–003 The Statute of Westminster[10] dealt only with *legislative* powers, and not exhaustively with them. The chief matters with regard to which legislation of the United Kingdom Parliament was required in order to reconcile the law relating to legislative powers with the conventional status of the Dominions were: (i) the operation of the Colonial Laws Validity Act 1865, which nullified Dominion

[3] *ante*

[4] See J. E. S. Fawcett, *The British Commonwealth in International Law* (1963), Chap. 15; *The Inter Se Doctrine of Commonwealth Relations* (1958); R. Y. Jennings, "The Commonwealth and International Law" (1953) B.Y.I.L. 20; *cf.* R. T. E. Latham, "The Law and the Commonwealth" in Hancock's *Survey of British Commonwealth Affairs*, Vol. I, pp. 602 *et seq.*

[5] Cmd. 3717.

[6] *Report of the Conference on the Operation of Dominion Legislation*, 1929, Cmd. 3479.

[7] (1930) Cmd. 3717.

[8] (1926) Cmd. 2768; (1949) Cmd. 3479.

[9] K. C. Wheare, *The Statute of Westminster and Dominion Status* (5th ed.); *Constitutional Structure of the Commonwealth* (1960) Chap. 2. See also Sir Ivor Jennings, *op. cit.* Beaglehole (ed.), *New Zealand and the Statute of Westminster*; W. P. M. Kennedy, "The Imperial Conferences, 1926–1930: The Statute of Westminster" (1932) 48 L.Q.R. 191.

[10] The title of the Statute was suggested by Sir Maurice Gwyer, then Treasury Solicitor and a member of the Conference on the Operation of Dominion Legislation, and later Chief Justice of India.

legislation repugnant to United Kingdom statute law; (ii) the doubtful rule that the Dominions could not pass legislation having extra-territorial effect; and (iii) the legally unfettered power of the United Kingdom Parliament to legislate for the Dominions. Attention was drawn to these matters by the Imperial Conference, 1926.[11] They were fully considered by the Conference on the Operation of Dominion Legislation, 1929,[12] whose resolutions were adopted by the Imperial Conference, 1930.[13] They determine the contents of the most important sections of the Statute of Westminster, which was passed by the Imperial Parliament in 1931 on the recommendation of the Imperial Conference, 1930, after the communication of resolutions of the Parliaments of the six Dominions.

The preamble recites: (i) the fact that the Imperial Conferences of 1926 and 1930 concurred in making certain declarations and resolutions; (ii) the convention relating to the law touching the succession to the Throne and the Royal Style and Titles; (iii) the convention with regard to legislation by the United Kingdom Parliament for the Dominions; (iv) that "it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom"; and (v) the request and consent of each of the six Dominions to the passing of the statute.

The expression "Dominion" in section 1 was defined as meaning any of the following: Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa,[14] the Irish Free State,[15] and Newfoundland.[16] Section 11 provided that, notwithstanding the Interpretation Act 1889, the expression "colony" should not, in any subsequent Act of the United Kingdom Parliament, include a Dominion or any province or state forming part of a Dominion.[17]

Repugnance of Dominion legislation to United Kingdom statutes

Section 2 provides as follows: **36–004**

"(1) *The Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.*

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to amend or repeal any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

[11] Cmd. 2768.
[12] Cmd. 3479.
[13] Cmd. 3717. These Reports have been referred to by the Judicial Committee; see W. Ivor Jennings, "The Statute of Westminster and Appeals to the Privy Council" (1936) 52 L.Q.R. 173, 175–177.
[14] South Africa became a republic and seceded from the Commonwealth in 1961. The provisions of the Statute of Westminster as affecting South Africa had been enacted as part of the law of the Union by the Status of the Union Act 1934.
[15] The Irish Free State, called Eire after 1937, seceded from the Commonwealth in 1949, and now calls herself the Republic of Ireland. See Republic of Ireland Act 1948 (Ir.); Ireland Act 1949 (UK); *Re Article 26 of the Constitution and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129.
[16] The Statute never came into operation as regards Newfoundland, which is now a province of Canada.
[17] See now, Interpretation Act 1978, s.5 and Sched. 1, s.11 of the Statute of Westminster was repealed by section 25 of the Interpretation Act 1978.

Subsection (2) was inserted in case the mere repeal of the Colonial Laws Validity Act[18] as affecting the Dominions should leave them in the position in which they would have been at common law before 1865. It applies only to Dominion legislation passed after the commencement of the Statute, but any void Act previously passed could be given validity by re-enactment. It covers "any existing or future Act" of the United Kingdom Parliament, but it is doubtful whether it extends to the amendment or repeal of the statute itself.

Extraterritorial operation of Dominion legislation

36–005 Section 3 states: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extraterritorial operation." This set at rest, so far as Dominion legislation was concerned, any doubts that might have existed as a result of the dicta in *Macleod v. Attorney-General for New South Wales*.[19] In practice, territorial limitations on the operation of legislation of all legislatures are quite common, and arise from the express terms of statutes or from rules of construction applied by the courts as to the presumed intention of the legislature, regard being had to the comity of nations and other considerations. What this section was designed to get rid of was any constitutional limitations there may have been which placed Acts of Dominion Parliaments in a different position in this respect from Acts of the Imperial Parliament. It did not mean that a Dominion could alter the law of the United Kingdom or of other Dominions or of foreign countries, but that it could pass legislation (for example) in criminal matters, "which attaches significance for courts within the jurisdiction of facts and events occurring outside the jurisdiction."[20]

Extension of United Kingdom legislation to the Dominions

36–006 Section 4 provides as follows: "*No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.*"

The request and consent required is that of the *government* of the Dominion concerned, except that in the case of Australia section 9(3) required also the request and consent of the Commonwealth Parliament as the Senate might not be in agreement with the government. Actual request and consent are not required: merely an express declaration of request and consent in the United Kingdom Act would be sufficient.[21] The significance of the words "as part of the law of that Dominion" has been discussed in Chapter 4 concerning the legislative power of the United Kingdom Parliament. Whether the Courts of a Dominion would enforce a United Kingdom Act which was clearly inconsistent with section 4, is another matter. Dixon C.J. said in *Copyright Owners Reproduction Society v. E.M.I. (Australia) Pty Ltd*[22] that there was a strong presumption that the United Kingdom Parliament would not legislate for a Dominion without its consent even before 1931, and there is therefore a rule of construction in the Australian High Court that, in the absence of evidence of such consent, a United Kingdom Act is not intended to apply to that country. The preamble to His Majesty's Declaration

[18] *ante*, para. 35–023.
[19] [1891] A.C. 455. See *ante*, para. 35–026.
[20] Wheare, *The Statute of Westminster and Dominion Status*, p. 167.
[21] *Manuel v. Att.-Gen.* [1983] Ch. 77, 106, *per* Slade L.J.
[22] (1958) 100 C.L.R. 597; (1958) 32 A.L.J.R. 306.

of Abdication Act 1936[23] recited that "the Dominion of Canada, pursuant to the provisions of section 4 of the Statute of Westminster 1931, has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa have assented thereto." The Abdication Act made an alteration in the law touching the succession to the Throne which could, with the necessary consents, have been made to extend to the Dominions.

The Statute of Westminster did not recite or provide that the United Kingdom Parliament *would* legislate for a Dominion whenever it requested and consented. A general convention probably existed or developed to that effect, though the matter could have raised difficulties with regard to federal Dominions such as Canada and Australia.

Application to Canada[24]

36–007 Canada was the only Dominion that had no power to amend its Constitution Act. This limitation is to be accounted for partly by the relatively early date of the British North America Act 1867 and partly by the federal nature of its Constitution. When the Conference on the Operation of Dominion Legislation reported in 1929 the provinces had not been consulted about the proposed Imperial Act, and the Report of the Imperial Conference, 1930, shows that certain of the provinces protested against the proposed legislation—in particular, section 2—until they had had an opportunity to determine whether their rights would be adversely affected. The saving clause relating to legislation by the Canadian Parliament (section 7) reads: "(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts 1867 and 1930, or any order, rule or regulation made thereunder . . .(3) The powers conferred by this Act upon the Parliament of Canada . . .shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada . . ." If Canada wished for constitutional amendments, or to have constituent power, it was free—(*semble*) subject to consultation with the provinces—to ask the United Kingdom Parliament to pass the necessary legislation. This in fact occurred when the British North America (No. 2) Act 1949 conferred on the Canadian Parliament a power of constitutional amendment by means of ordinary legislation, with certain important exceptions such as matters assigned exclusively to the provincial legislatures.

The "patriation" of the Canadian Constitution[25]

36–008 For more than 20 years successive Canadian Prime Ministers tried to bring about the "patriation" of the Canadian Constitution by obtaining agreement among the Provinces, which did not want to lose control over natural resources in their territories, to a formula for constitutional amendment. The Canadian Supreme Court gave an advisory opinion that there was no legal requirement for the Provinces to be consulted before the Queen was requested to lay before the

[23] N. Mansergh, *Documents and Speeches on British Commonwealth Affairs*, 1931–52, I, pp. 179 *et seq.*; *Survey of British Commonwealth Affairs*, 1931–39, pp. 41–46; R. T. E. Latham, Appendix to "The Law and the Commonwealth"; K. H. Bailey in *Politics*, March and June 1938; Wheare, *op. cit.* pp. 278–290.

[24] P. Hogg, *Constitutional Law of Canada: Canada Act 1982* (1982), B. Laskin, *Canadian Constitutional Law*.

[25] D. C. M. Yardley, "The Patriation of the Canadian Constitution," (1982) 7 *Holdsworth Law Rev.* 54; G. Marshall, *Constitutional Conventions* (1984) Chap. XI.

United Kingdom Parliament a Bill to amend the Canadian Constitution where provincial rights or the relations between the Federation and the Provinces would be affected, but the majority thought that convention required there to be at least a substantial measure of provincial agreement.[26] While the Canada Bill was before the United Kingdom Parliament an unsuccessful attempt was made to obtain a declaration from the English courts that, in view of treaties made with the Indians by George III, Indian rights ought to be excluded from the effects of the proposed legislation. The English Court of Appeal held that the obligations of the Crown to the Indian peoples were now those of the Crown in right of Canada and not in right of the United Kingdom.[27]

The Preamble to the Canada Act 1982 recites that Canada (*i.e.* The Canadian Government) requested and consented to its enactment by the United Kingdom Parliament, and that the Canadian Parliament submitted an address to Her Majesty requesting her to cause a Bill to be laid before the United Kingdom Parliament for that purpose. Section 1 enacts the draft (Canadian) Constitution Act 1982, set out in Schedule B. Section 2 provides that no Act of the United Kingdom Parliament passed after the Constitution Act 1982 comes into force shall extend to Canada as part of its law, and section 4 of the Statute of Westminster is repealed so far as Canada is concerned. The Constitution Act provides a complicated procedure for amendment by the Canadian Parliament of the Canadian Constitution, including the federal distribution of powers. A Charter of Rights and Freedoms, applicable to the legislatures and governments of the Federation and the Provinces, is contained in Part I. This Charter, unlike the Canadian Bill of Rights of 1960, is judicially enforceable, though federal or provincial legislation may expressly override the four "fundamental freedoms."[28] The Constitution, which includes the Canada Act 1982, the Constitution Act 1982 and the scheduled "Constitution Acts" (including the series of British North America Acts) is to be the supreme law of Canada.[29]

The Queen in person signed the Proclamation in Ottawa inaugurating the new Canadian Constitution.

Application to Australia[30]

36–009 Sections 2–6[31] of the Statute of Westminster were adoptive with respect to Australia, and Australia adopted them after Japan entered the war in 1942, as from the commencement of the war with Germany.[32]

[26] *Re Amendment of the Constitution of Canada* (1961) 125 D.L.R. (3d) 1. See *First Report from the Foreign Affairs Committee, Session 1980–81: British North America Acts: The Role of Parliament*, H.C. 42 (Kershaw); *Second Report on the British North America Acts: the Role of Parliament* (1961). See also O. Hood Phillipe, "Constitutional Conventions in the Supreme Court of Canada" (1982) 98 L.Q.R. 194; *cf.* Rodney Brazier and St. John Robilliard, "Constitutional Conventions: The Canadian Supreme Court's View Reviewed" [1982] P.L. 28.

[27] *Manuel v. Att.-Gen.* [1983] Ch. 77, CA; *Nottcho v. Att.-Gen.* [1983] Ch. 77 at 89 (Megarry V.-C.), following *R. v. Secretary of State for Foreign and Commonwealth Affairs ex p. Indian Association of Alberta* [1982] Q.B. 892, CA; (pet. dis.) 937, HL.

[28] See *Canadian Charter of Rights and Freedoms*, eds., Tanapolsky and Baudouin (Toronto, 1982); G. L. Peiria, "Legal Protection of Human Rights: The contemporary Canadian experience" (1985) 5 L.S. 261.

[29] See further, Peter Hogg, *The Canada Act 1982 Annotated* (Toronto, 1983).

[30] W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia*; C. Howard, *Australian Federal Constitutional Law*; L. Zines, *The High Court and the Constitution* (Sydney 1981); G. Winterton, *Parliament, the Executive and the Governor-General* (Melbourne, 1983).

[31] s.5 concerned merchant shipping and s.6 Admiralty courts.

[32] Not from the passing of the Statute of Westminster: *Ex p. Bennett; Re Cunningham* (1967) 86 W.N. (Pt 2) (N.S.W.) 323.

The Commonwealth of Australia Constitution Act 1900 provides the legal basis of federation under the Crown, which the recital states was intended to be indissoluble. Sections 1–8 of the Act, which involve the federal principle, make no provision for their amendment by the Australian Parliament.[33] The *Constitution*, which is contained in section 9 of the Constitution *Act*, can be altered by the Commonwealth Parliament, but only after a referendum.[34] This position was reserved by sections 8 and 9(1) of the Statute of Westminster, which provided that: "8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia ... otherwise than in accordance with the law existing before the commencement of this Act. 9. (1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia."[35]

Australia Act 1986

The provisions of the virtually identical Australia Acts passed by the United Kingdom and Commonwealth[36] Parliaments in 1986 were agreed to by the Queen, the Commonwealth Government, all the State Governments and the United Kingdom Government after extensive consultations between the Commonwealth and State Governments over a period of several years. The Commonwealth Parliament enacted its Act under section 51 (xxxviii) of the Constitution. The legislation was designed to remove the residual constitutional links between Australia and the United Kingdom Parliament, Government and judicial system, but the position of the Queen as Queen of Australia is not changed. 30–016

The preamble to the United Kingdom Act recites that the Parliament and Government of the Commonwealth of Australia have, with the concurrence of the States of Australia, requested and consented to the enactment of an Act of the United Kingdom Parliament in the terms therein set forth (thus fulfilling the requirements of sections 4 and 9(3) of the Statute of Westminster).

The Act deals first with legislative powers by providing that no future Act of Parliament of the United Kingdom shall extend, or be deemed to extend, to the Commonwealth or a State or Territory of Australia as part of its law (section 1). It goes on to deal with State legislation by declaring that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State having extra-territorial operation (following section 3 of the Statute of Westminster), and that the legislative powers of each State include all legislative powers that the United Kingdom Parliament might have exercised for that State before the commencement of the Act, but not including the capacity to engage in relations with countries outside Australia

[33] See G. Sawer, "The British Connection" (1973) 47 A.L.J. 113.

[34] The proposed amendment must be approved not only by a majority of all the votes, but also by a majority of the votes in a majority of the states; and any amendment diminishing the proportionate representation of a State in the House of Representatives requires the approval of the majority of voters in that State: Constitution of the Commonwealth s.128.

[35] The constitutions of the Australian states, though written (based largely on United Kingdom statutes), are largely flexible (subject to retaining such fundamentals as the monarchy); see *McCawley v. The King* [1920] A.C. 591, PC; R. D. Lumb, *The Constitutions of the Australian States* (2nd ed., Brisbane, 1965).

[36] "The Commonwealth" in the context of the Australia Act means the Commonwealth of Australia.

(section 2). The provisions of the Colonial Laws Validity Act 1865 so far as they applied to State Parliaments are repealed (section 3, modelled on section 2 of the Statute of Westminster applying to Commonwealth legislation); but the removal of restrictions on State Parliaments does not affect the Statute of Westminster, the Commonwealth Constitution Act or the Commonwealth Constitution (section 5). Certain restrictions on merchant shipping legislation[37] by State Parliaments are repealed (section 4, corresponding to section 5 of the Statute of Westminster applying to Commonwealth Acts). State legislation respecting the constitution, powers and procedure of the State Parliament must be made in the manner and form (if any) required from time to time by the law of that State (section 6, continuing the effect of section 5 of the Colonial Laws Validity Act).

36–011 The Act then deals with executive powers and functions. Instead of the Queen being formally advised on State matters as hitherto by United Kingdom ministers following recommendations from State Premiers to the Foreign and Commonwealth Office, it is provided that Her Majesty's representative in each State shall be the Governor and all the Queen's powers and functions in respect of a State shall be exercisable only by him, except that the appointment and dismissal of the Governor will be done on the advice of the State Premier. While Her Majesty is personally present in a State, however, she may, following mutual and prior agreement, exercise any of her State functions on the advice of the State Premier (section 7). Any powers to disallow, suspend, reserve or withhold assent to Acts or Bills of State Parliaments are abolished (sections 8 and 9); and the United Kingdom Government will have no responsibility for the government of any State (section 10).

All appeals from Australian courts[38] to the Privy Council, whether under statute or prerogative, are terminated, thus making the High Court of Australia the final court of appeal from Australian courts (section 11).

Sections 4, 9(2) and (3) and 10(2) of the Statute of Westminster,[39] in so far as they were part of the law of the Commonwealth or of a State or Territory, are repealed (section 12). This Act or the Statute of Westminster in so far as it is part of the law of the Commonwealth or of a State or Territory, may be repealed or amended only by a Commonwealth Act passed at the request or with the concurrence of all the State Parliaments (section 15).[40]

There was no need for honours, which are awarded by virtue of the prerogative, to be dealt with in the Act; but the Queen has agreed, with the approval of the United Kingdom and Australian Governments, that the Premier of any State whose Government wishes to do so may make recommendations direct to Her Majesty for awards of Imperial Honours.

Application to New Zealand

36–012 Sections 2–6[41] of the Statute of Westminster were adoptive with respect to New Zealand, which adopted them after the last war without retrospective effect.

[37] Merchant Shipping Act 1894, ss.735 and 736.

[38] "Australian courts" in this Act do not include the High Court of Australia, from which all appeals to the Privy Council had already been abolished, subject to s.74 of the Constitution (*inter se* questions certified by the High Court) which had no longer any practical operation: *Kirmani v. Captain Cook Cruises Pty Ltd (No. 2), ex p. Att.-Gen. of Queensland* (1984) 50 A.L.R. 108.

[39] *Ante*, para. 36-003.

[40] This does not apply to a repeal or amendment made in exercise of powers conferred on the Commonwealth Parliament by any future amendment of the Constitution.

[41] See note 31 *supra*.

The Constitution of New Zealand was to a very considerable extent alterable by the Parliament of New Zealand: but the powers of alteration conferred by the Constitution Acts were subject to certain qualifications, and it was a matter of doubt whether those qualifications had been removed by section 5 of the Colonial Laws Validity Act. As in the case of Canada and Australia, it was for New Zealand to make representations to the Imperial Parliament if it wished for further constituent power. Section 8 of the Statute of Westminster therefore provided that: "Nothing in this Act shall be deemed to confer any power to repeal or alter ... the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act." When New Zealand adopted sections 2–6 in 1947 she asked for and obtained an Imperial Act that gave her complete constituent powers.[42]

In *Fitzgerald v. Muldoon*[43] Wild C.J. adopted Dicey's definition of sovereignty in relation to the New Zealand Parliament.

In reliance on its powers and with no need for resort to Westminster, unlike Australia and Canada, the New Zealand Parliament enacted, in 1996, the Constitution Act which sets out the basic principles of the New Zealand constitution. Section 15(1) recognises that the Parliament of New Zealand has full power to make laws; section 15(2) provides that no Act of the United Kingdom Parliament passed after the commencement of the Act will extend to New Zealand; section 25 provides that the Statute of Westminster is to cease to have effect as part of The Law of New Zealand.[44] In 1990 the legislature also enacted a Bill of Rights but in neither case is the legislation entrenched.

II. The Commonwealth at the Present Day[45]

Grant of independence[46]

Whereas the grant to British dependent territories of responsible self-government within the Commonwealth, or of independence, is a matter for the United Kingdom Government and the territory concerned, the question of the admission of a territory to full membership of the Commonwealth is one on which all existing members are consulted. From the Indian Independence Act and the **36–013**

[42] New Zealand Constitution (Amendment) Act 1947. See J. C. Beaglehole, (ed.), *New Zealand and the Statute of Westminster* (1944); A. E. Currie, *New Zealand and the Statute of Westminster, 1931* (1944); J. L. Robson (ed.), *New Zealand, Development of its Laws and Constitution* (2nd ed., 1967); New Zealand Constitution Amendment Act 1973 (N.Z.); (extraterritorial legislation).

[43] [1976] 2 N.Z.L.R. 615, 622.

[44] I. S. Dickinson, "Up-dating the New Zealand Constitution", [1988] P.L. 193.

[45] Sir William Dale, *The Modern Commonwealth* (1983); Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) K. C. Wheare, *The Constitutional Structure of the Commonwealth* (1960); S. A. de Smith, *The New Commonwealth and its Constitutions* (1964); *The Vocabulary of Commonwealth Relations* (1954), Heather J. Harvey, *Consultation and Co-operation in the Commonwealth* (1952); J. E. S. Fawcett, *The British Commonwealth in International Law* (1963); *Changing Law in Developing Countries* (ed. J. N. D. Anderson, 1963); *Parliament as an Export* (ed. Sir A. Burns, (1966); V. Bogdanor *The Monarchy and the Constitution* (1995) Chap. 10; Wolf-Phillips "Post-Independence Constitutional Change in the Commonwealth" (1970) XVII *Political Studies* 18.

[46] The gradual acquisition of independence by Canada, Australia and New Zealand is described in the previous section.

Ceylon Independence Act of 1947,[47] the grant of independence has been effected by Act of Parliament.[48] Independence involves, first, the acquisition of international personality which is recognised by other countries. It leads to application, sponsored by the United Kingdom, for membership of the United Nations, which is invariably accepted. Independence also gives rise to complex problems of state succession.[49] Secondly, independence involves the freedom of the country concerned from dependence on the Parliament and Government of the United Kingdom.

Independence Acts

36–014 The Independence Act will therefore remove, in the manner of sections 2, 3 and 4 of the Statute of Westminster,[50] the three legislative limitations of repugnancy, extra-territoriality and the powers of the United Kingdom Parliament. The doctrine of repugnancy[51] is abolished by a provision on the lines of section 2 of the Statute of Westminster, whereby no future law made by the Parliament of the territory concerned shall be void on the ground that it is repugnant to any existing or future Act of Parliament. This would probably include the Independence Act itself, even if it is not specifically mentioned. Section 3 of the Statute of Westminster, authorising legislation with extra-territorial operation, was needed in relation to the Dominions in 1931, as that Statute did not make a definite break between dependence and independence: it was a statutory declaration of existing facts that had been brought about by gradual evolution. In the post-war Independence Acts this provision may not be necessary as the power of extra-territorial legislation is probably implied by independence, but it may be inserted *ex abundante cautela*.

The provision that future Acts of the United Kingdom shall not apply to the country concerned has been modelled on section 4 of the Statute of Westminster. That section was followed closely in the case of Ceylon (now Sri Lanka) and Ghana (formerly the Gold Coast). The Indian Independence Act, however, omitted the "request and consent" and substituted "unless it is expressly extended thereto" by a law of the Indian legislature. The Nigerian, Sierra Leone and later Acts merely omit the contingency that they might request and consent to United Kingdom legislation.

36–015 The powers of disallowance and reservation and the reserved power of certification were abolished by the Indian Independence Act 1947. The power of disallowance survived in theory in relation to Canada until 1982 and Australia until 1986 and has not been formally abolished in relation to New Zealand, but by convention it was never exercised after they became "self-governing". In other cases of independence these extraneous powers will have been abolished by amendment to the pre-independence constitution.

Independence in the case of former colonies, *e.g.* Ghana, Nigeria and Malta, which involves the transfer of sovereignty to territories that previously had no

[47] Sri Lanka (Ceylon) adopted an autochthonous republican Constitution in 1972. The Constitution of 1978 provides for an executive President: see M. J. A. Coorav, *Judicial Role under the Constitutions of Ceylon/Sri Lanka* (Colombo, 1982).

[48] The Ireland Act 1949 recognised a *fait accompli*.

[49] See Roberts-Wray, *op. cit.* pp. 267–269; Fawcett, *op. cit.* Chap. 13; and see *The Effect of Independence on Treaties* (International Law Association, 1966).

[50] *Ante*, para. 36–004 *et seq.*

[51] Colonial Laws Validity Act 1865, s.2.

international personality, is usually described in the Act as "fully responsible status" within the Commonwealth. Protectorates (e.g. Uganda) and trust territories (e.g. Tanganyika, now part of Tanzania) were not within Her Majesty's dominions, and therefore Independence Acts have technically annexed them to the Crown in order that on the withdrawal of protection they might be granted independence within the Commonwealth. In the case of trust territories this process required the approval of the United Nations. The independent Federation of Malaya (now Malaysia) was formed by agreement between the United Kingdom and the rulers of the protected Malay states, prior approval having been given by Act of Parliament.

The Statute of Westminster did not deal with executive powers, because their exercise was adequately governed by constitutional conventions, and the Statute was not intended at the time it was passed actually to confer independence.[52] The Indian Independence Act 1947 provided that the United Kingdom Government should cease to be responsible for the government of India, and this has been followed in Acts granting independence to former colonies. Acts conferring independence on protectorates either do the same or provide that Her Majesty shall cease to have jurisdiction over the territory.

36–016 There is usually an Agreement between the United Kingdom and the territory concerned that the latter shall succeed to the rights and obligations affecting it arising out of international agreements.[53] Other countries appear to accept this. Sometimes the grant of independence has been accompanied by an Agreement with the United Kingdom on external affairs, defence and public officers. This was so, for example, with Ceylon,[54] Malaya, Nigeria, Singapore and Malta.[55]

It is also necessary for Parliament to pass an Act continuing the law of the United Kingdom in force here in relation to the territory so far as it is applicable to its new constitutional status,[56] and to modify certain existing Acts of Parliament, *e.g.* British Nationality Acts (countries whose nationals are Commonwealth citizens), the Army and Air Force and Naval Discipline Acts (Commonwealth forces); and Acts relating to visiting forces and diplomatic immunities.[57]

A special kind of non-colonial though dependent status was devised for certain small islands in the Caribbean by the West Indies Act 1967[58] following the break-up of the Federation of the West Indies in 1962 and the independence of Jamaica and Trinidad and Tobago. The islands concerned were to be "States in association with the United Kingdom". The United Kingdom retained responsibility for defence, external affairs and citizenship, while the Associated States each had control of internal affairs including constitutional amendments, the Colonial Laws Validity Act ceasing for these purposes to apply to them. The association

[52] But see now: *Nolcho v. Att.-Gen.* [1983] Ch. 77, 89 *per* Sir Robert Megarry V.-C., following *R. v. Secretary of State for Foreign and Commonwealth Affairs ex p. Indian Association of Alberta* [1982] Q.B. 892, CA; (pet.dis) 937, HL.

[53] *e.g.* Cmnd. 2633 (Malta).

[54] Sir Ivor Jennings, *The Constitution of Ceylon* (3rd ed., 1953); "The Making of a Dominion Constitution" (1949) 65 L.Q.R. 456.

[55] Cmnd. 2423; Gmnd. 2410.

[56] *e.g.* Ghana (Consequential Provisions) Act 1960.

[57] The latest is the Brunei and Maldives Act 1985.

[58] *Constitutional Proposals for Antigua, St Kitts, Nevis, Anguilla, Dominica, St Lucia, St Vincent, Grenada* (1965) Cmnd. 2865; *Report of Antigua Constitutional Conference 1966*, Cmnd. 2963.

could be terminated by either side. This "Caribbean Arrangement" did not last long, and one by one the Associated States were granted independence.[59]

Independence constitutions

36–017 The constitution of the newly-independent country will have been drafted by agreement between the Secretary of State and the local party in power, sometimes in consultation with opposition or minority parties. It is often contained in a statutory Order in Council separate from the Independence Act, as this is a quicker and more flexible way of getting parliamentary approval. When the constitution has come into operation in what is now an independent country, provisions made thereunder by Order in Council cannot be challenged in the English courts.[60]

In addition to Canada and Australia, a number of post-war constitutions of Commonwealth members have some kind of federal form. These include India, Nigeria,[61] Malaysia, Uganda and Kenya.

Fundamental rights in the Commonwealth, though traceable ultimately to natural law and influenced in their formulation by the European and other regional conventions had their immediate origin in the principles of English law. The earliest example in the Commonwealth of a Bill of Rights in the modern sense is the Constitution of Tonga of 1875, which was probably inspired by Methodist missionaries. Most of the post-war constitutions include an entrenched declaration of fundamental rights, with power of judicial review.[62] The first was the Indian Constitution,[63] which came into force in 1950. The Nigerian declaration of fundamental rights (1960) formed the model for several later formulations in other Commonwealth countries, being derived not only from those in the Constitutions of Pakistan (1956) and Malaya (1957), which themselves borrowed extensively from India, but also from the European Convention.

36–018 Amendment of the constitutions of Commonwealth countries usually requires some special procedure at least for altering provisions relating to a federal distribution of powers, fundamental rights, and communal or minority guarantees. In *Bribery Commissioner v. Ranasinghe*,[64] an appeal from Ceylon, the Privy Council said: "a legislature has no power to ignore the conditions of lawmaking that are imposed by the instrument which itself regulates the power to make law. This restriction exists independently of the question whether a legislature is sovereign". These special provisions, however, may later be repealed by means of their own special procedure, as was done in the case of Ghana.

Commonwealth countries, a little time after achieving independence, often wish to base a revised constitution on a local *grundnorm*: they assert the principle of constitutional "autochthony", that is, that their constitution is sprung from their native soil and not derived from a United Kingdom statute. Strictly,

[59] See Sir Fred Phillips, *West Indian Constitutions: Post-Independence Reform* (1985).

[60] *Buck v. Att.-Gen.* [1965] Ch. 745, CA, affirming Wilberforce J. [1964] 3 W.L.R. 850. And see *Manuel v. Att.-Gen.; Noltcho v. Att.-Gen.* [1983] Ch. 77; applying *R. v. Secretary of State for Foreign and Commonwealth Affairs ex p. Indian Association of Alberta* [1982] Q.B. 892, CA, and *Buck v. Att.-Gen. supra.*

[61] The Nigerian Federation, which has gone through a number of changes since independence, was said to be unique in that it was not formed from units that were previously separate countries. The divisions were mainly tribal.

[62] Dale *op. cit.* Ch. 12; see Sir K. Roberts-Wray, "Human Rights in the Commonwealth" (1968) 17 I.C.L.Q. 908.

[63] H. M. Seervai, *Constitutional Law of India* Vol. 1 (3rd ed., Bombay, 1983).

[64] [1965] A.C. 172.

autochthony requires a breach in legal continuity, an actual or technical revolution.[65] A complete breach in legal continuity is attended by some risk if the local courts are independent and impartial. The notion of autochthony is hardly applicable at any rate to Canada, Australia or New Zealand.[66]

Dependent peoples usually want at first to adopt British methods of parliamentary and Cabinet government, adapted to suit local conditions. The main constitutional conventions are commonly formulated or incorporated by reference. The balance of power between conflicting ethnic, religious, linguistic or regional interests needs to be settled before independence.[67] An independent country should be economically viable. It must provide for its own defence and the handling of external affairs. The governmental structure should not be too complex in relation to the population. Literacy is not essential for the franchise. Capable leaders can usually be found to fill the ministerial posts; but beyond this there is the urgent need for an honest and efficient civil service. The dearth of administrators is largely a question of education, and the main obstacle in the way of providing education is the cost.

The desire for independence is itself stimulated by British political ideas, and nationalism marks the later stage in the development of a dependent territory. There is in effect only one party, whose aim is to end "colonialism"; but the British political system presupposes two main parties or groups, one being an effective opposition capable of providing an alternative government. The one-party principle may be introduced before long, especially after the country has become a republic with a strong Presidential system.[68] Thus the "Westminster model"[69] of parliamentary democracy was soon abandoned in Pakistan and Ghana, and later in Nigeria, Uganda, and a number of other Commonwealth countries.

Full membership of the Commonwealth

The Commonwealth was based on conventions which grew out of practice, relating largely to the acquisition and discontinuance of membership. Although it is not an international person it has become an association of an international kind, for it has developed an organisation, acquired a headquarters and developed the beginnings of a constitution, including instruments agreed by Heads of Government such as the London Declaration of 1949 (Head of the Commonwealth), the Agreed Memorandum on the Commonwealth Secretariat of 1965, the Singapore Declaration of 1971 (description of the association, its membership and objectives), the Lusaka Declaration of 1979 (human rights) and the Harare Declaration of 1991 (the promotion of democracy one of the aims of the

36–019

[65] Wheare, *The Constitutional Structure of the Commonwealth*, Chap. 4; *cf.* Kenneth Robinson, "Constitutional Autochthony in Ghana" (1961) 1 *Journal of Commonwealth Political Studies*, 41; "Constitutional Autochthony and the Transfer of Power," in *Essays in Imperial Government* (ed. Robinson and Madden, 1963), p. 249; The Canadian Constitution of 1982 was as nearly autochthonous as practicable.

[66] Roberts-Wray, *op. cit.* pp. 289–295; *ante*, pp. 751–756.

[67] See S. A. de Smith, "Mauritius: Constitutionalism in a Plural Society" (1968) 31 M.L.R. 601; Claire Palley, "Constitutional Devices in multi-racial and multi-religious societies" (1969) 19 N.I.L.Q. 377.

[68] See N. O. Nwabueze, *Presidentialism in Commonwealth Africa* (1974). One-party republics in the Commonwealth at present are Bangladesh, Kenya, Malawi, Seychelles, Sierra Leone, Tanzania and Zambia. Zimbabwe looks like going the same way.

[69] See *per* Lord Diplock in *Hinds v. The Queen* [1977] A.C. 195, TC; D. C. M. Yardley, "The Effectiveness of the Westminster Model of Constitution," *Year Book of World Affairs 1977*, Vol. 31, p. 342.

Commonwealth).[70] Other agreements are the Gleneagles Agreement of 1977 (apartheid in sport) and the Melbourne Declaration of 1981 (economic aid to developing countries). These instruments, however, can hardly be said to create legal, as opposed to political and moral, obligations.

In order that a country may be admitted to full membership of the Commonwealth it must be: (i) independent; (ii) willing to recognise the Queen as Head of the Commonwealth; and (iii) willing to co-operate. The Singapore Declaration begins by describing the Commonwealth of Nations as a voluntary association of independent sovereign states, each responsible for its own policies, consulting and co-operating in the common interests of their peoples and in the promotion of international understanding and world peace. Membership of the Commonwealth, it continues, is compatible with the freedom of member Governments to be non-aligned or to belong to any other grouping, association or alliance. Under the Harare Declaration a committee known as the Commonwealth Ministerial Action Group was established to monitor compliance with the terms of the Declaration.[71]

36–020 The decision to grant independence, as has been said, is made by the United Kingdom.[72] Then, if the government of the country concerned so wishes, the United Kingdom invites the governments of the other full members of the Commonwealth, because they have equality of status, to agree to the full membership of that country. If they, or a majority of them, did not agree, the country concerned would become independent within the Commonwealth, but it would not be a *full* member. On the other hand, there appears to be no rule that the members must be unanimous: a minority probably cannot prevent its becoming a full member although they might ignore it or even secede.

To be admitted to the Commonwealth it is not necessary that the applicant state had, before independence, been a Crown territory. Mozambique and Cameroon which joined the Commonwealth in 1995 are examples.[73]

The number of independent members of the Commonwealth is now 53.

While both sentiment and self-interest may be said to operate in keeping the older Dominions in the Commonwealth, self-interest predominates in determining new countries to join the Commonwealth; although even in them sentiment is not absent, especially among administrators, lawyers and educated persons generally. The advantages of the association to new members include continued financial aid; the secondment of skilled personnel, such as administrators and teachers; mutual trade; and co-operation of many kinds, such as the provision of diplomatic information and help in time of trouble. There are also unofficial links such as are formed by associations of Members of Parliament, lawyers, doctors, scientists and technologists. No disadvantages or limitations are involved in membership.

It has been recognised since the last war that an independent member may leave the Commonwealth by voluntary secession. Secession, to be fully effective, requires not only local legislation but also an act of the United Kingdom Parliament for such purposes as amending legislation relating to nationality. The

[70] Dale, *op. cit.* Ch. 2; "Is the Commonwealth an international organisation?" (1982) 31 I.C.L.Q. 451.

[71] Pakistan was not expelled from the Commonwealth following the military coup in October 1999 but developments are being kept under review.

[72] Or Australia, etc., in relation to dependencies of other Commonwealth countries.

[73] Cyprus entered the Commonwealth six months after the termination of its colonial status in order to emphasise the voluntary nature of its membership.

secession of Eire in 1948 was recognised by the other members,[74] that of South Africa in 1962[75] and that of (West) Pakistan in 1972.[76]

Pakistan was re-admitted to the Commonwealth in 1989[77] and South Africa in 1994.[78]

Following a coup in 1987 and the declaration of a republic, the membership of Fiji was treated as having "lapsed".

The Monarchy in the Commonwealth[79]

The symbol of Commonwealth association is the Queen and Head of the Commonwealth. The Queen has adopted a personal flag—initial E and Crown within a chaplet or roses—for use where the royal standard (especially associated with the United Kingdom) is inappropriate. **36–021**

The convention recited in the preamble to the Statute of Westminster[80] still requires that an alteration by the United Kingdom Parliament in the law touching *the succession to the Throne* should have the assent of the Parliaments of all the Dominions (or realms owing allegiance to the Crown).[81] They would presumably also need to pass their own legislation in order to make such an alteration in the law effective in their own countries. It is suggested that the republics and separate monarchies (such as Malaysia) in the Commonwealth need only be informed of the change made in the law identifying the Head of the Commonwealth, although as a matter of courtesy they would probably be kept informed of any preliminary discussions.

On the other hand, as regards a change made by one member in *the Royal Style and Titles* used by that member—at least within the bounds set by recent precedent—it seems that convention since 1952 no longer requires the assent of any of the other members. On the accession of Queen Elizabeth II in February 1952 proclamations of the Royal Style and Titles were issued in the independent countries of the Commonwealth which, except in the case of New Zealand, differed from that issued in the United Kingdom. Later that year discussions were held among the members, and it was agreed that each one should adopt a title to suit its own circumstances but including a common element. As a result Canada, Australia and New Zealand in 1953 adopted the same royal titles as the United Kingdom, but incorporated a specific reference to their own territory, thus: "Elizabeth II, by the Grace of God of the United Kingdom, Canada [Australia, New Zealand] and Her other Realms and Territories, Queen, Head of the

[74] Ireland Act 1949; but the Republic of Ireland is not to be regarded as a foreign country nor are its citizens to be regarded as aliens in the United Kingdom.

[75] South Africa Act 1962: South Africa became a foreign country, and its citizens became aliens unless they were also citizens of the United Kingdom and Colonies or of some other Commonwealth country.

[76] Pakistan Acts 1973 and 1974; *R. v. Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi* [1976] 1 W.L.R. 979, CA. The former East Pakistan (renamed Bangladesh) remained in the Commonwealth: Bangladesh Act 1973. Burma (1947), Somaliland (1960), Southern Cameroons (1961) and Aden (1971) left the Commonwealth on obtaining independence.

[77] Pakistan Act 1990.

[78] South Africa Act 1995.

[79] Dale, *op. cit.*, pp. 35–39. Sir Ivor Jennings, *Constitutional Laws of the Commonwealth* (3rd ed.), Vol. I pp. 18–25; J. E. S. Fawcett *The British Commonwealth in International Law* pp. 79–85; D. P. O'Connell, "The Crown in the British Commonwealth" (1957) 61 I.C.L.Q. 103.

[80] *ante*, para. 36–003.

[81] Suppose they do not all agree?

Commonwealth, Defender of the Faith."[82] In the republics and separate monarchies (*e.g.* Malaysia) the Queen is recognised only as Head of the Commonwealth.[83]

36–022 The Queen is a part of the legislature in each of her realms, and the government of each is carried on in her name on the advice of the Ministers in that country. The extent to which prerogative powers in relation to external affairs were transferred to the Governor-General in the former Dominions varied.[84]

Her Majesty during her tours of the Commonwealth has personally opened sessions of Commonwealth Parliaments, presided over Executive Councils and meetings of the Privy Council, administered the oath of office to Ministers and signed letters of credence of Commonwealth ambassadors.

Following the dismissal of the Australian Prime Minister (Mr Gough Whitlam) and the appointment of the Leader of the Opposition (Mr Fraser) as caretaker Prime Minister by the Governor-General (Sir John Kerr) in 1975, the Speaker of the House of Representatives wrote to the Queen asking her to intervene. Her Majesty replied: "The written Constitution, and accepted constitutional conventions, preclude the Queen from intervening personally in those functions [given to the Governor-General by the Constitution] once the Governor-General has been appointed, and from interfering with His Excellency's tenure of office except upon advice from the Australian Prime Minister." It is not clear who advised Her Majesty on that occasion, or who drafted her letter.[85]

Some controversy arose early in 1984 out of the Queen's Christmas broadcast to the Commonwealth (in which Her Majesty spoke of her recent visit to India and her meeting with Mrs Gandhi, the Indian Prime Minister) over the question whether convention requires the Head of the Commonwealth to take advice from ministers of the United Kingdom or of the Commonwealth countries concerned, or whether she may act without such advice. Statements were made by both Buckingham Palace and Mrs Thatcher, the Prime Minister, in the House of Commons to the effect that as Head of the Commonwealth the Queen may act without formal advice, and these statements were consistent with the opinion expressed by a former legal adviser to the Commonwealth Office.[86]

36–023 That does not, however, mean that she may, as Head of the Commonwealth, differ publicly from the views of the Government on a matter on which the Government has formed a particular view. In July 1986 there was speculation in a newspaper article that the Queen, as Head of the Commonwealth, did not agree with the Prime Minister on the wisdom of applying (or not applying) economic sanctions against South Africa.[87] Whatever the truth of that story, it would

[82] All the overseas countries described her as "Elizabeth the Second," although she was the first Elizabeth to reign over them as distinct Kingdoms: *cf. MacCormick v. Lord Advocate*, 1953 S.C. 396 (Scotland). In 1973 Her Majesty personally signed an Australian Act giving her the title of Queen of Australia, instead of Queen of the United Kingdom and Australia.

[83] *post*, para. 36–024.

[84] Further prerogative powers, extending to war and peace, were transferred at the beginning of 1978 to the Governor-General of Canada, *cf.* now, Canada Act 1982 and Australia Act 1986, *ante*.

[85] See D. P. O'Connell, "The Dissolution of the Australian Parliament: 11 November, 1975," (1976) 57 *The Parliamentarian*, p. 11 and letter from D. P. O'Connell and J. M. Finnis to *The Times*, November 25, 1975.

[86] Sir William Dale, letter to *Daily Telegraph* January 31, 1984. *cf.* Mr Enoch Powell, M.P.: "ministerial advice that ministerial advice is not requisite is also ministerial advice": letter to *The Times*, January 26, 1984. See further, R. W. Blackburn, "The Queen and Ministerial Responsibility" [1985] P.L. 561.

[87] *The Sunday Times*, July 20, 1986, *ante*, para. 17–024.

obviously be constitutionally improper for the Queen to express in public a view which was contrary to that of Her Ministers as the United Kingdom on a matter concerning the policy of the United Kingdom.

"The Crown" usually means the central government,[88] and as there are as many independent governments as there are independent countries of the Commonwealth, "the Crown" in any of these will usually mean the government of that country. This is especially so where statute has expressly or impliedly designated a particular fund to meet a debt.[89] Further, disputes between member nations of the Commonwealth are possible, such as the dispute between India and Pakistan on the status of Kashmir. The Crown may at the same time be at war in respect of some Commonwealth territories and at peace in respect of others. In the Second World War not only did some Commonwealth countries make separate declarations of war against Germany and Japan, but Eire remained neutral throughout. Since the war the members of the Commonwealth have not pursued a common foreign policy. They differed, for example, over the Suez Canal intervention in 1956 and on the question of recognising Communist China. Some have entered into regional treaties with non-members to the exclusion of other members.

The conclusion is that the common law doctrine of the indivisibility of the Crown[90] has been modified, from the English law point of view, by legislation and constitutional convention. The Queen holds several offices as Head of State. The legal systems of other Commonwealth countries generally regard the Crown as divisible, but within the federations it is indivisible for certain purposes. In international law the Crown is clearly divisible. Some writers would describe the relation of the Crown to the various realms in the Commonwealth as a new kind of personal union, but no formula yet devised is adequate to cover all the facts.

Republics in the Commonwealth

The India (Consequential Provisions) Act 1949[91] recognised that India[92] was a republic while remaining a member of the Commonwealth. Since its new Constitution came into force in 1950, India no longer owes allegiance to the Crown. The Queen is not Queen of India, but India recognises the Crown as the Head of the Commonwealth with which it is associated and of which it is a full member. The desire of India to remain a full member of the Commonwealth after the coming into force of her republican Constitution was discussed at a meeting of Commonwealth Prime Ministers in 1949, which issued a declaration[93] to the effect that the Governments of the other Commonwealth countries, the basis of whose membership of the Commonwealth was not thereby changed, accepted and recognised India's continuing membership. This declaration modified the Balfour declaration of 1926,[94] and dropped the term "British" as applied to the **36–024**

[88] *ante*, para. 15–007.
[89] *Att.-Gen. v. Great Southern and Western Ry of Ireland* [1925] A.C. 754.
[90] *ante*, para. 35–005.
[91] And see Statute Law (Repeals) Act 1976, Pt VII.
[92] *i.e.* the former British India excluding Pakistan, but including most of the former Indian states.
[93] For the negotiations leading to this declaration, including recognition by India of the King as "Head of the Commonwealth," see J. W. Wheeler-Bennett, *King George VI*, pp. 719–731.
[94] *ante*, para. 36–001.

Commonwealth: A similar process was gone through in 1956 in relation to Pakistan which has since left the Commonwealth.[95]

The existence of republics within the Commonwealth marks the end of that "common allegiance" which featured so prominently in the Balfour declaration; but the concept of allegiance, now divorced from British nationality, appears to have no legal significance except in the law of treason.

Citizenship[96]

36–025 As has been seen in Chapter 23, there is no longer a common code of British nationality. The first sign of divergence was the Canadian Nationals Act 1921, and crisis came with the Canadian Citizenship Act 1946. This led to a conference of legal experts on Commonwealth nationality and citizenship in 1947. Their proposal was that the United Kingdom and the other Commonwealth countries should each define their own citizenship, and that the citizens of the various Commonwealth countries should be recognised in every part of the Commonwealth as "British subjects" or "Commonwealth citizens."

This "common clause" was adopted by the United Kingdom, Canada, Australia and New Zealand. It does not necessarily mean, however, that British citizens (formerly citizens of the United Kingdom and Colonies) have in those other three countries the same citizenship and political rights as their citizens have in the United Kingdom.[97] Other Commonwealth countries recognise "Commonwealth citizens" in various ways.

Consultation and co-operation

36–026 After the Imperial Conference of 1937 the practice of holding more or less regular Imperial Conferences, with fixed agenda and full published reports, was discontinued. There have since been ad hoc meetings of Commonwealth heads of government to review the state of the war and to discuss post-war settlements; to discuss international relations, economic affairs and defence; to answer the question of India's continued membership of the Commonwealth after adopting a republican constitution; to discuss South Africa; to discuss the Common Market; the world political situation; the progress of British territories towards independence, and membership of the Commonwealth; the means of promoting closer co-operation between the peoples of the Commonwealth; world economic affairs; disarmament; trade and immigration. Meetings of all the member states are now held biennially.

There have also been other Conferences from time to time below heads of government level, for example, the British Commonwealth Conference on Nationality and Citizenship, 1947; and the Conference of Commonwealth Foreign Ministers at Colombo in 1950, which recommended the establishment of a Commonwealth Consultative Committee to plan developments for South and South-East Asia ("the Colombo Plan").

Since the war, treaty relations among members of the Commonwealth no longer appear to differ from those existing between other states. In the absence of any provision to the contrary, they would be governed by international law. When members of the Commonwealth have accepted the compulsory jurisdiction

[95] The number of republics (with either constitutional or executive Presidents) within the Commonwealth currently stands at 31, compared with 16 Realms acknowledging the Queen as Head of State and 6 indigenous monarchies.

[96] Dale, *op. cit.* pp. 187–189.

[97] *ante* para. 23–025 for the application of the Immigration Act 1971 to Commonwealth citizens

of the International Court of Justice, they have tended to reserve disputes with Commonwealth countries. The United Kingdom no longer excludes such disputes arising after 1968. No formal machinery had been devised for settling disputes between members of the Commonwealth. An advisory opinion of the Privy Council has been sought twice in disputes between Commonwealth members.[98] Settlement through the machinery of the United Nations has also been resorted to twice: between India and South Africa in 1946 over the treatment of Indians in the latter country, and between India and Pakistan over the future status of Kashmir in 1954.

36–027 Commonwealth High Commissioners in the United Kingdom now take precedence with ambassadors of foreign states and are accorded the title of "Excellency." Republican members of the Commonwealth may send ambassadors rather than High Commissioners to other Commonwealth countries. These representatives of Commonwealth governments in the United Kingdom were granted immunities similar to those of foreign diplomatic representatives in 1952.[99]

Consultation, exchange of information and co-operation among Commonwealth countries are found mainly in the fields of external affairs, defence, finance and economics, education and law. There is also a fair degree of mutual help. The obligation to consult, however, is not clearly defined, and consultation tends to be a one-way traffic. The United Kingdom would not change any law affecting citizens of Commonwealth countries, such as the Fugitive Offenders Acts, without consulting the other members, and in this case probably trying to effect reciprocal arrangements. The principle obtains of non-intervention in each other's domestic affairs. Apart from express agreements, no positive obligations are involved in Commonwealth membership. Generally, there is no definite Commonwealth policy. In particular, there is no common foreign policy. The experience of Eire in the last war shows that a member of the Commonwealth—even one of the Queen's realms (as Eire was then)—may remain neutral in a war in which the Crown is engaged. Eire's neutrality was recognised by the enemy belligerents, and by the neutral countries.

36–028 The media for consultation include the Crown and the Governors-General, meetings of Prime Ministers, other Ministers and officials, the exchange of High Commissioners or Ambassadors, and regular communication between the Foreign and Commonwealth Office and the Departments of External Affairs of Commonwealth countries.[1]

There are also a number of official organs for co-operation covering such matters as agriculture and forestry, education, air transport, economics, scientific liaison, shipping, statistics and telecommunications. Assistance of various kinds is provided by the Commonwealth Development Corporation.[2] Collective defence has been a major preoccupation both in war and peace, but the recent tendency is for regional international arrangements such as the North Atlantic Treaty Organisation. The Commonwealth Foundation administers a fund for increasing interchanges between Commonwealth organisations in professional

[98] *Re Cape Breton* (1846) 5 Moo.P.C. 259 (annexation of Cape Breton to Nova Scotia); *Re Labrador Boundary Dispute* (1927) 137 L.T. 187.

[99] Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952; Diplomatic Privileges Act 1964; *ante*, para. 15–033.

[1] The United Kingdom temporarily broke off diplomatic relations with Uganda in 1976, British interests being looked after by France.

[2] Commonwealth Development Corporation Acts, 1978 and 1982. The Commonwealth Development Corporation Act 1999 provides for the privatisation of the corporation.

fields. The Foundation is an autonomous body, maintaining a close liaison with the Commonwealth Secretariat, and is financed by contributions from Commonwealth governments.

The Commonwealth Secretariat[3]

36–029 The Commonwealth Secretariat, established in 1965 as a visible symbol of the spirit of co-operation animating the Commonwealth, is at the service of all Commonwealth governments. The Secretariat derives its functions from the authority of Commonwealth heads of government, and the Secretary-General has access to heads of government. The Secretariat has no executive functions. Among its chief purposes are to disseminate factual information to all member countries on matters of common concern; to assist existing agencies in the promotion of Commonwealth links; and to help to co-ordinate preparations for future meetings of Commonwealth heads of government and of other Commonwealth Ministers.

The Commonwealth Secretariat Act 1966 provides that the Secretariat shall have the legal capacity of a body corporate, and it and its staff have the privileges and immunities conferred by the Schedule. The certificate of a Secretary of State is conclusive as to any relevant fact.

[3] Cmnd. 2713, *Agreed Memorandum on the Commonwealth Secretariat*; *The Commonwealth Relations Office Year Book 1966*, Chap. 3; Margaret Doxey, "The Commonwealth Secretariat," *Year Book of World Affairs 1976*, p. 69.

CHAPTER 37

APPEALS TO THE PRIVY COUNCIL[1]

1. APPEALS FROM DEPENDENT TERRITORIES

37–001 The abolition of the jurisdiction of the Council in the seventeenth century did not extend to appeals from overseas territories, *e.g.* the Channel Islands, the Isle of Man, colonies ("plantations"), and later India. The remaining jurisdiction rested on the prerogative of the King as the fountain or reservoir of justice; but its exercise came to be regulated by the Judicial Committee Acts of 1833 and 1844, which created the judicial Committee of the Privy Council to hear all Privy Council appeals.[2] The Crown has the prerogative to determine what is the jurisdiction of the Judicial Committee.[3] The Colonial Courts of Admiralty Act 1890 provided for the continued hearing of appeals by the Privy Council from courts in any British possession invested with Admiralty jurisdiction where there was no right of appeal to a local court or on appeal from a local court. There is power to make rules of court.

Privy Council Precedents

37–002 A Privy Council decision (technically an opinion) is binding on the courts of the country from which the appeal came. The Judicial Committee said in the *Bakhshuwen* case[4] that decisions of the Board on Islamic law in appeals from India bound the Court of Appeal for Eastern Africa, and there are older dicta to the effect that the Boards' decisions are binding throughout the Privy Council's overseas jurisdiction[5] but the statement should probably be restricted, first to cases where the relevant parts of the legal systems concerned are the same and, secondly to appeals from dependent territories. Decisions of the House of Lords on United Kingdom legislation which has been adopted in similar terms in a colony should be treated by colonial courts as binding, according to the Board in *Delasala v. Delasala*,[6] although in juristic theory such decisions are persuasive only.

[1] N. Bentwich, *Privy Council Practice* (3rd ed., 1937); Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, pp. 433–463; Sir William Dale, *The Modern Commonwealth* pp. 128–129; Loren P. Beth, "The Judicial Committee: Its Development, Organisation and Procedure" [1975] P.L. 219; E. McWhinney, *Judicial Review in the English-Speaking World*. For the early history see J. H. Smith, *Appeals to the Privy Council from the American Plantations* (1965); P. A. Howell, *The Judicial Committee of the Privy Council 1833–1876*.

[2] *ante*, para. 16–010.

[3] *Australian Consolidated Press v. Uren* [1969] 1 A.C. 590, PC.

[4] *Fatuma Bin Salim Bakhshowen v. Mohamed Bin Salim Bakhshuwen* [1952] A.C. 1; *Australian Consolidated Press v. Uren, supra*. In *Frankland v. The Queen* [1987] A.C. 576, on an appeal from the Isle of Man concerning the common law *mens rea* of murder the Privy Council took the view that decisions of the House of Lords were persuasive only. See H. H. Marshall, "The Binding Effect of Decisions of the Judicial Committee of the Privy Council" (1968) 17 I.C.L.Q. 743; G. W. Bartholomew in (1952) 1 I.C.L.Q. 392; Roberts-Wray, *op. cit.* pp. 572–575.

[5] *e.g. Robins v. National Trust Co* [1927] A.C. 515.

[6] [1980] A.C. 546. Decisions of the Council reflect differing views: see J. W. Harris, "The Privy Council and the Common Law" (1990) 106 L.Q.R. 574; *post* para. 37–010.

Appeals lie from the Channel Islands, the Isle of Man and the colonies, and by virtue of the Foreign Jurisdiction Act 1890 they formerly lay from protectorates, protected states and British trust territories.

Appeals to the Judicial Committee from overseas territories fall into two main classes:

(1) Appeals by "right of grant."

(2) Appeals by "special leave" of the Privy Council.

1. Appeals by "right of grant"

37–003 These are called appeals "by right of grant" because the limits are defined by Imperial Act, Order in Council or local statute, although fundamentally the appeal is founded on "the prerogative right and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction" (*R. v. Bertrand*[7]). They fall into two groups: (a) appeals "as of right" in the narrow sense, and (b) appeals at the discretion of the local court. In so far as these appeals rest on Act of Parliament or Order issued thereunder, they cannot be limited or abolished by the colonial legislature.[8] Leave to appeal to the Privy Council must be obtained from the local court, usually the Supreme Court of the territory. Neither group of appeals by right of grant now in fact includes criminal cases.[9]

(a) *Appeals "as of right"*

37–004 Although this kind of appeal is called "as of right," application for leave to appeal has to be made to the local court; but the latter must grant leave to appeal if certain conditions are fulfilled. These conditions vary in different territories, although there is now a fair degree of uniformity. Generally speaking, an appeal lies "as of right" where the decision complained of is a final judgment, the subject-matter involved is worth a specified minimum sum, and the appellant fulfils the prescribed conditions, *e.g.* as to the time within which application is to be made.[10]

(b) *Appeals at the discretion of the local court*

37–005 If these conditions are not fulfilled, *e.g.* because the sum involved is below the prescribed minimum or the judgment is not a final one, the local court may have a discretion to grant leave to appeal if it considers that the question is one which by reason of its great general or public importance or otherwise ought to be submitted to Her Majesty in Council. It commonly requires security for costs.

2. Appeals by "special leave" of the Privy Council

37–006 These are sometimes still called "prerogative" appeals, although they are now regulated by the Judicial Committee Act 1844. The Judicial Committee may grant special leave to appeal where:

[7] (1867) L.R. 1 P.C. 520.
[8] Colonial Laws Validity Act 1865, s.2.
[9] *Falkland Islands Co v. R.* (1863) 1 Moo.P.C.(N.S.) 299; and see *Chung Chuck v. The King* [1930] A.C. 244.
[10] *Royal Hong Kong Jockey Club v. Miers* [1983] 1 W.L.R. 1049.

(i) there is no grant of the right of appeal from the court; or

(ii) the local court has no power to grant leave to appeal in the particular case, that is, generally in criminal cases; or

(iii) the local court has power to grant leave to appeal in the particular case, but has refused leave[11]; or

(iv) appeal lies directly to the Privy Council under the Judicial Committee Act 1844 from a court which is not a court of final appeal.

The power to grant special leave to appeal cannot be limited or abolished by the legislature of a dependent territory except under the authority of an Act of Parliament, first, because that would be repugnant to the Judicial Committee Acts of 1833 and 1844 and therefore void under the Colonial laws Validity Act 1865; and, secondly, because it could only be effective if construed as having an extraterritorial operation, and a colonial Act cannot in general have extraterritorial operation. The decision of the Privy Council in *Nadan v. The King*[12] was explained in this way in *British Coal Corporation v. The King*,[13] although it would have been sufficient to base it on repugnancy to Imperial statute.

Special leave to appeal may be granted in criminal cases as well as civil cases, but different principles are applied.

(a) *Civil cases*

37–007 The Judicial Committee will grant special leave to appeal in civil cases only "where the case is of gravity involving a matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."[14] Thus special leave was granted where the question was whether gold and silver minerals discovered in British Columbia in the nineteenth century were vested in the Crown as represented by the Government of Canada or that of British Columbia.[15] Special leave has been granted on important questions of law even though the amount involved was below the prescribed minimum for an appeal by right of grant[16]; in constitutional cases such as the interpretation of a colonial Act[17]; where the revenue rights of the Crown are concerned[18]; and where the colonial court acted without jurisdiction.[19] Cases where special leave is likely to be granted although the matter is not of great public importance include questions affecting status, the validity of marriage, the legitimacy of children and injury to character or professional reputation.[20]

[11] *Davis v. Shaughnessy* [1932] A.C. 106.
[12] [1926] A.C. 482.
[13] [1935] A.C. 500, PC; and see *Att.-Gen. for Ontario v. Att.-Gen. for Canada* [1947] A.C. 127, PC.
[14] *Prince v. Gagnon* (1882) 8 App.Cas. 103, 105; *Caldwell v. McLaren* (1883) 9 App.Cas. 295.
[15] *Att.-Gen. of British Columbia v. Att.-Gen. of Canada* (1889) 14 App.Cas. 295.
[16] *Sun Fire Office v. Hart* (1889) 14 App.Cas. 98.
[17] *Ex p. Gregory* [1901] A.C. 128.
[18] *Re Att.-Gen. of Victoria* (1866) 3 Moo.P.C.(N.S.) 527.
[19] *The Queen v. Price* (1854) 8 Moo.P.C. 203.
[20] e.g. *Le Mesurier v. Le Mesurier* [1895] A.C. 517; *Att.-Gen. of the Gambia v. N'Jie* [1961] A.C. 617. And see *Re Dillet, infra.*

On the other hand, special leave will not be granted to determine merely abstract right, or purely hypothetical questions; or in election petitions; nor generally on questions of fact.

(b) *Criminal cases*

37–008 In *Re Dillet*[21] Lord Blackburn said of appeals in criminal cases: "the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." These principles were restated by the Board in 1914 in *Arnold v. The King-Emperor*.[22] "It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of the criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside of the pale of regular law, or unless, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided."[23] It may be noted that these principles were laid down at a time when there was no system of criminal appeals in this country. They have, however, continued to be applied in more recent times: *Ragho Prasad v. The Queen*.[24]

Where the Privy Council has jurisdiction, whether civil or criminal, it may hear an appeal from either party. Thus in *Attorney-General of Ceylon v. K. D. J. Perera*[25] the Judicial Committee allowed an appeal by the Crown against the decision of the Court of Criminal Appeal of Ceylon ordering a new trial (not an acquittal) of a person who had been convicted of murder by the court of first instance.

The Judicial Committee follow the usual practice of appellate courts in not granting leave to appeal in criminal cases on questions of fact. A misdirection to the jury is not by itself a sufficient ground for interference if either the local Appeal Court or the Judicial Committee itself is satisfied that the facts nevertheless indicate the guilt of the accused. Appeals will not be heard from a military tribunal administering martial law (*Tilonko v. Attorney-General of Natal*[26]), or from courts-martial administering military law.[27] The petitioner will generally be expected to have availed himself of any right of appeal to the local courts before approaching the Privy Council.[28]

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[21] (1887) 12 App.Cas. 459; Chief Justice of colony acted in effect as prosecutor, witness and judge. See too, *Ibrahim v. The King* [1914] A.C. 599, 614 *per* Lord Sumner: the *locus classicus* according to Lord Hailsham, *Badry v. D.P.P.* [1983] 2 A.C. 297, 302.

[22] [1914] A.C. 644.

[23] See, *e.g. Chang Hang Kiu v. Piggot* [1909] A.C. 312 (grossly improper procedure); *Knowles v. The King* [1930] A.C. 366 (jury in murder trial not told they could return verdict of manslaughter); *Ras Behari Lal v. The King-Emperor* (1933) 60 Ind.App. 354 (juryman had insufficient knowledge of English).

[24] [1953] A.C. 200; following *R. v. Bertrand* (1867) L.R. 1 P.C. 520; *Buxoo v. The Queen* [1998] 1 W.L.R. 820, following *Badry supra*.

[25] *Atygale v. The King* [1936] A.C. 338.

[26] [1907] A.C. 93, 461.

[27] *Mohammad Yakub Khan v. R.* (1947) 63 T.L.R. 94.

[28] *Kenyatta v. R.* [1954] 1 W.L.R. 1053.

II. Appeals from Independent Commonwealth Countries

Appeals and the Statute of Westminster

37–009 Immediately before the passing of the Statute of Westminster 1931, appeal lay by *right of grant* from the Court of Appeal of New Zealand, and in some cases directly from the Supreme Court of New Zealand with the leave of that court. Appeal by right of grant also lay from the superior courts of the Canadian provinces, and (in relation to their state jurisdiction) from the Supreme Courts of the Australian states. As has been pointed out, such right of appeal could be altered or abolished by a Dominion legislature, subject to the provisions of the Colonial Laws Validity Act 1865.[29]

Before the passing of the Statute of Westminster the Dominions could not restrict or abolish the jurisdiction of the Privy Council to grant *special leave* to appeal: (i) by reason of the Colonial Laws Validity Act 1865, s.2, because the jurisdiction of the Judicial Committee rested on—or was regulated by—the Judicial Committee Acts 1833 and 1844; and (ii) because they could not legislate with extraterritorial effect, except for the peace, order and good government of their territory (*Nadan v. The King*[30]).

The general principles on which special leave from the Dominions was at that time granted were explained by Viscount Haldane in *Hull v. McKenna*.[31] Generally, he said, the jurisdiction of Dominion courts should be regarded as final: only in exceptional cases would the Judicial Committee use its discretion to grant leave to appeal. Leave was very sparingly granted in criminal cases. Otherwise, leave was more freely granted in *inter se* disputes from federal Dominions (except in so far as limited by statute in the case of Australia) and from India than in cases from unitary dominions. This practice followed the wishes of the various Dominions themselves.

37–010 The question of appeals to the Judicial Committee was discussed by the Imperial Conference of 1926, but no proposal was made beyond recording the understanding that "it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected." The Imperial Conference, 1930, did not agree on any solution to the question of appeals from the Dominions to the Privy Council, and it seems fairly clear that the Statute of Westminster 1931 was not intended to affect them.

After the passing of that Statute, however, the Judicial Committee held that sections 2 and 3 enabled the Dominions to which the Statute applied to abolish all appeals to the Privy Council, criminal[32] and civil,[33] including appeals by special leave. The same consequence followed without any doubt from the Indian Independence Act 1947 and subsequent Independence Acts affecting other territories. Since the legislature of an independent Commonwealth country may at any time modify or terminate appeals to the Privy Council, said Viscount

[29] Though it was doubtful whether the Australian Parliament could abolish such appeals from the States even with their concurrence.

[30] [1926] A.C. 482, PC: Canada.

[31] Reported in [1926] Ir.R. 402: the first appeal from the Irish Free State.

[32] *British Coal Corporation v. The King* [1935] A.C. 500. See W. Ivor Jennings, "The Statute of Westminster and Appeals" (1936) 52 L.Q.R. 173.

[33] *Att.-Gen. for Ontario v. Att.-Gen. for Canada* [1947] A.C. 127. See C. G. Pierson, *Canada and the Privy Council* (1960).

Radcliffe in *Ibralebbe v. The Queen*,[34] true independence is not in any way compromised by continuance of such appeals.

In *De Morgan v. Director-General of Social Welfare*,[35] the Judicial Committee, on appeal from New Zealand, held that the right of appeal could be excluded not merely by express statutory words but also by necessary intendment.

Privy Council precedents

37–011 The courts of an independent Commonwealth country are probably not bound by Privy Council decisions on appeal from another country, even where the laws in force in the countries concerned are similar. The attainment of independence, involving an independent legal system and the voluntary nature of the retention of appeals to the Privy Council, may be said to sever the previously undivided jurisdiction of the Privy Council.[36] Such decisions, on the other hand, would be strongly persuasive, apart from the probability that the Privy Council would decide the question in the same way.

The Privy Council has expressed conflicting views on whether the courts of Commonwealth countries (and the Council itself) are bound by decisions of the House of Lords. In *Australian Consolidated Press Ltd v. Uren*[37] it held that the High Court of Australia was not bound by *Rookes v. Barnard*.[38] In *Abbott v. The Queen*[39] it refused to follow *Lynch v. D.P.P. for Northern Ireland*.[40] The Privy Council, on the other hand, attributed binding effect to decisions of the House of Lords in *Hart v. O'Connor*[41] and *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd*.[42]

Waning jurisdiction of the Privy Council[43]

37–012 Appeals to the Privy Council, as we have seen, have now been abolished by the "older" Commonwealth countries of Canada[44] and Australia.[45] Such appeals may be abolished by the legislation establishing the constitution of a newly independent Commonwealth country,[46] but they are usually retained at least for

[34] [1964] A.C. 900, PC. And see *Geelong Harbour Trust Commrs v. Gibbs* [1974] A.C. 810; the Privy Council does not think it proper to intertere with matters of legal policy, *e.g.* whether or not to follow a previous decision of the courts of the country concerned, as opposed to substantive law.

[35] [1998] A.C. 275, PC (Power of PC to entertain appeals was no longer wholly prerogative but, in essence, statutory. Earlier authorities had failed to take account of impact of Judicial Committee Acts 1833 and 1844). *Walker v. The Queen* [1994] 2 A.C. 3644, PC. See too *Dow Jones (Asia) Inc. v. A.G. of Singapore* [1989] 1 W.L.R. 1308 for example of purely statutory right of appeal.

[36] There are dicta to the effect that the Judicial Committee is part of the hierarchy of each system of courts from which appeal lies, *e.g. British Coal Corporation v. The King* [1935] A.C. 500, 52, *cf. ante*, para. 37–002.

[37] [1969] 1 A.C. 590, PC.

[38] [1972] 2 A.C. 1027, HL.

[39] [1977] A.C. 755, PC.

[40] [1975] A.C. 653, HL See also *Frankland v. The Queen* [1987] A.C. 576, PC.

[41] [1985] A.C. 1000.

[42] [1986] A.C. 80. See further J. W. Harris, cited *supra*, n. 6.

[43] See H. H. Marshall, "The Judicial Committee of the Privy Council: a Waning Jurisdiction" (1964) 13 I.C.L.Q. 697; Enid M. Campbell, "The Decline of the Jurisdiction of the Judicial Committee of the Privy Council" (1959) 33 A.L.J. 196; Lord Normand, "The Judicial Committee of the Privy Council" [1950] C.L.P. 1.

[44] *ante*, n. 32 and n. 33.

[45] *ante*, para. 36–011.

[46] *cf. Ibralebbe v. The Queen* [1964] A.C. 900 (PC); attainment of independence of itself does not abrogate jurisdiction of Privy Council.

a time on attainment of independence. The tendency has been to abolish the Privy Council's jurisdiction, however, on assuming republican status, as with India, Pakistan, Cyprus,[47] Ghana, Nigeria, Sri Lanka and Malta.

From the New Zealand Court of Appeal appeal lies in most cases, and in exceptional cases directly from the Supreme Court.[48] The abolition of the right of appeal is, however, regularly suggested.

As Malaysia (formerly Malaya) became a monarchy not owing allegiance to the Queen, an arrangement was made whereby the Head of State should refer appeals, or applications for special leave to appeal, to the Judicial Committee in certain cases; the opinion of the Judicial Committee being then reported direct to the Head of State.[49] The Judicial Committee thus became part of the judicial system of Malaysia. Another device has been to make appeals lie from a republic to the Judicial Committee itself, and not to the Queen in Council.[50]

Despite its waning jurisdiction the Privy Council has in recent years dealt with a variety of interesting and often controversial issues. In a succession of cases it has recognised that "less rigidity" and "greater generosity" are required in interpreting constitutions than statutes.[51] In *A.G. of Trinidad and Tobago v. Whiterman*[52] Lord Keith said that "the language of a constitution falls to be construed not in a narrow and legalistic way, but broadly and purposively so as to give effect to its spirit and this is particularly true of those provisions which are concerned with the protection of human rights." The Privy Council applied that approach in holding that a constitutional right to legal representation would be nullified without the implication of a right to be informed of the constitutional guarantee. As was seen earlier,[53] the Privy Council has interpreted constitutions on the assumption that they are based, or should be based, on the separation of powers.[54] In *Browne v. The Queen*[55] a sentence of detention during the Governor General's pleasure (passed under legislative powers) was held to be unconstitutional because the Governor General was part of the executive; questions of

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[47] Except appeals from the Senior Judges' Court of the Sovereign Base Areas.

[48] *e.g. Lee v. Lee's Air Farming Ltd* [1961] A.C. 12; *Boots Chemists (New Zealand) v. Chemists Service Guild of New Zealand* [1968] A.C. 457. In *Thomas v. The Queen* [1980] A.C. 125 the Judicial Committee held that no appeal lay from an "opinion" given by the New Zealand Court of Appeal on a reference to the Court by the Governor General under s.406(6) of the Crimes Act 1961 which allows the Governor General, if he desires the assistance of the Court, to refer a point for the Court's opinion. Recent examples include *Cussons (New Zealand) Pty Ltd v. Unilever plc* [1995], A.C. 328 (trademarks); *Countrywide Banking Corpn v. Dean* [1998] A.C. 338 (insolvency); *Commissioner of Inland Revenue v. Wattie* [1999] 1 W.L.R. 873 (revenue); *A.G. of New Zealand v. Horton* [1999] 1 W.L.R. 1195 (compulsory purchase).

[49] Agreement of 1958. See *Hussien (Shaabin Bin) v. Kam (Chong Fook)* [1970] A.C. 492; *Ningkan (Stephen Kalong) v. Government of Malaysia* [1970] A.C. 379; *Teh Cheng Poh v. Public Prosecutor, Malaysia* [1980] A.C. 458. Following the abolition of the right of appeal by Malaysian legislation, the relevant UK legislation was repealed by the Statute Law (Repeals) Act 1989; Federation of Malaya Independence Act 1957, s.3 and Malaysia Act 1963, s.5.

[50] *e.g.* Malawi Independence Act 1964, s.5; Kenya Independence Act 1963, s.6. These provisions are no longer in force.

[51] *Minister of Home Affairs v. Fisher* [1980] A.C. 637; *Société United Docks v. Govt of Mauritius* [1985] A.C. 585.

[52] [1991] 2 A.C. 240, 247. See also *A.G. of Hong Kong v. Lee Kwong-Kut* [1993] A.C. 951, *per* Lord Woolf; *Ming Pao Newspapers v. A.G. of Hong Kong* [1996] A.C. 907, 917 *per* Lord Jauncey.

[53] *Supra* para. 2–021.

[54] *Liyanage v. R.* [1967] 1 A.C. 259; *Hinds v. R.* [1977] A.C. 195; *A.G. of Fiji v. D.P.P.* [1983] 2 A.C. 672; *John v. D.P.P.* [1985] 1 W.L.R. 657.

[55] [2000] 1 A.C. 45.

punishment were for the judiciary.[56] Fundamental rights before the Board have included the right to bail[57]; the right of a detained person to communicate with a lawyer[58] the right to a fair hearing of a criminal charge within a reasonable time[59] the right to legal representation[60]; the right not to be deprived of property without compensation[61]; the right to freedom of expression[62] and the inviolability of premises against unlawful search.[63] The extent to which a constitutional presumption of innocence is compatible with imposing the burden of proof relating to particular issues on a defendant was considered in *A.G. of Hong Kong v. Lee Kwong-Kut*.[64] In *Matadeen v. Pointu*[65] the Privy Council refused to find a general principle of equality of treatment in the constitution of Mauritius and held that individuals were protected against discrimination only on the specific grounds laid down in the constitution. The most controversial aspect of the Council's work has come to be its role in relation to appeals concerning the death penalty. It has clearly established that capital punishment is not, in itself, unconstitutional as a "cruel and unusual punishment".[66] But in *Pratt v. A.G. for Jamaica*[67] it was held that unconscionable delay in carrying out a sentence of death may make the punishment "cruel". In *Thomas v. Baptiste*[68] it was stated that the prison conditions in which a condemned prisoner is kept may themselves constitute cruel and unusual treatment but do not of themselves render the carrying out of the death sentence, cruel or unusual. "It would be otherwise if the man were kept in solitary confinement or shackled or flogged or tortured . . . A state which imposes such punishments forfeits its right to carry out the death

[56] Applying *Hinds v. The Queen*, *supra* and *R. v. Secretary of State for the Home Department ex p. Venables* [1998] A.C. 407. See also *Ali v. The Queen* [1992] 2 A.C. 93. (Provision that D.P.P. could choose to direct that offence be heard before a court which could, on conviction, only impose death penalty, unconstitutional).

[57] *Attorney-General of the Gambia v. Jobe* [1984] A.C. 689. (Constitutionality of Special Criminal Court also in issue). For a critical note see, Barbara de Smith, "The Judicial Committee as a Constitutional Court" [1984] P.L. 557.

[58] *Thornhill v. Attorney-General of Trinidad and Tobago* [1981] A.C. 61.

[59] *Bell v. D.P.P.* [1985] A.C. 937 (Jamaica). In *D.P.P. v. Tokai* [1996] A.C. 856, on appeal from Trinidad and Tobago, the Privy Council refused to read into a constitutional provision guaranteeing a "right to a fair hearing in accordance with the principles of fundamental justice" a right to a trial within a reasonable time. Delay was a matter for the judge by virtue of his general jurisdiction to prevent abuse of process. See also *Charles v. The State* [2000] 1 W.L.R. 384.

[60] *Mitchell v. The Queen* [1999] 1 W.L.R. 1679. (Conviction quashed; trial continued without adjournment when defendant's counsel withdrew from the proceedings.) *Dunkley v. The Queen* [1995] 1 A.C. 419 applied. *Robinson v. The Queen* [1985] A.C. 956 and *Ricketts v. The Queen* [1998] 1 W.L.R. 1016, distinguished.

[61] *Société United Docks v. Govt. of Mauritius* [1985] A.C. 585; *Blomquist v. A.G. of Dominica* [1987] A.C. 489; *Morgan v. A.G. of Trinidad and Tobago* [1988] 1 W.L.R. 297; *Alleyne Forte v. A.G. Trinidad and Tobago* [1998] 1 W.L.R. 68.

[62] *De Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 A.C. 69.

[63] *A.G. of Jamaica v. Williams* [1998] A.C. 351.

[64] [1993] A.C. 951.

[65] [1999] 1 A.C. 98.

[66] *De Freitas v. Benny* [1976] A.C. 239. In *Boodram v. Baptiste* [1999] 1 W.L.R. 1709 the Privy Council emphasised that it was not deciding whether the death penalty was in itself unlawful. "The question for their Lordships Board is whether hanging today in Trinidad and Tobago is or is not a lawful method of execution." Held lawful because expressly authorised by legislation, subject to which the constitution took effect.

[67] [1994] 2 A.C. 1. (Delay of more than five years after sentence strong grounds for assuming "inhuman or degrading punishment".)

[68] [2000] 2 A.C. 1.

sentence in addition."[69] Pre-trial delay will not normally be taken into account in determining whether execution after a long period of detention amounts to cruel and unusual punishment.[70] In *Reckley v. Minister of Public Safety (No. 2)*[71] the Privy Council refused to interfere with the decision of the Committee which advised the Minister on the exercise of the prerogative of mercy. The prisoner had no right to make representations to the Committee or to know what material was before the Committee. Lord Goff repeated the words of Lord Diplock in *de Freitas v. Benny*,[72] "Mercy is not the subject of legal rights. It begins where legal rights end." *R. v. Secretary of State for the Home Department ex p. Bentley*[73] was distinguished on the ground that it dealt with an error of law by the Home Secretary, "an exceptional situation".

In *Lewis v. Attorney General of Jamaica*,[74] however, the Privy Council 37–014
allowed the appeals of six men condemned to death and refused to follow a number of earlier, recent decisions of its own. The delays in carrying out the sentences varied from 4 years 11 months to 6 years 10 months. *Pratt* alone would have justified the decision to advise that the sentences should be commuted. The Privy Council, however, upheld two other, more controversial grounds of appeal. First, it held that although the merits of the decision of the Governor General on the exercise of the prerogative of mercy was not open to review, the procedure by which the Jamaican Privy Council reached its conclusion on its recommendation to the Governor General was open to review. The majority of the Privy Council refused to follow *Reckley v. Minister of Public Safety*.[75] Lord Slynn thought that there was not such a clear cut distinction as to procedural matters between mercy and legal rights as Lord Diplock's aphorism might indicate. Secondly, it held, refusing to follow *Fisher v. Minister of Public Safety and Immigration (No. 2)*[76] and *Higgs v. Minister of National Security*[77] that the right to the protection of the law "guaranteed under the constitution of Jamaica extended to protect the applicants rights under the United Nations Convention on Human Rights 1969 and the Inter-American Convention on Human Rights which Jamaica had ratified although it had not incorporated them into domestic law. The reasoning by which that conclusion was reached is thus explained by Lord Slynn:

> "It is of course well established that a ratified but unincorporated treaty, though it creates obligations for the state under international law, does not in the ordinary way create rights for individuals enforceable in domestic courts and this was the principle applied in the *Fisher (No. 2)* case. But even assuming that that applies to international treaties dealing with human rights, that is not the end of the matter. . . . In their Lordships' view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection

[69] At p. 28 *per* Lord Millett.
[70] *Fisher v. Minister of Public Safety and Immigration* [1998] A.C. 673; *Thomas v. Baptiste, supra.*
[71] [1996] 1 A.C. 527.
[72] [1976] A.C. 239, 247.
[73] [1994] Q.B. 349.
[74] [2000] 3 W.L.R. 1785. "Whatever the humanitarian attractions of the opinion delivered by Lord Slynn, Lord Hoffmann" dissent is a devasting critique of the reasoning of the majority.
[75] *Supra*, n. 71.
[76] [2000] 1 A.C. 434.
[77] [2000] 2 A.C. 228.

of the law provision in section 13 to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered." (At p. 1811).

37–015 Thirdly, the Privy Council indicated that had it been necessary it would have held that the Jamaican courts should have investigated the allegations of harsh treatment to see whether they were such as to render the carrying out of the death sentence in itself cruel and unusual.

Unease has been expressed at this aspect of the work of the Privy Council[78] when capital punishment has been abolished in the United Kingdom and mens' lives may turn on a nice calculation of how many years and months they have spent in prison.

Suggested Commonwealth Court of Appeal[79]

37–016 We have noticed the tendency for Commonwealth countries to abolish appeals to the Privy Council on assuming republican status, if not before. This is no criticism of the objective impartiality of the Judicial Committee, as may be seen from the use made of that body as part of the machinery for the removal of judges in some independent Commonwealth countries. But the criticisms of the Judicial Committee as a court of appeal are that it appears to be virtually a British Court sitting in London (although in 1926 Viscount Haldane had already emphasised that the Judicial Committee sat in London purely for reasons of convenience: "[It is] not a body strictly speaking with any location"[80]); it cannot fully understand the background of the legal system it is applying; and its jurisdiction, based as it is largely on the prerogative to grant special leave to appeal to colonies, is inconsistent with independence, and especially with republican status. It is a harmless anomaly that the form of procedure is advisory rather than judicial; and this could be obviated by the method devised by Kenya and Malawi.[81]

The Commonwealth Prime Ministers' Conference in 1962 expressed the hope that the regular appointment of judges from other Commonwealth countries would strengthen the Judicial Committee and emphasise its importance as a Commonwealth link. Such appointments are made from time to time on a temporary basis. A later proposal, which had a good deal of support, was to set up a peripatetic Commonwealth Court composed of judges from various Commonwealth countries. Its jurisdiction would be twofold: (i) as a final court of appeal in certain cases from the courts of the Commonwealth countries, and (ii) to determine justiciable disputes between Commonwealth countries. Some would add the jurisdiction of a Supreme Court for the enforcement of a Commonwealth Bill of Rights.

37–017 Procedural problems would have to be solved. Should appeal to the Commonwealth Court always be as of right? If not, on what principles should leave to appeal be granted? And on what principles should decisions of the courts of Commonwealth countries be upset—for any error, or only for a gross miscarriage

[78] Lord Browne-Wilkinson, *The Lawyer* (1999), p. 22.
[79] See Gerald Gardiner and Andrew Martin, *Law Reform Now* (1963) p. 16; Nwabueze, *The Machinery of Justice in Nigeria* (1963) Chap. 10; H. H. Marshall, "A Commonwealth Court" (1965) *Round Table* No. 221, p. 6.
[80] *Hull v. M'Kenna* [1926] I.R. 402, 404.
[81] *Supra*, para. 37–012.

of justice? Questions such as these could no doubt be settled by legal experts without undue difficulty. But there are more formidable obstacles to be overcome. One is that the United Kingdom would be expected to abolish the appellate jurisdiction of the House of Lords[82] and to accept for herself the new Commonwealth Court as the final court of appeal, at least in some cases, from British courts. Another question is the composition of the court. How would the judges be selected? Would some countries be willing to spare senior judges for this purpose? Would the composition be scrutinised by the country visited? Would the country visited always supply one of its own judges? Lastly, the question of the expense of a court going on circuit round the world is usually raised in discussion of this proposal; and certainly the fares and subsistence allowances would amount to a significant item. On the other hand, we should also take into account the cost to litigants of the present system of appeals going to the Privy Council in London.

A Commonwealth Law Ministers' Meeting in 1966 under the chairmanship of Lord Gardiner, the Lord Chancellor, considered a proposal for a Commonwealth Court of Appeal. Some countries expressed their approval, but the majority have not shown themselves interested. Support came from the smaller Commonwealth countries that still used the Judicial Committee, but little has been heard of this suggestion recently.[83]

[82] The merger of the judicial functions of the House of Lords with those of the Privy Council was often discussed in the nineteenth century: Robert Stevens, "The Final Appeal: Reform of the House of Lords and Privy Council 1867–1876" (1964) 80 L.Q.R. 343.

[83] For a dispiriting survey of the role of the Judicial Committee and proposals for reform, see Robert Stevens, "The Role of the Judiciary: Lessons from the End of Empire" in *Essays for Patrick Atiyah*, (ed. Case and Stapleton 1991).