PART III
EUROPEAN INFLUENCES

6

INCORPORATION OF EUROPEAN LAW

The framework of indigenous institutions—Parliament, the executive and the courts—is no longer adequate to contain British constitutional and administrative law. Large and important areas of European law have been incorporated, and effect must be given to the legislation and judicial decisions of international bodies, which may take precedence not only over the common law but also in some cases over Acts of Parliament. Some of their profound effects have already been noted in the context of sovereignty. The European institutions are:

(a) the European Convention on Human Rights and Fundamental Freedoms, incorporated by the Human Rights Act 1998, and
(b) the European Union (formerly the European Economic Community), incorporated by the European Communities Act 1972.

These European institutions are in the form of treaties. By virtue of the Acts of Parliament which incorporate them they have become part of the British constitution, but Parliament has no power to amend them, nor do they themselves contain provisions for amendment. Amendment can be effected only by agreement of the Member States, as by the Protocols added to the Convention on Human Rights and the treaties of Maastricht, Amsterdam and Nice in the case of the European Union. There is potential for conflict between these two European sources of law.[1]

EUROPEAN HUMAN RIGHTS

The European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted by a group of Western European nations in and after 1950.[2] Its purpose was to provide safeguards against the dictatorial and totalitarian forms of government which had led to the Second World War. It took effect as a treaty ('the Treaty of Rome') under the aegis of the Council of Europe, ratified first by Britain and then by other countries.[3] Britain contributed largely to its drafting, as

[1] [[2002] *PL* 724 (A. O'Neill).
[2] The Convention (Cmd. 8969) was signed in Rome in 1950 and the First Protocol in Paris in 1952. References to the Convention follow the revised numbering according to the Eleventh Protocol.
[3] For a fascinating account of the background see [1984] *PL* 86 (Lord Lester).

may be inferred from many of its provisions. It contained a catalogue of human rights and provisions for a Commission and a Court in Strasbourg to ensure their observation. It imposed obligations on the participating governments to secure that their citizens should enjoy the convention rights with effective remedies in the courts of their own countries.[4] It created a new fundamental law based on rights, in contrast to traditional British law based on liberty, which allowed any action not specifically made illegal. In the first instance complaints of breaches could be brought before the court only by governments against other governments, and then only if endorsed by the Commission. In 1966, however, Britain accepted both the compulsory jurisdiction of the Strasbourg court and also the right of individual petition[5] (both optional clauses of the Convention), so that a British citizen could take a complaint against his government to Strasbourg, provided that he had first exhausted domestic remedies and was himself a 'victim' of the injustice.[6] The Commission, if it found the complaint admissible, would itself bring the case before the Court, but it became the practice to allow the complainant to be represented also. In 1998 the Commission stage was eliminated and the former part-time Commission and Court were replaced by a single full-time Court which sits in several Chambers of seven judges and sometimes in the Grand Chamber of seventeen.[7] Unlike most European courts, it allows dissenting judgments and makes its decisions by majority. There is one judge for each state, nominated by the state and elected by the Parliamentary Assembly.

All complaints of violations are made against the country concerned, as for breach of the duty to secure convention rights to its citizens, whether the offending act is that of a government agency or of a private individual.[8] All domestic remedies must first have been exhausted.[9] If a complaint is found admissible the court will, before proceeding further, attempt to secure a friendly settlement between the parties, often unsuccessfully. If it finds a violation, it will if necessary 'afford just satisfaction to the injured party',[10] usually in the form of money damages and costs, which the Member State has then to pay.

Unlike most of the other participating countries, Britain did not incorporate the Convention into domestic law.[11] Consequently it could not be enforced in British

[4] Arts 1, 13.

[5] For the background see [1998] *PL* 237 (Lord Lester). The right of individual petition is now secured by Art. 34.

[6] Arts 35, 34 respectively. The latter excludes representative claims by trade unions, amenity societies, etc., as noted below.

[7] Eleventh Protocol. For details see [1999] *PL* 219 (A. Mowbray). The *Hood* and *Cable* cases (below) were heard by the Grand Chamber.

[8] See, for example, *A* v. *UK* (1999) 27 EHRR 611 (excessive beating of boy by stepfather; stepfather prosecuted but acquitted; court awarded £10,000 against UK for violation of Art. 3).

[9] Art. 35.

[10] Art. 41.

[11] But did so for many British Commonwealth countries by incorporating its primary provisions in their independence constitutions under which appeals came to the Privy Council. See, e.g., *Guerra* v. *Baptiste* [1996] AC 397.

courts, but only by long and costly proceedings in Strasbourg.[12] The judgments of the Strasbourg court had no legal effect in Britain and the Convention had no more than the force of a treaty. When decisions were given against Britain the government would pay any money award and would take steps to amend the offending law or practice, but British violations, of which there were many,[13] were exposed to international notoriety. Britain had acceded to the Convention on the assumption that British law would satisfy its obligations, but this proved to be far from the case, even the procedure of habeas corpus being found defective.[14] This unsatisfactory state of affairs was constantly criticised, but was defended by previous governments who feared that the judges would become politicised and would acquire too much power. Ultimately all such objections were overcome by the strength and the logic of the demand for incorporation, which was effected by the Human Rights Act 1998, following the White Paper, *Rights Brought Home*.[15]

For a long time before the Act the Convention was habitually invoked in argument in attempts to clothe it with some legal force. These attempts met with some success in cases where the law was uncertain or ambiguous, and the judges, sensing the need for incorporation, became progressively more favourable, aided by a presumption that Parliament would not intend to legislate contrary to treaty obligations,[16] and by recourse to the doctrine of legitimate expectation.[17] In extra-judicial writings eminent judges suggested that the common law itself should adopt fundamental rights on the same lines as the Convention. But Lord Irvine opposed these ambitious theories, accusing them of 'judicial supremacism' prompted by 'extra-judicial romanticism'.[18] Reform by legislation, he said, was the correct constitutional course, and that has now been taken in the Human Rights Act 1998.

The catalogue of the relevant human rights, as set out in the Convention, will be found below.[19] They are reproduced verbatim in the 1st schedule to the Act, with the exception of Articles 1 and 13 which the Act itself effectuates. Article 1 obliges

[12] The White Paper (Cm. 3782) mentions five years and £30,000 as typical.

[13] By 2002 British violations were more numerous than those of any country except Italy.

[14] See below, p. 596.

[15] Cm. 3782 (1997). The sustained and effective advocacy of Lord Lester of Herne Hill gave impetus to the movement for incorporation.

[16] See below, p. 392 for examples. See generally Lester and Pannick (eds.), *Human Rights Law and Practice*, 2nd edn. (2004); Janis, Kay and Bradley, *European Human Rights Law*, 2nd edn. (2000); Jacobs and White, *The European Convention on Human Rights*, 3rd edn. (2002); Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*; Grosz, Beatson and Duffy, *Human Rights, The 1988 Act and the European Convention*; Lord Cooke in [1999] EHRLR 243.

[17] See below, p. 372.

[18] See [1996] *PL* at 77, where Lord Irvine comments on writings of Lord Woolf MR, Laws J and Lord Cooke of Thorndon; and ibid. at 636.

[19] Below, p. 187.

each Member State to secure these rights to every one within its jurisdiction. Article 13 requires effective domestic remedies.

Most of the rights have qualifications attached to them, the only exceptions being the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the prohibition of slavery or servitude (Article 4), the prohibition of retrospective criminal liability (Article 7) and the right to marry according to national laws (Article 12). The right to life (Article 2) has to be qualified so as to allow capital punishment and the prohibition of forced labour (Article 4) has to allow for military service and other obligations. The right to personal liberty and security (Article 5), which includes the right to challenge the lawfulness of detention, has numerous exceptions for lawful restraints. The right to a fair and public trial in both civil and criminal matters (Article 6), together with a list of consequential rights, allows for the exclusion of the press and the public on justifiable grounds. Articles 8 to 11 form a group, since they have one special qualification. They provide respectively for respect for private and family life, for freedom of thought, conscience and religion, for freedom of expression and for freedom of assembly and association. The special qualification which is common to all four of them is that any legal restriction upon them may only be such as is 'necessary in a democratic society' for the protection of public order, health or morals or for the protection of the rights of others (ignoring a few differences of wording). Nothing, perhaps, in the Convention better illustrates the new world of interpretation that will confront the judiciary under these clauses. How are they to establish objective standards of democratic necessity? Britain has often been condemned in Strasbourg for laws which failed to pass this test, as in the *Thalidomide*[20] and *Spycatcher*[21] cases (both decisions of the House of Lords). More recently, there was another example, when the court in Strasbourg held that the statutory limit of £5 on publications in favour of a particular candidate in the period just before an election was disproportionate and so unnecessary in a democratic society.[22] In addition there is the right of property in the First Protocol, which is qualified so as to allow compulsory purchase 'in the public interest'.[23] This protocol provides also for the right to education and the right to free elections. The Sixth Protocol provides for the abolition of the death penalty except in time of war.[24] The Convention has no provision against unreasonable searches and seizures, except through the right of privacy under Article 8, and nothing about the rights of employees, except for the right to join, or not to join, trade unions under Article

[20] *Sunday Times* v. *UK* (1979) A–30 2 EHRR 245 (articles intended to help claims by parents of deformed babies prohibited by injunction. Held (by 11 votes to 9) to violate Art. 10, there being no 'pressing social need').

[21] *Observer and Guardian* v. *UK* (1991) A–216 14 EHRR 153 (injunction against book revealing official espionage operations but published in the USA held (unanimously) to violate Art. 10; £100,000 costs awarded).

[22] *Bowman* v. *UK* (1998) 26 EHRR 1.

[23] For this see below, p. 190.

[24] Incorporated in the Human Rights Act 1998, 1st sched., Pt. III.

11 (freedom of association). It does contain a full anti-discrimination clause (Article 14), but that applies only to the rights specifically protected by the Convention.

Britain has at various times been found by the Strasbourg court to be in breach of nearly all of the Convention rights. Even the right to life in Article 2 was held violated by the shooting of IRA terrorists by the SAS in Gibraltar in 1988, though only by the votes of ten judges against nine.[25] The right to life, which by Article 2 'shall be protected by law', has been extended by the Strasbourg court to require a member state to protect witnesses in legal proceedings or inquiries whose lives might be in danger and to require an effective official investigation where a person has been killed by the use of force—and both requirements have been violated by British decisions, though corrected on appeal.[26] The UK was held liable in respect of inhuman and degrading treatment in the neglect of child welfare by local authorities.[27] Many violations have been found in Acts of Parliament, for example in the legislation on court martial procedures,[28] on trade union closed shops,[29] on homosexual acts in private,[30] on the use of evidence obtained by compulsion,[31] and, as already mentioned, electoral expenses. The court makes much use of the doctrine of proportionality in condemning restrictions or penalties which are unduly severe. On the other hand it may allow a 'margin of appreciation' to a defendant government, recognising that the national authorities may be the best judges of what measures are suitable or necessary in the circumstances of their own countries, for example as to whether there is a 'public emergency' or a need for 'the protection of morals' and whether the measures are 'strictly required'.[32] But this indulgence is an uncertain quantity. It was not allowed, for example, in the Gibraltar case, despite the deep division among the judges, nor where juvenile murderers were tried in an ordinary court,[33] yet it was allowed in resisting complaints of inadequate compensation on the nationalisation of a shipbuilding company[34] and in the expropriation of certain landlords 'in the public interest'.[35] Nor was it

[25] *McCann* v. *UK* A-324 (1995) 21 EHRR 97.

[26] *R. (A)* v. *Lord Saville of Newdigate* [2002] 1 WLR 1249 (protection of witnesses at the tribunal of inquiry into deaths in Northern Ireland on 'bloody Sunday' in 1972) and holding the (statutory) tribunal to be a 'public authority'; *R. (Amin)* v. *Home Secretary* [2003] 3 WLR 1169 (murder of prisoner—duty of investigation not satisfied where next of kin unable to participate to safeguard their legitimate interests).

[27] *Z* v. *UK* (2002) 34 EHRR 97 (damages awarded).

[28] *Findlay* v. *UK* (1997) 24 EHRR 221. See similarly *Coyne* v. *UK*, *The Times*, 24 October 1997; *Hood* v. *UK* (2000) 29 EHRR 365 and *Cable* v. *UK*, (2000) 30 EHRR 1032. The law was changed by the Armed Forces Act 1996.

[29] *Young, James and Webster* v. *UK* A-44 (1982) 4 EHRR 38.

[30] *Dudgeon* v. *UK* A-45 (1981) 4 EHRR 149.

[31] *Saunders* v. *UK* (1997) 23 EHRR 313.

[32] See *Handyside* v. *UK* (1976) A-24, (1976) 1 EHRR 737.

[33] *T and V* v. *UK*, (2000) 30 EHRR 121 (discretion in enforcing law against obscene publications). See also *Rees* v. *UK* (1987) 9 EHRR 56.

[34] *Lithgow* v. *UK* A-102 (1986) 8 EHRR 429.

[35] *James* v. *UK*, A-98 (1986) 8 EHRR 123 (unsuccessful complaint by the Duke of Westminster's trustees against the expropriating provisions of the Leasehold Reform Act 1967).

allowed where members of the armed forces were discharged under a policy prohibiting homosexuality, despite the fact that national defence policy might best be left to the national government.[36] The doctrines of proportionality and margin of appreciation are closely connected and often invoked in the same judgment. Prisoners have been a successful class of litigants, for example where the Parole Board's procedures and the scope of judicial review were both found inadequate.[37] Complaints made good against the British government range in importance from the shooting of Irish terrorists to the birching of a schoolboy under the order of a juvenile court.[38] More examples will be found later in this chapter where government liability is illustrated.[39]

All such proceedings arise under the government's primary duties, 'to secure to every one within their jurisdiction the rights and freedoms defined', etc. (Article 1), and to provide 'an effective remedy before a national authority' (Article 13). Where the domestic remedy is inadequate 'The Court shall if necessary award just satisfaction to the injured party.'[40] It is a firm rule that domestic remedies must first be exhausted[41] and that will now include remedies under the Human Rights Act 1998. There is a time limit of six months from the final domestic decision.[42] It is always possible that a litigant may claim that a British judgment does not fulfil his human rights and then take his case to the Strasbourg court, which will necessarily remain as the ultimate tribunal. This has happened many times.

THE HUMAN RIGHTS ACT 1998

The scope of the Act[43]

The Act of 1998 came fully into force on 2 October 2000. For the sake of clarity the following account of it describes its main features as they stood at that time. Numerous judicial decisions later made under the Act are discussed separately elsewhere. The central provision of the Act is in s. 6:

[36] *Smith and Grady* v. *UK* (1999) 29 EHRR 493.
[37] *Weeks* v. *UK* A–114 (1987) 10 EHRR 293; *Thynne, Wilson and Gunnell* v. *UK*, A–190 (1990) 13 EHRR 666.
[38] *Tyrer* v. *UK* A–26 (1978) 2 EHRR 1.
[39] Below, p. 747.
[40] Art. 41. As to this see below, p. 746.
[41] Art. 35.
[42] Art. 35.
[43] See especially (in abundant literature) Clayton and Tomlinson, *The Law of Human Rights* (with annual supplements); Lester and Pannick, *Human Rights Law and Practice*, 2nd edn. (2004); Grosz, Beatson and Duffy, *Human Rights, The 1998 Act and The European Convention*; [1999] *CLJ* 509 (I. Leigh and L. Lustgarten); [1999] *PL* 221 (Lord Irvine), 254 (Sir John Laws); [2003] *PL* 308 (Lord Irvine).

6(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

The Convention rights are set out in a schedule which quotes the articles of the Convention verbatim and with the same numbering, including the First and Sixth Protocols but omitting Articles 1 and 13. The contents of the schedule are reproduced in the catalogue below, together with the two omitted articles. The scheduled articles 'are to have effect for the purposes of this Act'.

'Public authority' is not defined with any precision. It 'includes (a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature', but in relation to a particular act a person is not a public authority by virtue only of (b) 'if the nature of the Act is private'.[44] A 'public authority', accordingly, is defined by the nature of its functions and not by the possession of any particular authority or power. Furthermore, it comes within the definition only in respect of its public, as opposed to its private, functions. Two examples were given by the Lord Chancellor in Parliament: doctors with both national health service patients and private patients would be public authorities in respect of the former but not of the latter; and Railtrack would have public functions in relation to railway safety but private functions as a property developer.[45]

These basic provisions are subject to qualifications. Section 6(1) does not apply (for reasons explained below) where the public authority could not act otherwise because of incompatible primary legislation or regulations made under it. 'Public authority' does not include Parliament or Parliamentary proceedings, except for the House of Lords in its judicial capacity.

The definition of 'public authority' was deliberately left vague in order that the courts might make it correspond with the Strasbourg jurisprudence as to bodies which are 'sufficiently public to engage the responsibility of the state'.[46] It is thought that it will cover the BBC, privatised utilities and the Jockey Club, in view of their public functions, so that it may not exactly match the 'public element' which governs the scope of judicial review.[47]

The elastic definition and the dichotomy of functions which it demands plainly represent a fertile source of difficulty.[48] But it is possible that the definition will make little significant difference in the decision of cases. The crucial question is what will be the effect of including the courts as public authorities. According to s. 6, no court can lawfully act in a manner incompatible with Convention rights. It cannot therefore lawfully give judgment, if a human rights point arises, except by

[44] s. 6(3), (5).

[45] 583 HL Deb. 811 (24 November 1997).

[46] See the Home Secretary's explanation in (1998) 314 HC Deb. 406, 432 (17 June 1998) and other ministerial statements quoted in Lester and Pannick, *Human Rights Law and Practice*, 30.

[47] See below, p. 631.

[48] Compare the definition in the Public Authorities Protection Act 1893, cited below, p. 759.

deciding that point in accordance with the rights scheduled to the Act.[49] This will be equally true in litigation between private parties as in claims against public authorities. If for example there is an infringement of privacy between private parties of a kind not protected by English law but protected by Article 8 of the Convention, the court will be obliged to decide according to Article 8. The definition of 'public authority' will therefore in practice make little difference. All the problems of the definition may thus be bypassed.

The inherent paradox of the Act is revealed by this example. On its face, and in some of its detailed provisions, the Act is concerned only with remedies against the state, in some shape or form. But the effect of its terms will evidently reach much further. By embracing private as well as public activities it will have 'horizontal' as well as 'vertical' effect, following the lead of the EU Court of Justice which has similarly exploited the possibilities of treating courts as public authorities.[50] It is impossible to be sure about the intentions of the draftsmen, since ministerial statements were made on both sides of the question.[51] In one of them the Lord Chancellor said:

> We . . . believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals. Why should they not?

Although the judges will be not so much developing the common law as performing a statutory duty, the result will be the same. In the same sense, a work of special authority in this field treats the position as clear:[52]

> Because the courts are public authorities, they have a duty to ensure that Convention rights are protected even in litigation between private parties. The obligation of the court under s. 6 will apply where the Convention has effect on the legal relationship between private parties because the state (acting through its courts) is obliged under the Convention to

[49] Unless there is a conflict with primary legislation, as explained below.

[50] See below, p. 203 (*Van Colson* and *Marleasing* cases).

[51] See the statements by Lord Irvine LC as to vertical effect only in 583 HL Deb. 1231 (3 November 1997) and 585 HL Deb. 840 (5 February 1998) and as to horizontal effect in 583 HL Deb. 783 (24 November 1997), quoted above. For horizontal effect see also [1998] *PL* 423 (Murray Hunt) and [1998] *EHRLR* 523 (Wade), both quoting these statements; (1999) 115 *LQR* 47 (B. S. Markesinis, discussing German analogies and arguments for and against horizontality); [1999] *CLJ* 509 (I. Leigh and L. Lustgarten (discussing interpretation and remedies); (2000) 116 *LQR* 48 (Lord Justice Buxton, opposing horizontality); Grosz, Beatson and Duffy, *Human Rights*, 88 (discussing alternatives); (2000) 116 *LQR* 217 (Wade); (2000) 116 *LQR* 380 (Lord Lester and D. Pannick, opposing horizontality and saying that 'the correct way is more diagonal than directly horizontal. In terms of chess, the judge moves the unwritten law more in the manner of the Knight, that is, forward and diagonally but not directly sideways and horizontally,' and that the Act 'creates a strong magnetic field across the entire body of the law.') But it is not evident what legal realities lie beneath these metaphors and allusions.

[52] Lester and Pannick, *Human Rights Law and Practice*, 31. The authors of this passage however deny the apparent meaning for which it is here cited: see (2000) 116 *LQR* 380, and above, p. 167.

protect individuals against breaches of their rights . . . Therefore the HRA 1998 will have an indirect but powerful influence upon private law rights and obligations in tort, contract and other contexts in which the Convention imposes minimum standards which the United Kingdom must guarantee.

There is no suggestion of any doubt or controversy or alternative interpretation. On this analysis the incorporation of the Convention will be both more extensive and more satisfactory than may have been supposed. It would scarcely be tolerable if the privacy of a doctor's NHS patient was protected by the Act while a private patient could seek only a slow and costly remedy in Strasbourg.

Passing from the letter to the spirit of the Act, we must surely expect that human rights will show a strong tendency towards universality, being fundamental principles of justice which in their nature are impatient of confinement. That they were conceived as such when the Convention was drafted can be seen from several of its Articles, which make no mention of the state in any form. Another indicator is the attitude of the judges in the period before the Act was brought into force, when they seemed predisposed to activate it without waiting for its commencement date. If indeed they decide that they have a choice between verticality and universality, they are more likely to take the broader view. Thus the culture of human rights will pervade the whole legal system. In many matters, of course, British law will accord with it harmoniously. But in others its effect may be profound.

Courts and tribunals are required by the Act to take account of decisions and opinions of the European Court of Human Rights and of the Commission and the Committee of Ministers.[53] In proceedings against public authorities the court may 'grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'.[54] But it may do so only in favour of a 'victim', since the Convention itself contains this restriction on standing, so that, in contrast to British law, representative bodies such as trade unions and amenity societies cannot sue on behalf of their members.[55] But corporate bodies may themselves have human rights.[56] There is a time limit of one year, in the absence of any stricter period, but this may be extended if that is held to be equitable.[57] Relief against judicial acts may be sought only by way of appeal or judicial review, unless rules prescribe otherwise; but it may include damages, which are to be awarded against the Crown, the appropriate minister being made a party.[58] The provisions as to remedies and time limits relate only to proceedings against public authorities; but

[53] s. 2.

[54] s. 8. This is substituted for Art. 13 of the Convention, omitted by the Act as already noted.

[55] s. 7, following Art. 34 of the Convention. See [2000] *CLJ* 133 (J. Miles). See also *Re Medicaments and Related Classes of Goods* (No. 4) [2002] 1 WLR 269 (trade association not 'victim'). Cf. *R.* v. *Broadcasting Standards Commission ex p. BBC* [2000] *The Times*, 12 April.

[56] *County Properties Ltd* v. *Scottish Ministers* 2000 SLT 965.

[57] s. 7(5).

[58] s. 9.

the requirement to follow the jurisprudence of the European Court is not so confined, and that may suffice to supply remedies in proceedings between private parties since the European Court commonly awards damages and costs.

Conflict with legislation

Human rights under the Convention may conflict with Acts of Parliament, as already mentioned, and have done so frequently. The Act addresses this problem with a remarkable amalgam of judicial, legislative and administrative procedures, designed to respect the sovereignty of Parliament while at the same time protecting human rights. In the first place, the court must strive to avoid conflict by benevolent construction. But if that proves impossible, the court may make a 'declaration of incompatibility', whereupon it is for the government and Parliament to take 'remedial action' if they think fit. This is a very different policy from that of the European Communities Act 1972, which incorporated the law of the European Union by providing simply that it should prevail with paramount effect, overriding the sovereignty of Parliament whenever necessary.[59]

The rule of construction is that legislation, both primary and subordinate, and whenever enacted, must be 'read and given effect in a way which is compatible with the Convention rights' 'so far as it is possible to do so'.[60] In other words, instead of seeking the true intention of Parliament at the time of the enactment, the court must adopt the interpretation which is the more favourable to a Convention right. The model for this provision was the New Zealand Bill of Rights Act 1990,[61] though the wording is marginally different. It has been said on high authority that the British formula is slightly stronger.[62]

If no such solution is possible, the court may make a 'declaration of incompatibility'.[63] The declaration must be made at High Court level or above; it does not affect the validity, continuing operation or enforcement of the offending legislation; it is not binding on the parties; and before it is made the Crown must be notified, whereupon a minister or his nominee may be joined as a party.[64] The

[59] See below, p. 193.

[60] s. 3. See the wide-ranging discussion by Lord Irvine LC, [1999] *EHRLR* 350. See also [2000] *PL* 77 (F. Bennion).

[61] s. 6, providing: 'Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning'.

[62] See 583 HL Deb. 1272 (3 November 1997) (Lord Cooke of Thorndon), repeated in *R.* v. *Director of Public Prosecutions ex p. Kebilene* [1999] 3 WLR 972 ('a rather more powerful message') and in [1999] *EHRLR* 243.

[63] s. 4.

[64] s. 5. Notice should be given as soon as the question of incompatibility is raised: *Gunn* v. *Newman* [2001] SLT 776.

procedure applies to primary legislation[65] and also to secondary (i.e. delegated) legislation where primary legislation prevents removal of the incompatibility.[66]

Where a declaration of incompatibility is made, and no appeal is pending, or where an incompatibility is revealed by a later decision of the European Court of Human Rights, the appropriate minister must consider whether there are 'compelling reasons' for amending the conflicting legislation. If so, he 'may by order make such amendments to the legislation as he considers necessary to remove the incompatibility'.[67] This is a 'remedial order', which must first be laid in draft before Parliament for 60 days with an explanatory statement and approved by resolution of each House. The order may be retrospective to an earlier date, may delegate functions, may amend or repeal any primary or subordinate legislation, but it may not impose criminal guilt retrospectively. The minister may omit to seek Parliamentary resolutions if reasons of urgency make that necessary, but the order must be laid before Parliament later and will cease to have effect if not approved by resolution of each House.[68]

This novel procedure was approved by authoritative speakers in the Parliamentary debates as an ingenious method of reconciling fundamental rights with Parliamentary sovereignty. It also allayed fears about giving too much power to the judiciary, and judicial reluctance to sit in judgment on the validity of primary legislation. But these comforts can be obtained only by the sacrifice of constitutional principle. When the minister decides whether or not to make a remedial order, and if so whether it shall be retrospective, he is in effect deciding which party is to win the case: shall it be he whose human rights have been violated, or shall it be he who is in the right under the existing law? The minister's dilemma is likely to be invidious, particularly since the government will often be a party, there may be much money at stake and Parliamentary resolutions may be opposed. But the most serious objection is constitutional. How can it accord with the rule of law to allow the rights of litigants to be determined by executive and legislative discretion? The European Convention itself provides, as does the Act, that 'in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[69] Political decisions by ministers and Parliament are the reverse of the judicial process required by this fundamental right.

That litigants' rights are intended to be determined in this way is corroborated

[65] Defined in s. 21(1) and including *inter alia* prerogative (i.e. non-statutory) Orders in Council.

[66] s. 4.

[67] s. 10.

[68] s. 10 and 2nd sched. The first remedial order was SI 2001 No. 3712, amending provisions of the Mental Health Act 1983 which had put upon mental patients the burden of proof in seeking discharge by the Mental Health Review Tribunal.

[69] Art. 6. For this see below, p. 441 (natural justice). For the right to a judicial determination see *Golder* v. *UK* [1975] A–18 1 EHRR 524.

by an important statement made by the Lord Chancellor in the debates on the Bill:[70]

> We think it more appropriate for decisions on what remedy should be given to individuals affected by a particular act[71] to be taken by the Government in light of the individual circumstances of every case . . . should it be thought necessary for a remedial order affecting the legislation to take effect from a date earlier than that on which the order was made, this will be possible under the Bill . . . this will not of itself provide a direct remedy to individuals affected by the legislation which has been retrospectively amended; but, following the order, it may be open to them to seek such a remedy. In addition to these powers in the Bill, there are prerogative powers which can be exercised and other *ex gratia* actions that could be taken to grant remedies in appropriate circumstances.

The final sentence suggests what may be the only way out of the dilemma, that the government will be obliged to compensate the party damnified either by the remedial order or by a failure to make it, in order to prevent that party from winning an award against it in Strasbourg. But there is still the ironical prospect that the Act itself may be held to violate the Convention by requiring individual rights to be determined by non-judicial bodies. The ultimate conclusion may be that fundamental rights and Parliamentary sovereignty are, in fact, irreconcilable.

Subordinate legislation

Where subordinate legislation cannot be brought into line with Convention rights without amending primary legislation, it falls under the provisions about declarations of incompatibility discussed above. In other cases of incompatibility the court will have to declare the offending regulations invalid, or disapply them, since under s. 6 of the Act it cannot lawfully decide otherwise. The minister who made the regulations will normally have power to amend and so rectify them. He may likewise rectify regulations shown to be incompatible by a later decision of the European Court.[72]

Other features of the Act

A minister in charge of a Bill in either House of Parliament is required by the Act to make a written statement, to be published as he thinks best, before Second Reading, saying either that in his view the Bill is compatible with Convention rights or

[70] 853 HL Deb. 1108 (27 November 1997). See Grosz, Beatson and Duffy, *Human Rights*, 149, 150.

[71] [*sic*]. But 'Act' may have been intended.

[72] s. 10.

else that, though he cannot make such a statement, the government wishes to proceed with the Bill.[73]

The Convention allows Member States to limit their commitments by derogations and reservations for special reasons. The United Kingdom made a derogation for anti-terrorism laws in Northern Ireland, permitting extended periods of detention without charge, and also a reservation under the First Protocol limiting the right of parental choice in education to what is compatible with efficiency and economy. The texts are scheduled to the Act, which empowers the Secretary of State to amend the schedule as may be required and provides, among other things, for the periodic review of reservations.[74] A further derogation was made in 2001 providing for detention of suspected international terrorists.[75]

The Secretary of State may by order amend the Act so as to accord with any protocol to the Convention.[76]

There are detailed provisions for allowing judges of the Court of Appeal and the High Court and Circuit judges, and their equivalents in Scotland and Northern Ireland, to be appointed to the European Court of Human Rights at Strasbourg, retaining their offices but not their domestic duties.[77] Proposals for a standing commission on human rights were rejected by the government as premature.

Parts of the Act, including the provision for compatibility statements by ministers in charge of Bills, were brought into force in 1999. The principal provisions, however, came into force on 2 October 2000.

Freedom of expression, thought and religion

When the Bill was before Parliament there was anxiety about the possible inhibiting effect of the right of privacy (Article 8) on the right to freedom of expression (Article 10). The right of privacy is strong in Strasbourg but weak in Britain, and it was feared by the media that incorporation of the Convention might mean 'an end to investigative journalism'.[78] Two amendments were made in order to allay these fears.[79] First, where the grant of relief might affect the right to freedom of expression, the court must have particular regard to the importance of that right; and in the case of what is claimed to be journalistic, literary or artistic material, the court

[73] s. 19. Parliament has established a Joint Committee on Human Rights, which considers matters relating to human rights in the United Kingdom (but not individual cases). Scrutiny of remedial orders (below, p. 179) is within its remit. For discussion see [2002] *PL* 323 (D. Feldman).

[74] ss. 14–17 and 3rd sched.

[75] Derogation Order made on 11 November 2001 (SI 2001/1644), discussed in *A.* v. *Home Secretary* [2003] 2 WLR 564. See also Anti-terrorism, Crime and Security Act 2001, s. 30.

[76] s. 1(4).

[77] s. 18 and 4th sched. Bratza J was appointed as the British judge in 1998.

[78] See 583 HL Deb. 773 (24 November 1997) (Lord Wakeham). See also [1998] *PL* 254 at 262 (Sir John Laws).

[79] s. 12.

must consider how far the material may be publicly available or its publication may be in the public interest, together with any relevant privacy code. Secondly, if the respondent is neither present nor represented, no relief is to be granted unless the court is satisfied that the applicant has taken all practicable steps to notify the respondent or that there are compelling reasons why he cannot do so; and there is to be no restraint on publication before trial unless the court is satisfied that the applicant is likely to establish his case. The object of this provision is to prevent 'midnight injunctions' being granted *ex parte* to stifle publication of news, except where a strong case can be shown.

This provision shows, incidentally, that the government expected the Act to have 'horizontal effect', as discussed above, since newspapers are not public authorities.

The anxieties of religious bodies led to a further amendment requiring the court to have particular regard to the importance of the right to freedom of thought, conscience and religion where the court's determination might affect the exercise of that right by a religious organisation.[80] The purport of this amendment is far from clear.

The HRA in operation

No measure of law reform has had such wide and profound effects on administrative law as has the HRA.[81] Although the 'worst case' predictions have been falsified, and the courts have been able to handle a mass of new doctrines and principles, the load of new judicial work has been very great and shows no sign of abating. As cases are reported week by week the HRA plays an important role in about a third of them, and there is no branch of the law which it cannot reach. The jurisprudence of the European Court in Strasbourg is necessarily much relied upon, as required by s. 2 of the Act. The doctrine of proportionality is becoming ever more prominent, extending the scope of judicial review in human rights cases and perhaps indirectly in the common law also.

The Article most frequently invoked has been Article 6, giving the right to the determination of civil rights and criminal liabilities by a fair and public hearing within a reasonable time by an independent and impartial tribunal. Although the Article's demands mirror those of the common law, its uncompromising terms have encouraged the courts to enforce it in many cases where the more tolerant common law would have allowed exceptions or qualifications. Police disciplinary procedures and trials by court martial have both been made to conform to the more rigorous standards of Article 6, as interpreted by the European court, which

[80] s. 13, discussed but not clarified in *R. (Williamson)* v. *Secretary of State for Education and Employment* [2003] 3 WLR 482.

[81] See the assessment by Lord Irvine in [2003] *PL* 308; [2003] *JR* 221 (T. de la Mare and D. Pievsky); and [2002] *EHRLR* 175 (R. Clayton).

has its own 'autonomous' principles of natural justice. The whole of that subject, both in its domestic and its European aspects, belongs to a later part of this book and need not be investigated here. Likewise the right to liberty and security is discussed later in the context of habeas corpus.

Other human rights under the HRA, and other features of the Act, which have played some part since the Act came into force, but which do not naturally belong elsewhere in this book, are discussed below under their own rubrics.

A general verdict on the HRA by the legal profession would probably be that it has been a force for good, revealing many corners of the law where justice and fairness are found wanting and where principles need to be applied more strictly. Prisoners and mental patients have benefited particularly, as have other disadvantaged groups. The separation of powers has been made a bulwark for the independence of the judiciary and any mixture of executive and judicial functions is likely to be condemned by the Strasbourg court. Violations of the Convention by the UK are still being exposed. It is a continuous and beneficial process.

Compatibility by construction—the art of the 'possible'[82]

Not surprisingly, judges have found difficulty in determining how much liberty they may take under s. 3 of the Act in interpreting Acts of Parliament as compatible with Convention rights 'so far as it is possible to do so'. In the more extreme decisions courts have taken a free hand to amend legislation, in effect, in ways certainly not intended by Parliament and well beyond the elucidation of ambiguities and obscurities. Although the leading cases mostly fall outside administrative law, they provide essential, though not unanimous, guidance as to what may be 'possible' interpretations of statute under this unprecedented rule of construction.

An example is a case where an Act provided for an automatic sentence of life imprisonment for a person convicted of a second serious offence (in this case robbery), in the absence of exceptional circumstances. It was held that exceptional circumstances existed in any case where the defendant did not pose an unacceptable risk to the public and that the mandatory life sentence was not justified.[83] Lord Woolf CJ said that the policy of Parliament was to protect the public, so that the Act would not apply where protection was not needed. Subsequently, the House of Lords had to consider the Act which protected women complaining of rape from cross-examination about their previous sexual history, and which might have infringed a defendant's right to a fair trial under Article 6 by excluding relevant evidence.

The House of Lords held that the right to a fair trial was absolute and that

[82] See [2003] *PL* 236 (G. Marshall), 319 (Lord Irvine of Lairg). For contrasting views see (2002) 61 *CLJ* 53 (A. Young) and (2002) 118 *LQR* 248 (C. Gearty).

[83] *R.* v. *Offen* [2001] 1 WLR 253. The House of Lords refused leave to appeal.

relevant evidence should be excluded only where the court was satisfied that the trial would not be unfair.[84] But this bold interpretation was the subject of conflicting views. Lord Steyn held that the protective Act should be read as subject to an implied provision that the right to a fair trial should not be infringed. Lord Hope however held that this course would amount to legislation rather than interpretation, since it contradicted the entire structure of the protective Act.

That contrast was emphasised again by the House of Lords in a case which concerned children committed to the care of local authorities.[85] The Court of Appeal had, in the guise of interpretation, imposed a new system of judicial supervision not sanctioned by Parliament and inconsistent with the policy of the Children Act 1989. This was held to pass 'well beyond the boundary of interpretation', though the House of Lords, while overruling the supervisory scheme, in fact found no incompatibility with Convention rights. In a less controversial decision it was held possible for a homosexual partner to be included within the meaning of 'wife or husband' for the purpose of succession to a statutory tenancy.[86] Where no solution by interpretation is possible, a declaration of incompatibility has to be made.

As Lord Irvine has said, this special technique of interpretation 'enables the courts to iron out incompatibilities throughout the statute book',[87] thus avoiding the formalities of declarations of incompatibility except as a last resort.

The meaning of 'public authority'

The HRA in its central provisions (s. 6) makes the important distinction between acts of a public and a private nature, but it leaves the definition of these terms entirely to the courts.[88] The problems which have arisen so far may be seen in a group of cases concerning publicly assisted housing which local authorities have statutory duties to provide for people in need, but which may be arranged either directly or through private bodies under contract. Two decisions of the Court of Appeal provide a contrast. In the first, the local authority had set up a housing association (under statutory powers), to which it had transferred much of its housing stock including the care home in which the claimant was then resident. Under housing legislation the housing association was a 'registered social landlord'

[84] *R.* v. *A* (No. 2) [2001] 2 WLR 1546, remitting the case for assessment of the evidence.
[85] *Re S (Minors)* [2002] 2 WLR 720.
[86] *Ghaidan* v. *Godin-Mendoza* [2003] 2 WLR 478. See now Appendix Two.
[87] [2003] *PL* 308 at 319.
[88] The Joint Committee on Human Rights has issued a report on 'The meaning of public authority in the Human Rights Act 1998' (2004, HL Paper 39; HC 382). It discusses the cases dealt with below and considers that they adopt too narrow a view of public authority. It does not recommend legislation but instead recommends that the courts should adopt a more functional approach to the interpretation of s. 6 of the Act. The report does not consider that the horizontal application of the Act (see below, p. 181) resolves all these difficulties.

but was in law a private body. When the association took steps to evict the claimant she contended that they were a public authority under s. 6 of the HRA and so obliged to respect her private and family life and her home (Article 8). The court held that the housing association was a public authority for HRA purposes, but that there had been no human rights violation.[89]

The second case concerned a basically similar situation except that the care home was an independent foundation in which the claimant had resided for many years. She contested the foundation's decision to close the home and to transfer her elsewhere. Lord Woolf CJ, who gave the court's judgment in both cases, discussed a number of relevant but inconclusive factors, concluding that although the foundation was discharging the statutory obligations of the local authority, it nevertheless remained a private body.[90] 'The fact remains that effective protection of convention rights is lost as a result of the local authorities delegating their responsibilities.'[91] It had been decided in an earlier High Court case, likewise concerning the closure by a private body of an old people's home but decided before the HRA came into force, that delegation of the local authority's statutory duties removed also the protection of judicial review, which depended upon the same public–private distinction.[92] These consequences could not have been foreseen when the power of delegation was conferred by the National Assistance Act in 1948. The problem may be solved if it becomes established that convention rights are enforceable between private parties, but the reported decisions show no awareness of this possibility. The Jockey Club has been held to be 'a public authority in every sense of that term',[93] but this was not for the purposes of the HRA. So also was a private psychiatric hospital where patients were detained compulsorily under statutory power.[94] So also was a 'farmers market' set up originally by a local authority under statutory powers but later transferred to a non-profit making company managed by the farmers themselves, though with some local authority assistance, the Court of Appeal observing that the texts for an HRA public authority and for amenability to judicial review were for practical purposes the same.[95]

The only decision of the House of Lords on this issue was not unanimous. The question was whether a Parochial Church Council, when suing a landowner (under statutory procedure) for money due from him for the repair of the chancel of the parish church, was taking action of a private nature within s. 6(5) of the HRA.

[89] *Poplar Housing Association Ltd* v. *Donoghue* [2001] 3 WLR 183.
[90] *R. (Heather)* v. *Leonard Cheshire Foundation* [2002] 2 All ER 936. For criticism see [2002] 118 *LQR* 551 (P. P. Craig).
[91] [2002] 2 All ER at 946.
[92] *R.* v. *Servite Houses ex p. Goldsmith* [2001] LGR 55.
[93] *Jockey Club* v. *Buffham* [2003] 2 WLR 178 at 195.
[94] *R. (A)* v. *Partnerships in Care Ltd* [2002] 1 WLR 2610.
[95] *R. (Beer trading as Hammer Trust Farm)* v. *Hampshire Farmers Markets Ltd* [2004] 1 WLR 233 (refusal of licence quashed).

The majority of the House held that the nature of the action was private, as for the enforcement of any other incident of land tenure.[96] But Lord Scott held the contrary, stressing the strong public flavour of the duty of the PCC to act for its parishioners and the public generally; though in fact no human rights violation had occurred. It is obvious from this decision that long vistas of argument and disagreement lie ahead.

Conflicting human rights

Among the many balancing exercises required under the HRA is the reconciliation of conflicts between its different articles. Intrinsically this is no different from cases where an article allows for exceptions and the question is whether the exception outweighs the rule, for example where the right to a public hearing under Article 6 is negatived by the interest of morals, public order etc., as there provided. But balancing becomes particularly difficult where the main thrust of different articles is in opposite directions. An obvious case is where the right of respect for private and family life under Article 8 is invaded by the exercise of freedom of expression under Article 10. How far should freedom of the press, for example, be restrained for the sake of personal privacy?

The decisions show that freedom of expression, and particularly of the press, weigh heavily in the balance. Where a professional footballer sought to restrain a newspaper from publishing details of his extra-marital affairs it was held by the Court of Appeal (Lord Woolf CJ) that the public had a legitimate interest in being told about a public figure.[97] The court, as a public authority, would comply with the Convention 'by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence'. He added: 'There is a tension between the two articles which requires the court to hold the balance . . . Each article is qualified expressly in a way which allows the interests under the other article to be taken into account.' Lord Woolf CJ then suggested guidelines, stressing the importance of press freedom.

The balance was again struck in favour of public reporting where a mother was under indictment for the murder of one of her sons.[98] The other son, a 5-year old boy, was protected by a court order forbidding press reports or comment which might identify the mother or the deceased brother, and so save him from acute distress in his private life. Some proceedings, however, had already taken place before courts sitting in public, and on the application of a local newspaper the order was modified by a proviso allowing reference to those proceedings. An appeal against this proviso failed, the Court of Appeal holding that the judge had

[96] *Parochial Church Council of Aston Cantlow* v. *Wallbank* [2003] UKHL 37.
[97] *A* v. *Bplc* [2002] 3 WLR 542.
[98] *Re S (a Child)* [2003] 3 WLR 1425.

struck the balance correctly, recognising the primacy in a democratic society of the open reporting of public proceedings on grave criminal charges the inevitable price of incursions on the privacy of individuals. Since it was certain that the surviving son would be identified, the balance tilted decisively in favour of the press. Lord Phillips MR held that the son's Article 8 rights 'came no way towards outweighing the freedom of expression urged by the press'. No account was taken (though it had been in the case of the footballer) of the special provision of the HRA in favour of freedom of expression, as explained earlier, which was held to give neither Article 8 nor Article 10 pre-eminence over the other.[99]

Declarations of incompatibility and remedial orders

A number of declarations of incompatibility have been made in cases where Acts of Parliament could not be reconciled with Convention rights by interpretation, as explained above. Where mental health legislation imposed the burden of proof on a detained patient, requiring him to show that all the conditions for his detention no longer existed, the Court of Appeal declared that the reversed burden of proof violated his right to liberty under Article 5.[1] Where a transsexual female, who had been registered at birth as male, and was obliged by statute to be so treated in law, was unable to marry, the House of Lords made a declaration that the relevant provisions of the Matrimonial Causes Act 1983 were incompatible with her convention rights under Articles 8 (family life) and 12 (right to marry).[2]

No formal declaration of incompatibility seems to have been made, however, in an important case where the Court of Appeal held by a majority that the drastic statutory scheme for fixed penalties and forfeiture of vehicles enforced against carriers who transported illegal immigrants was incompatible with their rights to fair trial and their rights of property under Article 6 and the First Protocol.[3] And the House of Lords, holding that there was no incompatibility, disallowed a declaration of incompatibility made by the Court of Appeal in a pawnbroking case where it had held that the penalty of unenforceability imposed by the Consumer Credit Act 1974 for any omission from the contract of the prescribed terms was disproportionate and contrary to the right of property in the First Protocol of the Convention, as well as contrary to the right to a fair trial under Article 6.[4]

[99] s. 12 (above, p. 174).

[1] *R. (H)* v. *London North and East Mental Health Review Tribunal* [2002] QB 1.

[2] *Bellinger* v. *Bellinger* [2003] 2 WLR 1175.

[3] *International Transport Roth* v. *Home Secretary* [2002] 3 WLR 344.

[4] *Wilson* v. *Secretary of State for Trade and Industry* [2003] 3 WLR 568. In the Court of Appeal the case was reported as *Wilson* v. *First County Trust Ltd.* (No. 2) [2001] 3 WLR 42. The original parties did not appear in the House of Lords and the Secretary of State took part in order to defend the Consumer Credit Act.

Remedial Orders have thus far been few in number. The first amended the mental health legislation so as to relieve the patient of the burden of proof.[5] The second amended Naval Courts-Martial procedures.[5a]

'necessary in a democratic society'

Articles 8 (private and family life), 9 (freedom of conscience), 10 (freedom of expression) and 11 (freedom of assembly and association) allow for restrictions on these human rights for particular purposes such as national security, national economic policy, crime prevention, public health or morals and the protection of the rights and freedoms of others. Article 10 extends also to the protection of information received in confidence and for maintaining the impartiality of the judiciary.

The leading example on Article 10 is the *Sunday Times* case, where the European Court by a narrow majority found violation in an injunction, granted against the newspaper by the House of Lords to prohibit (as contempt of court) discussion of cases already pending after the thalidomide disaster, holding that 'necessary' indicated a 'pressing social need' and that interference with freedom of expression must be 'proportionate to the legitimate aim pursued' and supported by 'relevant and sufficient reasons'[6]. In the words of Lord Clyde,[7] later endorsed by Lord Steyn, the court must ask itself

> whether (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Since the HRA came into force the House of Lords has held that these rules justify the reception in a criminal trial of foreign intercepted evidence,[8] and also official secrecy legislation.[9] Other decisions have accepted them for fingerprinting,[10] for restrictions on press reporting,[11] for a landlord's ordinary right to evict a defaulting tenant,[12] and the protection of the identity of a likely victim of crime.[13]

[5] Mental Health Act 1983 (Remedial) Order SI 2001 No. 3712.
[5a] Naval Discipline Act 1957 (Remedial) Order SI 2004 No. 66.
[6] *Sunday Times* v. *UK* (1979) 2 EHRR 245.
[7] *de Freitas* v. *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, endorsed by Lord Steyn in *R. (Daly)* v. *Home Secretary* [2001] 2 WLR 1622.
[8] *R.* v. *P* [2001] 2 WLR 463.
[9] *R.* v. *Shayler* [2002] 2 WLR 754.
[10] *R. (S)* v. *Chief Constable of the South Yorkshire Police* [2002] 1 WLR 3223.
[11] *Ex p. Telegraph Group Plc* [2001] 1 WLR 1983.
[12] *R. (McLellan)* v. *Bracknell Forest CB* [2002] 2 WLR 1448; *Harrow LBC* v *Qazi* [2003] 3 WLR 792.
[13] *Venables* v. *News Group Newspapers Ltd.* [2001] 2 WLR 1038.

Remedies and liability

The provisions of the HRA about remedies and liability are explained later in Chapter 20.

Private litigation and 'horizontal effect'

Although, as already pointed out, the HRA provides specific remedies only against public authorities, there is the overriding provision of s. 6 that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Courts or tribunals are specifically included in the definition of public authorities, so that a court faced with a Convention issue would have to decide it compatibly, whatever the legal proceedings in which the issue arose. The Convention rights would then permeate the whole legal system, in private as much as in public law. Remedies would be available under HRA s. 2, which requires the court to take account of Strasbourg jurisprudence, under which compensation for violations is frequently awarded by the European Court of Human Rights.

Administrative law is not concerned with this question directly, since it deals only with public authorities. But it is concerned indirectly, since 'horizontal' operation of the HRA against private parties would make it unnecessary to distinguish between public and private parties as illustrated in the preceding section. The elimination of that difficult distinction would save much hazardous litigation.

The indications so far point clearly towards horizontality. The benefits of the HRA and of Convention rights have been accorded to private parties in actions between landlord and tenant and private complaints against newspapers. Where there was a dispute about succession to a statutory tenancy and, as already noted, the Court of Appeal allowed a homosexual partner to claim as a 'spouse', the Court of Appeal held that this interpretation under HRA s. 3 must be adopted, so as to give effect to the partner's Convention rights, since the court was a public authority which must act compatibly with Convention rights even in proceedings between private parties.[14]

There have been strong pointers in the same direction in various proceedings against newspapers, which are not public authorities but where Convention rights have been assumed to be applicable.[15] It was in order to protect newspapers that the government added s. 12 to the HRA, as already explained, but that provision would be futile unless newspapers were entitled to claim Convention rights by horizontal application of the Act. In the pawnbroking case already mentioned, where a declaration of incompatibility was refused by the House of Lords, no

[14] *Ghaidan* v. *Godin-Mendoza* [2003] 2 WLR 478. Now confirmed by the House of Lords, see Appendix Two.

[15] See *Douglas* v. *Hello Ltd* [2001] 2 WLR 992; *Loutchansky* v. *Times Newspapers Ltd.* [2002] 2 WLR 640.

mention was made of the fact that the case was basically about the rights of private parties.[16]

When injunctions were granted against newspapers in order to protect the future anonymity of two child murderers, the court's duty to enforce their Convention rights was clearly stated by the High Court in a 'horizontal' situation. But it was held also that the court should apply the Convention principles to 'existing causes of action' only and 'cannot hear free-standing applications based directly on the articles of the Convention'.[17] The law of confidence in this case provided the cause of action. But the supposed restriction of the plain meaning of section 6 seems devoid of logic or authority. If the claimant can show a violation of his Convention rights, that itself should be his cause of action, even though 'free-standing'.[18]

EXAMPLES OF BRITISH VIOLATIONS

Examples of UK liability (pre-HRA)

In the period before the HRA came into force the UK was frequently held liable for violations committed by ministerial acts or orders, local authorities, police, prison and immigration authorities and others, on the principle that Convention rights had not been secured to the victim as required by Article 1. Some examples are given here.

The Home Secretary's advisory panel, which was the only body before which a Sikh asylum-seeker was allowed to contest a deportation order on the merits, and which failed to inform him of the evidence against him or of its advice to the Home Secretary, and refused him legal representation, and was in any case advisory only, was held to fall far short of the judicial protection of personal freedom required by Article 5.4 and to fail to provide an effective domestic remedy as required by Article 13.[19]

Discharge of homosexuals from the armed forces was held to violate their right to respect for their private life under Article 8.[20]

Parents of a child taken into care by a local authority in Scotland were refused access to social reports and vital documents needed at a 'children's hearing', in

[16] *Wilson* v. *Secretary of State for Trade and Industry* [2003] 3 WLR 568, above, p. 179.
[17] *Venables* v. *News Group Newspapers Ltd.* [2001] Fam 430, paras. 27, 111 (Butler-Sloss P).
[18] A cause of action need not be statutory. 'A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.' *Letang* v. *Cooper* [1965] 1 QB 232 at 243 (Diplock LJ).
[19] *Chahal* v. *United Kingdom*, 70/1995 (1996) 23 EHRR 413.
[20] *Smith and Grady* v. *UK* (1999) 29 EHRR 493.

violation of their right to a fair trial of their civil rights under Article 6 and to respect for their family life under Article 8.[21]

Unreasonable delay in the discharge of a mental patient was a violation of his right to personal freedom under Article 5.[22]

Two cases of delay violated the right to determination of civil rights 'within a reasonable time' under Article 6. In the first, a period of nearly nine years was consumed in administrative and legal appeals by a biologist against his dismissal from employment by a regional health authority.[23] In the second, social security and court officials took over four years to settle a relatively simple dispute about costs in a dispute between neighbours over sewerage, and court officials were totally inactive for a further sixteen months.[24]

The opening and reading by the prison authorities of a prisoner's correspondence with his solicitor about legal proceedings violated his right to respect for his correspondence under Article 8, in view of the confidentiality of the lawyer–client relationship, and was not 'necessary in a democratic society'.[25]

The continuation of a prisoner's detention and the recalling of paroled prisoners to prison, in each case on the recommendation of the Parole Board, failed to satisfy their right under Article 5 to have the lawfulness of their detention decided by a court at reasonable intervals, the scope of judicial review being inadequate.[26]

Refusal of legal aid violated the rights of impecunious prisoners to free legal assistance under Article 6.3(c) in two cases, one being that of a poll tax defaulter[27] and on the other that of a convict who was granted legal aid for the trial but denied it for an appeal.[28]

Physically distressing and exhausting methods of interrogation inflicted upon detainees suspected of terrorism in Northern Ireland were inhuman and degrading treatment violating Article 3.[29] At the other end of the scale, excessive chastisement of a boy by his stepfather was degrading treatment violating the same Article.[30]

Examples of violations established in UK courts (post-HRA)

After the HRA came into force complaints against public authorities in the ordinary courts were many and various. Mostly they were unsuccessful, but examples of success are the following.

[21] *McMichael* v. *United Kingdom* (1995) A–307B, 20 EHRR 205.
[22] *Johnson* v. *United Kingdom*, 119/1996, [1998] *EHRLR* 7 (£10,000 awarded).
[23] *Darnell* v. *United Kingdom* (1993) A–272, 18 EHRR 205 (£3,922 awarded).
[24] *Robins* v. *United Kingdom*, 118/1996, 26 EHRR 527.
[25] *Campbell* v. *United Kingdom* (1992) A–233, 15 EHRR 137 (£9,257 awarded).
[26] *Thynne, Wilson and Gunnell* (1990) A–190, 13 EHRR 666 (£45,000 awarded).
[27] *Benham* v. *United Kingdom*, 7/1995, 22 EHRR 293.
[28] *Boner* v. *United Kingdom* (1994) A–300B, 19 EHRR 246 (£7,5000 awarded).
[29] *Republic of Ireland* v. *United Kingdom* (1972) A–25, 2 EHRR 25.
[30] *A* v. *United Kingdom* (1999) 27 EHRR 611.

An interim injunction was granted to protect confidentiality of a footballer's sexual relationships since there was no public interest in publicising them and his rights under Article 8 prevailed over a newspaper's rights under Article 12.[31] The injunction was later discharged.[32]

A delay of eight weeks imposed on applications routinely by a mental health review tribunal violated Article 5. Declarations granted.[33]

Where a prisoner's sentence was extended for the protection of the public the Parole Board failed to keep it under periodic review as was necessary under Article 5. Judicial review granted.[34]

On an application for extradition of an alleged offender the lawfulness of his detention was to be decided by the Home Secretary and not by a court of law. Judicial review granted.[35]

A local authority's refusal to remove the claimant's name from an electoral list sold commercially to advertisers violated Article 8. Judicial review granted.[36]

The refusal of a statutory tribunal of inquiry into the 'Bloody Sunday' deaths in Londonderry to allow soldier witnesses to give their evidence elsewhere took insufficient account of the risk to their lives from terrorists, contrary to Article 2. Judicial review granted.[37]

Temporary sheriffs in Scotland were held not to constitute an independent and impartial tribunal for the purposes of Article 6, since they held their appointments precariously for one year at a time and might be biased by their hopes of promotion. Appeals against conviction allowed.[38]

A drastic penalty scheme for fixed financial penalties and impounding of vehicles enforced by the Home Secretary on owners, hirers and drivers in respect of clandestine immigrants found concealed on their vehicles was unlawful as denying fair trial under Article 6 and as disproportionately severe on property rights (First Protocol). Home Secretary's appeal dismissed.[39]

A delay by the Parole Board of up to three months in dealing with the case of a prisoner whose tariff period had expired was excessive and violated Article 5. Declaration granted.[40]

A policy of excluding a prisoner while his cell was searched, despite it containing his legally privileged correspondence with his lawyer, violated his rights under Article 8 as well as his rights at common law. Judicial review granted.[41]

[31] *A* v. *Bplc* [2001] 1 WLR 2341.
[32] *A* v. *B* [2002] 3 WLR 542.
[33] *R. (C)* v. *London South and West Region Mental Health Review Tribunal* [2002] 1 WLR 176.
[34] *R. (Giles)* v. *Parole Board* [2002] 1 WLR 654.
[35] *R. (Kashamu)* v. *Governor of Brixton Prison* [2002] 2 WLR 907.
[36] *R. (Robertson)* v. *Wakefield Metropolitan District Council* [2002] 2 WLR 889.
[37] *R. (A)* v. *Lord Saville of Newdigate* [2002] 1 WLR 1249.
[38] *Millar* v. *Dickson* [2002] 1 WLR 1615.
[39] *International Transport Roth GmbH* v. *Home Secretary* [2002] 3 WLR 345.
[40] *R. (Noorkaiv)* v. *Home Secretary* [2002] 1 WLR 3284.
[41] *R. (Daly)* v. *Home Secretary* [2001] 2 WLR 1622.

A number of mental health patients suffered excessive delays in their applications to a review tribunal and were awarded damages.[42]

Where a severely disabled woman and her husband had been left in inadequate accommodation for 20 months the court awarded £10,000 in damages for violation of Article 8.[43]

Where a patient had died through gross neglect amid allegations of a cover up, the Court of Appeal found that the State's obligations under Article 2 were not in the circumstances fulfilled by the police and NHS Trust inquiries but required a public judicial investigation involving the deceased's family (and at the expense of the State).[44]

POST-HRA

Examples of violations established before the European Human Rights Court

The use of financial incentives to induce employees to surrender their right to trade union representation for collective bargaining was a violation of their right to freedom of assembly and association, contrary to Article 11, since it undermined the trade union's right to protect its members interests.[45] Members' claims had previously been rejected by the House of Lords.

Failure to warn the prison authorities of the dangerous character of a prisoner who killed his cell-mate was a violation of the right to life under Article 2.[46]

The taking of a baby girl from her parents by a local authority under a care order was in violation of Article 6(1) since they had no legal assistance and thus not a fair trial; and since there were no adequate reasons Article 8 (respect for family life) was also violated.[47]

The fixing by the Home Secretary of a life prisoner's 'tariff' was held to violate Artice 6(2), contrary to the fundamental principle of the separation of judicial and executive powers, since this was part of the prisoner's sentence which must be imposed by a court in a public hearing.[48] The 'tariff' is the part of the sentence

[42] *R. (KB)* v. *South London Mental Health Review Tribunal* [2003] 3 WLR 185. See below, p. 601.

[43] *R. (Bernard)* v. *Enfield LBC* [2003] HLR 27.

[44] *R. (on the application of Kahn)* v. *Secretary of State for Health* [2003] EWCA Civ. 1129, [2003] 4 All ER 1239.

[45] *Wilson* v. *UK* (2002) 35 EHRR 20.

[46] *Edwards* v. *UK* (2002) 35 EHRR 19.

[47] *P, C and S* v. *UK* (2002) 35 EHRR 31.

[48] *Easterbrook* v. *UK* (2003) 37 EHRR 40.

attributable to retribution and deterrence, before the case can be referred to the Parole Board.

Another violation of the same principle was found in the continued detention of a mental health patient whose release could be authorised only by the Home Secretary.[49]

The procedure of the Parole Board in recalling a paroled prisoner to prison violated Article 5(4) since it did not allow an oral hearing with legal representation and the calling of witnesses.[50] The specific right to compensation under Article 5(5) was also violated.

Disclosure by a local authority to news media of a closed circuit television recording violated Article 8, as also did covert recording by the police, without proper authority, in the home of a suspected drug dealer.[51]

The failure of prison authorities to provide for the care and medical needs of a prisoner who died amounted to inhuman and degrading treatment contrary to Article 3.[52]

A policy of excluding homosexuals from the armed forces infringed their rights of private life under Article 8 as well as their rights at common law.[53] And where there were allegations of collusions by the security forces in the murder of a solicitor in Northern Ireland, the lack of a prompt, effective and independent investigation was a breach of Article 2.[54]

In all the examples quoted the proceedings were necessarily brought against the United Kingdom for failure to secure the Convention rights to some person within the jurisdiction.

CATALOGUE OF EUROPEAN HUMAN RIGHTS

Articles 1–14 of the European Convention and Articles 1–3 of its First Protocol, and also its Sixth Protocol, are set out below (these articles are reproduced verbatim, with the exception of Articles 1 and 13, in the first schedule to the Human Rights Act 1998).

[49] *Benjamin and Wilson* v. *UK* (2003) 36 EHRR 1.
[50] *Waite* v. *UK* (2003) 36 EHRR 54.
[51] *Armstrong* v. *UK* (2003) 36 EHRR 30.
[52] *McGlinchey* v. *UK* (2003) 36 EHRR 41.
[53] *Smith and Grady* v. *UK* (1999) 29 EHRR 493.
[54] *Finucane* v. *United Kingdom* (2003) 37 EHRR 29. There were in fact three investigations. That by the police was not compliant since the allegations were against the police; the inquest was not compliant since the deceased's wife was not allowed to give evidence of the collusion at it; and the final independent inquiry was too late—ten years after the event.

Article 1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Article 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purposes of this Article the term 'forced or compulsory labour' shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
(b) any service of a military character or, in the case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
(d) any work or service which forms part of normal civic obligations.

Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

First Protocol

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Sixth Protocol

Article 1

Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2

Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate

to the Secretary General of the Council of Europe the relevant provisions of that law.

THE EUROPEAN UNION

The Communities[55]

The European Economic Community (EEC) came into being under the Treaty of Rome, signed by six countries in 1957. In addition there were the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom), founded in 1951 and 1957 respectively. In 1965 the Merger Treaty amalgamated the institutions of the three communities, so that they shared a single constitutional structure consisting of a Council, a Commission, an Assembly (now Parliament) and a Court of Justice, though in law they remained distinct. France, West Germany, Italy and the Benelux countries were the founder members; Britain, Ireland and Denmark acceded in 1973, Greece in 1981, Spain and Portugal in 1986, Austria, Finland and Sweden in 1995. Ten further countries acceded in 2004.

The task of the EEC was to establish a common market and its objectives were to include: elimination of customs duties and quantitative trade restrictions between Member States; a common customs tariff; abolition of obstacles to freedom of movement for persons, services and capital; common policies for agriculture and transport; a system ensuring undistorted competition; improved balances of payments; approximation of state laws; a Social Fund for the benefit of workers; a European investment bank; and association with overseas countries and territories.[56] The Treaty provided specifically for many of these purposes, prohibiting for example quantitative restriction of imports and exports and all measures having equivalent effect[57]; abuse by undertakings of a dominant position;[58] and sex discrimination over equal pay for equal work.[59]

The original treaties were modified in 1986 by the Single European Act (SEA) a treaty which extended the powers of the EEC in the economic and environmental fields, including also health and consumer protection among other things. Obstacles to the free movement of goods, capital, services and persons were to be

[55] There is a large literature on the law of the EU. Valuable works are Hartley, *Foundations of European Community Law*; Wyatt and Dashwood, *European Community Law*; Craig and De Burca, *EU Law*; and see also Schwarze, *European Administrative Law*; Nehl, *Principles of Administrative Procedure in EC Law*.

[56] Treaty of Rome, Arts. 2, 3.

[57] Arts. 28, 29 (ex 30, 34).

[58] Art. 92 (ex 86).

[59] Art. 119, 141 (ex 119).

removed before 1993. The SEA also augmented the powers of the European Parliament, as the Assembly then became.

In 1992 the Treaty on European Union was signed at Maastricht after much controversy. This treaty was of great political and constitutional importance. It had many and diverse objects, ranging from political affairs on the widest plane to technical schemes such as that for a common European currency. It pointed clearly in the direction of turning the original economic community into a federal union, fulfilling ambitions cherished in some member states. The three communities remained distinct, but collectively they were christened the European Union (EU). At the same time the EEC became the European Community (EC), recognising that its activities travelled far beyond its original economic objectives. Within the EU, also, there were to be policies of intergovernmental cooperation on two fronts, 'common foreign and security policy' and 'cooperation in the fields of justice and home affairs'. Every citizen of a Member State is to be a citizen of the Union, though without much evident legal effect. There is also the 'social chapter', dealing primarily with workers' rights, from which Britain secured the right to opt out, though it later acceded.

The Treaty of Amsterdam, signed in 1997, made numerous amendments of detail, including stronger provisions about discrimination and employment and simplifying the procedures of decision-making. It reorganised and consolidated the EC Treaty and the EU Treaty, with their numerous amendments, by renumbering their articles.[60] It incorporated, inter alia, provisions for police and judicial cooperation.

The Treaty of Nice, signed in 2001, made changes in the composition of the Commission, in the system of voting in the Council, and various institutional reforms including amended rules for the Court of Justice. Proposals for a new Constitutional Treaty were discussed at an intergovernmental Conference in 2003, but it proved impossible to reach agreement.

The European Communities Act 1972

This short statute incorporates the law of the EU into British law in the most thoroughgoing manner. It provides that all rights, powers, liabilities, obligations and restrictions deriving from the treaties which 'in accordance with the Treaties are without further enactment to be given legal effect' shall be 'recognised and available in law and enforced, allowed and followed accordingly', and that this includes 'any enactment passed or to be passed'—the words which, as noted already, have prevailed over the principle of Parliamentary sovereignty.[61] Power is

[60] For the text as consolidated and renumbered, see *Blackstone's EC Legislation*, 14th edn., 1.
[61] See s. 2(4) and above, p. 27.

given to provide, either by Order in Council or by regulation, for implementing Community law wherever necessary. This power extends to anything that could be effected by Act of Parliament, but it does not authorise taxation, retrospective operation or serious new criminal offences.[62] In legal proceedings any question concerning Community law is to be determined according to the decisions of the European Court of Justice. There are some detailed provisions about customs duties, agricultural policy and other matters, but the basic rules for the wholesale incorporation of Community law are short, comprehensive and (as explained earlier[63]) revolutionary. The Act is supplemented by the European Communities (Amendment) Act 1993, the European Union (Finance) Act 1995 and the European Communities (Amendment) Act 2002.

Constitution of the EU

The principal decision-making bodies of the EU are the Council, the Commission, the European Parliament and the European Court of Justice. In addition there are the European Council, the Court of Auditors and the European Central Bank, none of which formed part of the original EEC constitution. These bodies are based in Brussels, except for the Parliament which sits in Strasbourg and the Court of Justice which sits in Luxembourg and the Central Bank which sits in Frankfurt.

1. *The Council*, properly called the Council of Ministers, consists of a minister from each Member State who must be authorised to commit his government. The ministers will vary with the subject matter, e.g. finance ministers will come for financial business and transport ministers for transport. The presidency of the Council is held by the Member States in turn for six months at a time. Since ministers come only for meetings, continuity is provided by a Committee of Permanent Representatives (COREPER) which manages the procedures and prepares the agenda for the Council. These permanent representatives are the Member States' ambassadors to the EU or else their deputies.

2. *The Commission* is the powerful executive body at the heart of the EU machine. Each Member State may nominate at least one and not more than two commissioners who serve for five years and are renewable. A point of prime importance is that they must be independent of their home governments, and indeed generally. 'They shall neither seek nor take instructions from any government or from any other body.' Their appointment is now subject to approval by the Parliament. Each commissioner will normally be in charge of one or more portfolios. The portfolios are allotted by the President of the Commission (nominated by the Council and

[62] s. 2 and 2nd sched.
[63] Ibid.

approved by the Parliament), who is in a position of great power, having charge of the general policy and conduct of the Commission. The Commission meets as a body to take decisions, which is done by simple majority vote. There is a large staff of permanent officials organised in departments under director-generals. This is the 'Brussels bureaucracy' which, in contrast to the Council, contains no elective or democratic element and so creates the 'democratic deficit' which raises questions about the EU's political legitimacy.

3. *The European Parliament* was established in 1967, replacing the Assembly originally set up by the Treaty of Rome. It now has some 626 members (MEPs) who since 1979 have been directly elected, each Member State having a proportionate number. Under the Treaty of Nice the Parliament is to draw up proposals for election by direct universal suffrage. The MEPs sit in multinational party groupings, thus tending towards a European party system which is a primary need for evolving a genuine parliamentary constitution. The treaties have successively conferred more powers and influence on the Parliament, particularly in budgetary matters. Although it has power to dismiss the Commission, and in effect did so in 1999, when the Commission resigned, it remains relatively devoid of initiating power and unable to enforce day-to-day responsibility on the Commission and the Council. Its inadequacy is the outstanding defect of the EU constitution.

4. *The European Court of Justice* is, from a lawyer's standpoint, the most impressive of all the EU's institutions. It has vigorously extended its jurisdiction, sometimes beyond the terms of the treaties,[64] and, although in some cases it can enforce its judgments only through national courts, it has established the effective supremacy of EU law throughout the Member States. It has become perhaps the most powerful court in the world, despite the fact that it has jurisdiction only within the boundaries of the treaties. There are now fifteen judges, appointed by common accord of the Member States, one judge coming normally from each. In addition there are eight advocates-general one of whom, following the French system, sits with the court (except at first instance) and, after the argument, gives a written opinion advising the court how to decide. Judges are appointed for six years and are renewable. They themselves elect their President for a renewable term of three years. The court may sit in several divisions. There is also a court of first instance, established by the Single European Act, with limited jurisdiction and subject to appeal to the Court of Justice, which lightens the court's constantly increasing case-load. A feature of the court's procedure is that one of the judges (the 'juge-rapporteur') prepares a written summary of the facts and the parties' arguments before the oral hearing, which by British standards is very short. Another contrast with Britain is that dissenting opinions are not given.

The Court's jurisdiction extends, among other things, to enforcing Union law

[64] See (1996) 112 *LQR* 95 (T. C. Hartley).

against defaulting Member States, to reviewing the acts and omissions of the various EU bodies and awarding compensation for abuse of power, and to determining by 'preliminary rulings' issues of EU law referred to it by the courts of the member states. This last is the busiest department of its jurisdiction.

5. *The Ombudsman* is appointed by the Parliament and is removable by the Court of Justice at the Parliament's request.[65] He must be completely independent and may have no other occupation. He may receive complaints from any citizen or resident of the EU about instances of maladministration in the activities of Community institutions or bodies other than the Court of Justice. Complaints may be made to him either direct or through MEPs, and he may act on his own initiative, except where legal proceedings have been taken. Adverse findings are referred to the institution concerned which must reply within three months. The Ombudsman then makes a report to Parliament, but what is to happen thereafter is not explained.

6. *The European Council*, to be distinguished from the Council of Ministers described above, is a political body consisting of the heads of governments of the Member States accompanied by their foreign ministers. It was constituted informally in 1974 and since 1986 is formally established under the Single European Act in order to 'provide the Union with the necessary impetus for its development' and to 'define the general political guidelines'. It has no legal powers, but will concern itself with matters which demand discussion at the highest possible level such as economic policy and proposals for monetary union. It aims to integrate the policies of the member states and to provide initiatives which the Commission can translate into effective measures.

Legislative powers and procedures

The basic procedure for EU legislation is that it is made by the Parliament acting jointly with the Council or by the Council, acting in both cases on a proposal from the Commission.[66] The source of power is the Council, but the initiative rests with the Commission which is the powerhouse of the EU.

When conferring powers the treaties will specify the procedure to be used. It has been modified from time to time, primarily for the purpose of giving the Parliament a greater degree of involvement and so reducing the 'democratic deficit'. The Treaty of Rome required the Parliament to be consulted in various cases, but gave it no decisive power. This 'consultation procedure' was supplemented by a 'cooperation procedure' under the Single European Act.[67] This procedure has in

[65] Art. 195 (ex 138E).
[66] Arts. 249, 250 (ex 189, 189A).
[67] Arts. 251, 252 (ex 189B, 189C). This procedure is now abolished except for the EMU.

its turn been largely replaced by the 'co-decision procedure', under which a measure requires the approval of both the Council and the Parliament.[68] A proposal from the Commission is sent to both bodies and the Council can adopt the measure if it accepts any amendments proposed by the Parliament. Otherwise the Council shall 'adopt a common position' and state its reasons to the Parliament. If the Parliament approves, or does nothing, the measure will be treated as adopted accordingly. Any amendments proposed by the Parliament are submitted to the Council and the Commission for their opinion. If the Council does not approve the amendments, the President together with the President of the Parliament, shall convene the Conciliation Committee, which consists of an equal number of members of the Council and the Parliament, which attempts to produce an agreed text with the aid of the Commission. If the Conciliation Committee approves a joint text, the measure may be adopted by a qualified majority vote of the Council and by an absolute majority vote of the Parliament, both votes being essential. In the absence of an agreed text the measure falls.

The co-decision procedure is now prescribed for most EU legislation, except for a few special matters such as the admission of new Community members. The co-decision procedure, with its emphasis on conciliation, has in general worked well. Most importantly, it has given the Parliament a power of veto over legislation, making it begin to look like a real legislature, though still devoid of initiating power.

Finally there is an 'assent procedure', also introduced by the SEA, under which the Council, acting on a proposal from the Commission, must obtain the assent of Parliament. This is restricted to the admission of new Member States and association agreements with other states and a few special matters such as elections to the Parliament and freedom of movement within the EU.

Voting in the Council, according to the treaty provision in question, is either by simple majority or by qualified majority or by unanimity. For a qualified majority the votes are weighted in proportion to population, from twenty-nine votes each for Britain, France, Germany and Italy down to three for Malta. Before a measure is passed a majority of Member States must approve it and at least 231 of the 321 votes available must be cast in its favour. A member state may request confirmation that the votes in favour represent 62 per cent of the population of the EU. If this is not found to be the case, the measure falls. In 1966, at a time of crisis in the Community, it was agreed informally under the 'Luxembourg Accord' that a member state claiming that its vital national interests were at stake would be allowed a right of veto, but in practice this concession seems now to be in abeyance.

Three forms of legally binding legislation are prescribed by the Treaty of Rome:[69]

[68] Art. 251 as amended by Treaty of Amsterdam.
[69] Art. 249 (ex 189).

(a) A *regulation* shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
(b) A *directive* shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
(c) A *decision* shall be binding in its entirety upon those to whom it is addressed.

There may also be recommendations and opinions, but these have no binding force. The merit of the directive was that it allowed for the principle of subsidiarity. Its weak point was that it depended for its efficacy on action by the Member States. Their persistent defaults led to the doctrine of direct effect of directives, discussed below.

Supremacy of EU law

The Treaty of Rome imposed a duty on Member States to 'ensure fulfilment of the Community's tasks',[70] but did not specify how this was to be achieved. Perhaps the most striking achievement of the Court of Justice is its doctrine of supremacy, under which national courts must accept that Community law prevails over all domestic legislation and rules of law of whatever kind. Its effect is therefore automatic, and not dependent upon the cumbersome procedures provided in the Treaty for infringements to be prosecuted before the Court of Justice by the Commission or by member states.

The principle was laid down by the Court in two celebrated cases. In *Costa* the Court said:[71]

> In contrast with ordinary international treaties, the Treaty has created its own legal system which, on entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.

And in *Simmenthal* the Court said:[72]

> Every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals, and must accordingly set aside any provisions of national law which may conflict with it, whether prior or subsequent to the Community rule.

In Britain these rulings came to the test in the *Factortame* cases,[73] where Spanish ship-owners complained that their fleets were excluded from British waters by the requirements of the Merchant Shipping Act 1988 as to the nationality of owners

[70] Art. 10 (ex 5).
[71] *Costa* v. *ENEL*, 6/64 [1964] CMLR 425.
[72] *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA* (No. 2), 106/77 [1978] 3 CMLR 263.
[73] *R.* v. *Secretary of State for Transport ex p. Factortame Ltd* [1990] 2 AC 85; (No. 2) [1991] 1 AC 603; (No. 3) [1992] QB 680; (No. 4) [1996] QB 404; (No. 5) [1999] 3 WLR 1062 (HL).

and crews, and that these requirements violated the Community laws on freedom of establishment and discrimination—as, in the end, it was held that they did. In the first case the High Court held, more presciently than the House of Lords, that while a preliminary ruling was sought from the Court of Justice the Act of 1988 must be 'disapplied' (an unprecedented term in British law) and an interim injunction granted against enforcement of the Act, so as to protect the ship-owners from heavy losses in laying up their ships in the meantime. The House of Lords reversed that decision, holding that they had no power to disapply an Act of the sovereign Parliament in an uncertain situation and that, in any case, there was no power in British law to grant an interim injunction against an officer of the Crown (this was wrong, though believed by the judges at the time);[74] but they referred the question of interim protection to the Court of Justice. That court ruled, predictably, that interim protection was just as necessary in Community law as in any other system and that any conflicting rule of national law or sovereignty must be set aside by the national court or tribunal. In the second *Factortame* case, accordingly, the House of Lords accepted these corrections and was obliged to take the revolutionary step of granting an injunction to forbid a minister from obeying an Act of Parliament.[75] There could be no better illustration of the profound effects which the supremacy of Community law can have not only on the domestic law but also on the constitutions of the Member States.

If the incompatibility is clear, the national court may disapply the domestic law without reference to the Court of Justice. This was done by the House of Lords in the *Equal Opportunities* case,[76] where the time thresholds applied to part-time workers under the Employment Protection (Consolidation) Act 1978 as to protection against unfair dismissal and entitlement to redundancy payments were held to conflict both with the Treaty of Rome and with a directive of the EU Council on grounds of sex discrimination. Part-time workers were predominantly women, and it was held that the evidence produced by the government failed to show objective justification for excluding them. Declarations were granted accordingly on judicial review at the instance of the Equal Opportunities Commission.

In cases of this kind the Court of Justice is not content that the offending provisions of national law should be left as they stand and merely treated as dead

[74] See below, p. 834.

[75] As explained above, p. 27.

[76] *R.* v. *Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 AC 1. For repercussions in the tribunal system see [1996] *PL* 579 (D. Nicol). When the two-years' employment qualification was similarly challenged the European Court held that it was for the national court to decide whether there was statistical evidence, objective justification and a legitimate aim of social policy: *R.* v. *Secretary of State for Employment ex p. Seymour-Smith* [1999] 3 WLR 460 (ECJ). The Court of Appeal had held in the negative ([1997] 1 WLR 473) but the House of Lords allowed the Secretary of State's appeal, [2000] 1 All ER 857. Acts were disapplied in *Bossa* v. *Nordstress Ltd.* [1998] ICR 694 and in *Perceival-Price* v. *Department of Economic Development*, [2000] IRLR 380.

wood. Community law requires that they should be amended or repealed so that they may not mislead.[77] This is part of the doctrine of legal certainty.

The authority of the Court of Justice is confined to that conferred by the Treaties and it has no inherent jurisdiction. Its doctrines do not automatically apply in British courts unless some specific Community rule is in issue. Thus when the Commission banned the export of British beef and the British government's compensation scheme favoured producers with slaughtering facilities at the expense of those without them, the latter were not entitled to complain under the Community law about discrimination since that law did not derive from a Treaty provision but from 'the common law of the Community' as developed by the Court itself.[78] But when the rates of insurance premium tax, imposed by Act of Parliament, discriminated against travel agencies and in favour of independent insurance companies, and the government could show no objective justification, this was held to be illegal (overriding the Act) as 'state aid' distorting competition and so violating a specific treaty provision.[79]

The success of the Court of Justice in imposing the supremacy of EU law may be contrasted with the lack of success in this respect of the European Communities Act 1972. That Act provided in very general terms for Community law to be 'enforced, allowed and followed' in British courts and 'any enactment passed or to be passed' was expressly made subject to that sweeping provision. Yet the appellate courts, as the first *Factortame* case shows, felt unable to give full scope to these directions, or to the decisions of the Court of Justice which had already established the principle of supremacy. It was only when that Court gave its rulings in the later *Factortame* litigation that the 'new legal order' was fully accepted and disentangled from the restraints and technicalities of domestic law.

Enforcement through national courts

The Court of Justice has no powers of enforcement. It has to rely upon the courts of the Member States and on their duty to fulfil their treaty obligations. Infringements of EU law by a Member State may be brought before the Court by another Member State (Art. 227) or by the Commission (Art. 226) and there have been many such proceedings. The commonest procedure, however, is for some national court or tribunal to seek a 'preliminary ruling' from the Court on some question of EC law which has arisen in proceedings before it.[80] Though called 'preliminary', the Court's ruling is normally definitive. The case then returns to the national

[77] See *Commission* v. *France*, 167/73 [1974] CMLR 216.

[78] *R.* v. *Ministry of Agriculture Fisheries and Food ex p. First City Trading* [1997] 1 CMLR 250.

[79] *R.* v. *Commissioners of Customs and Excise ex p. Lunn Poly Ltd.* [1999] 1 CMLR 1357.

[80] Art. 234 (ex 177).

court which must give effect to the ruling, using its own remedies but disregarding any restrictions of national law which are inconsistent with the ruling. This procedure may be used in ordinary litigation between private parties or in judicial review. A ruling may be sought by any court or tribunal, and must be sought if there is no further judicial recourse possible, as in a decision of the House of Lords.

It is not lawful for a Member State, believing that another Member State is in breach of EU law, to attempt to enforce it by unilateral action. Consequently the British government, supposing that live animals for slaughter were maltreated in Spain, had no right to ban such exports and were held liable to compensate the exporters.[81]

The direct effect of EC law

The enforcement of EC law through the doctrine of direct effect is the lynch-pin of the Union's legal system, giving it much of the efficiency of a unified jurisdiction as opposed to a collection of international treaties enforceable only by diplomacy. Rights and duties are conferred not only upon states but upon their nationals. In the landmark case of *Van Gend en Loos* the Court of Justice stated the principle:[82]

> The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals. Independently of the legislation of member states Community law not only imposes obligations on individuals but is also intended to confer on them rights which become part of their legal heritage.

Article 12 of the original treaty, which prohibited new customs duties on imports or exports between Member States, therefore enabled a German firm to reclaim in the Dutch courts customs duty wrongfully imposed by the Dutch government.[83] Since the terms of the treaty were clear and unconditional they were 'ideally adapted to produce direct effects in the legal relationship between member states and their subjects'. But would this be equally true between those subjects themselves? The Court of Justice answered positively in the *Defrenne* case, where an air hostess successfully sued an independent Belgian airline for violating the principle of equal pay for equal work.[84] The treaty provision was both mandatory and absolute, and also capable of conferring rights on individuals, and so directly applicable in the Belgian court. Even where a provision is capable of elaboration by

[81] See *R.* v. *Ministry of Agriculture, Fisheries and Food ex p. Hedley Lomas (Ireland) Ltd.* [1997] QB 139 (ECJ).

[82] *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen*, 26/62 [1963] CMLR 105, [1963] ECR I.

[83] *Van Gend en Loos* (above).

[84] *Defrenne* v. *Sabena* [1976] ECR 455. A later example is *Angonese* v. *Cassa di Rispiarmo di Bolzano SpA* (Case C–281/98) [2000] ECR I–4139.

national legislation, it may, it was held, nevertheless have direct effect in the absence of action by the Member State.

Since the treaty provides that a regulation 'shall be binding in its entirety and directly applicable', EU regulations come naturally within the doctrine of direct effect. They are thus automatically incorporated into domestic law without further ado, and they frequently confer rights on individuals. But a treaty provision or regulation can be given direct effect only if it is clear and unconditional and not dependent upon further action by the Member State.[85]

The difficult problem came with directives, where the Court of Justice had to find ways round a categorical provision of the Treaty of Rome which did not work satisfactorily. It is clear from the Treaty that directives were intended to take effect only indirectly, since they are 'binding as to the result to be achieved', but 'shall leave to the national authorities the choice of form and methods'. This clause put too much faith in the national authorities, which often failed to give effect to directives, and caused the Court of Justice to look for ways of circumventing it. In 1974 a measure of direct effect was devised in the *Van Duyn*[86] case, where a Dutch citizen had been refused entry to Britain since she intended to work with the Church of Scientology, an organisation at that time disapproved of by the British government. The treaty provision for freedom of movement allowed exceptions justified by public policy, but a directive restricted them to matters of 'personal conduct'—and no personal misconduct was alleged. The directive had not been incorporated in the British regulations, but the Court of Justice held that it 'would be incompatible with the binding effect attributed to a directive' by the treaty to exclude the possibility that it could be invoked by those concerned and that 'the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts'. There was also the argument that a state which had failed to implement a directive ought not to be able to benefit by its own default. As against the terms of the treaty these were not convincing reasons, but the corner had been turned and new horizons opened. Their potentiality was shown by the *Marshall* case,[87] in which the Court of Justice upheld the complaint of a woman employed by a health authority who was compulsorily retired under the age limit of 60 for women, whereas the age limit for men was 65. The British sex discrimination legislation allowed differential retiring ages, but the corresponding directive did not. The directive was held to prevail by direct effect, enabling the woman to sue the health authority in a British court.

[85] *Comitato di Coordinamento per la Difesa della Cava* v. *Regione Lombardia* (Case C–236/92) [1994] ECR I–483.

[86] *Van Duyn* v. *Home Office*, 41/74 [1975] Ch. 358, [1975] 1 CMLR 1. Judicial review is a satisfactory remedy for Community nationals refused entry to Britain on grounds of public policy: *R.* v. *Home Secretary ex p. Shingara* (Case C–65/95) [1997] ECR I–3341.

[87] *Marshall* v. *Southampton and South-West Hampshire Health Authority*, 152/84 [1986] QB 401, [1986] 1 CMLR 688; and see *Gibson* v. *East Riding of Yorkshire Council* [1999] ICR 662 (working time directive held directly effective so that swimming instructor could claim pay for leave before Britain had implemented the directive).

A limit, however, was found in the rule that a directive was 'binding upon each Member State to which it is addressed'. It was held that directives could have direct effect only against the state and not against private parties. This is the principle of 'vertical but not horizontal effect'. A broad concept of 'the state' was however adopted, so that it extended to a privatised gas company,[88] a privatised water authority[89] and a voluntary grant-aided school.[90] The test was satisfied if the body provided a public service under state legislation and under some degree of state control and had special powers.[91] It did not cover the (then) publicly owned Rolls Royce company, since it did not provide a public service.[92] Drawing a line round 'the state' in this way produces obvious anomalies, for example as between employees of government agencies and employees of private companies. Nevertheless the Court of Justice decided that it could not do further violence to the treaty, otherwise regulations and directives would be indistinguishable.[93]

Eventually a way forward was discovered in a doctrine of indirect effect. In the German case of *von Colson*,[94] also a discrimination case, the Court of Justice held that, since a directive was 'binding, as to the result to be achieved' on the Member State, it bound all the authorities of that state including the courts, which therefore had a duty to give effect to it. They must then interpret national law accordingly, and if it conflicts with Community law the 'interpretation' must be that national law is to be set aside. In the German case the plaintiff, an employee of a private company, was accordingly able to recover full compensation for discrimination, despite the fact that German law allowed much less. In this way the Court of Justice, by treating the national court as a state authority, has contrived to achieve generalised direct effect and to rewrite part of the Treaty of Rome. (There is an interesting parallel here with the Human Rights Act 1998, which is noted elsewhere.)[95] The new doctrine was corroborated in the Spanish *Marleasing* case,[96] where one private corporation was suing another to nullify its establishment in Spain as being designed for fraudulent purposes. Spanish law allowed this ground of objection, but the Council directive on the right of establishment for companies did not. The Court of Justice held that the Spanish court must 'interpret' the

[88] *Foster* v. *British Gas*, 188/89 [1991] 2 AC 306, [1990] 2 CMLR 833.

[89] *Griffin* v. *South-West Water Services Ltd.* [1995] IRLR 15.

[90] *National Union of Teachers* v. *Governing Body of St Mary's Church School* [1997] IRLR 242.

[91] A chief constable is included despite his constitutional independence: *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1987] QB 129 (ECJ).

[92] *Doughty* v. *Rolls Royce Plc* [1992] IRLR 126.

[93] See *Faccini Dori* v. *Recreb Srl* [1994] ECR I–3325 where the ECJ refused to give effect to a consumer protection directive, unimplemented by Italy, against a private trader but held that it was for the national court to award reparation under national law.

[94] *von Colson* v. *Land Nordrhein-Westfalen*, 14/83 [1984] ECR 1891, [1986] 2 CMLR 430.

[95] Above, p. 167.

[96] *Marleasing* v. *La Commercial International de Alimentation*, 106/89 [1990] ECR I–4135, [1992] 1 CMLR 688. But see *Kolpinghuis Nijmegen BV* [1987] ECR 3969.

Spanish law in accordance with the directive and disallow any objection not contained in it. Moreover, the Court of Justice has somewhat relaxed its doctrine, holding that the national court need only interpret the national law 'so far as possible' in conformity with the directive; but that if that is not possible it need not decide *contra legem* by disregarding national law; otherwise it would be giving horizontal effect to directives. This dilemma is unresolved.

How far British courts will feel able to accept this style of 'interpretation' remains to be seen. Before the *Marleasing* decision the House of Lords had already modified a regulation protecting the rights of employees of transferred undertakings so as to make it agree with a directive.[97] But the House had also declined to modify an Act of Parliament, once again in a sex discrimination case, in favour of a woman compulsorily retired at 60 by a private employer contrary to the equal treatment directive of the EU Council, since the directive had no horizontal effect.[98] Lord Templeman said that 'it would be most unfair to the respondent to distort the construction of the 1975 Sex Discrimination Act in order to accommodate the 1976 Equal Treatment Directive' and that 'the respondent could not reasonably be expected to reduce to precision the opaque language which constitutes both the strength and the difficulty of some Community legislation'. The question now is whether the Court of Justice, having now broken through all restraints, will consolidate its position in future cases or whether national courts will refuse to accept the horizontal as well as the vertical operation of directives as overriding all forms of domestic law.[99] The rigidity of the EU constitution, in which any amendment needs the consent of all Member States, must be taken as the excuse of the Court of Justice for its manipulation of the treaties.

Unimplemented directives: compensation and remedies

The Court of Justice has another string to its bow in dealing with Member States which fail to implement directives. This is that individuals who suffer by the default may be able to sue the defaulting state for compensation. There is then no disregard of the Treaty of Rome and no difficulty in the reasoning. It is simply an application of the principle that where there is a wrong, there is a remedy.

This solution was found in the Italian *Francovich* case,[1] where Italy had failed to implement a directive requiring Member States to provide legal security for the rights of employees, in particular to unpaid wages, in case of the insolvency of their

[97] *Litster* v. *Forth Dry Dock and Engineering Co.* [1990] 1 AC 546, [1989] 2 CMLR 194.

[98] *Duke* v. *GEC Reliance* [1988] AC 618, [1988] 1 CMLR 719. Cf. *Marshall* v. *Southampton Health Authority* (above).

[99] Although the rule against horizontal effect still prevails: see, e.g. *El Corte Ingles* v. *Christina Blazquez Rivero*, 192/94 [1990] ECR 1–1281.

[1] *Francovich* v. *Italy*, 6 and 9/90 [1993] 2 CMLR 66. See similarly *R.* v. *Secretary of State for Social Security ex p. Sutton* [1997] ECR I–2163 (ECJ).

employer. A number of the former employees of two Italian concerns which went bankrupt were owed large sums for past wages but could not recover them in the absence of the legislation required by the directive. The directive itself was not sufficiently precise to be directly effective, but it was 'inherent in the system of the Treaty' and necessary for 'the full effectiveness of Community rules' that individuals should be able to obtain redress for infringements for which the state was responsible. Three conditions, however, had to be fulfilled. First, 'the result prescribed by the directive should entail the grant of rights to individuals'. Secondly, those rights should be identifiable in the directive. Thirdly, there must be 'a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties'. The result may then be that the Member State 'manifestly and gravely disregards the limits on its discretion'.[2]

As regards compensation, the Court of Justice held that it was for the defaulting state to make reparation under its own substantive and procedural law, but its rules 'must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation'.

The *Francovich* principle will not only be a spur to Member States tempted to procrastinate over directives. It is also to be regarded as one branch of a general doctrine of state liability for breaches of EU law, This doctrine is explained later as a head of government liability.[3]

Judicial review of community action

The actions (and inactions) of the authorities of the EU are subject to judicial review by the Court of Justice. The Treaty of Rome, as amended at Maastricht, provides that:

> The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-à-vis* third parties. It shall for this purpose have jurisdiction in actions brought by a member state, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.[4]

Secondly the treaty provides that

> Any natural or legal person may, under the same conditions, institute proceedings against a

[2] *Dillenkofer* v. *Germany* [1996] 3 CMLR 469, elaborating the *Francovich* tests; *R.* v. *HM Treasury ex p. British Telecom Plc* [1996] 2 CMLR 217.

[3] Below, p. 746.

[4] Art. 230 (ex 173).

decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.[5]

The treaty then prescribes a time limit of two months from the publication or notification of the decision or, in their absence, of its discovery by the plaintiff. There is no provision for extension of this short period,[6] but it may be evaded if proceedings are started in the national court and a reference to the ECJ can be obtained.[7] In contrast to Britain, acts and measures are reviewable only if they have legal effect.[8]

The four specified grounds of review (lack of competence etc.) are modelled upon the four traditional *ouvertures* for the *recours pour excès de pouvoir* in French administrative law, which cover the whole field of judicial review much as in Britain. But the rules for standing are interpreted strictly[9] and give much less scope for individual complainants than do the corresponding British rules, which are now relaxed almost to vanishing point.[10] A distinction is made between open and closed categories of persons affected, so that regulations affecting a whole industry cannot be challenged by individual firms, but may be challengeable if the only firms affected are a small and identifiable class. But this did not avail Italian companies disputing a Council regulation restricting the subsidy of Williams pears who claimed that the regulation affected them particularly.[11] Nor does the Court admit representative actions, e.g. by trade unions on behalf of their members or by conservation groups.[12] The jurisprudence of the Court of Justice has been erratic in this difficult area, but will perhaps become more liberal when fears of 'opening the floodgates' recede and the court appreciates that strict rules of standing, just as formerly in Britain, may allow the authorities or individuals to act unlawfully and escape challenge.[13] A movement in this direction is shown by the decision of the Court of Justice, on a preliminary ruling issued to the English Court of Appeal, that a commercial competitor could sue for a breach of Community quality standard regulations committed by another firm importing seedless grapes. The Court stressed the necessity for 'full effectiveness' of Community law without mentioning

[5] Ibid.

[6] Except for the extensions on account of distance (10 days for Britain) and for unforeseeable circumstances and force majeure allowed by the Court's statute.

[7] See M. J. Beloff in Forsyth and Hare (eds.), *The Golden Metwand*, 289.

[8] *IBM* v. *Commission*, 60/81 [1981] 3 CMLR 635. Contrast below, p. 638.

[9] *Plaumann & Co.* v. *Commission* [1964] CMLR 29. See, e.g., *Government of Gibraltar* v. *Council* [1993] ECR I–4009 (narrow interpretation of 'direct and individual concern').

[10] See below, p. 690.

[11] *Calpac* v. *Commission* 789 and 790/79 [1981] CMLR 26. Contrast *Gestevision Telecino SA* v. *Commission* [1998] All ER (EC) 918 (standing allowed to commercial competitor).

[12] *Stichting Greenpeace Council* v. *Commission* [1998] All ER (EC) 620 (standing denied for challenging subsidy for power stations in Canary Islands).

[13] See below, p. 690.

its conflicting decisions.[14] Furthermore, since Member States, the Council and the Commission always have standing before the Court, individuals and firms may be able to induce them to bring proceedings on their behalf. There is also provision for regulations of the Council and the Commission to be challenged indirectly in other proceedings, as in the British doctrine of collateral pleas, but this applies only to regulations.[15]

Among the grounds of review, which basically reflect the principle of ultra vires, it is notable that 'an essential procedural requirement' is held to include the duty to give a fair hearing to a party adversely affected,[16] and also that 'infringement of the Treaty' includes failure to give reasons for regulations, directives and decisions of the Council and the Commission, which are expressly required.[17] More generally, the Court of Justice will enforce fundamental rights, 'as an integral part of the general principles of law, the observance of which it ensures'.[18] It likewise respects the rights guaranteed by the European Convention on Human Rights, as resulting from the constitutional traditions common to the Member States; and a clause to this effect was added to the Maastricht treaty.[19]

Where an unlawful act is annulled, it is treated as voidable rather than void. That is to say, it may have legal effect in transactions prior to the judgment. This again contrasts with British law,[20] and may allow rights to be affected by unlawful acts, as may also happen when the very short two-month period of limitation expires. Under the treaty, however, the Court of Justice has discretion to 'state which of the effects of the regulation which it has declared void shall be considered as definitive'.[21] Although nominally confined to regulations, this power has been applied to directives also, particularly where they are kept alive until valid directives replace them.[22] As a general rule the Court will allow the benefit of the annulment only to parties who have begun proceedings before the date of the judgment.[23] Others will have to accept the 'void' act as valid.

Where an act is flagrantly and obviously illegal it is treated as 'non-existent' (as in French administrative law) and so void from the beginning and technically not even reviewable.[24]

[14] *Muñoz y Cla SA* v. *Frumar Ltd* [2003] 3 WLR 58. In *Union de Pequēnos Agricultores* v. *Council* [2002] ECR I–6677 the ECJ adhered to its strict doctrine.
[15] Art. 241 (ex 184).
[16] *Transocean Marine Paint* v. *Commission*, 17/74 [1974] ECR 1063, [1974] CMLR 459.
[17] Art. 253 (ex 190).
[18] *Nold* v. *Commission*, 3/73 [1974] 2 CMLR 338.
[19] Art. F–2 (now 6(2)).
[20] See below, p. 297.
[21] Art. 231 (ex 174).
[22] See *European Parliament* v. *Council*, 295/90 [1992] 3 CMLR 281.
[23] See *Defrenne* v. *Sabena*, 43/75, [1976] 2 CMLR 98.; *Barber* v. *Guardian Royal Exchange Assurance Group*, 262/88, [1990] 2 CMLR 513, balancing the principles of legality and legal certainty; *Commission* v. *AssiDomän Kraft Products AB*, 310/97 [1999] All ER (EC) 737.
[24] See *BASF* v. *Commission* [1992] ECR II–315, [1992] 4 CMLR 357.

A national court has no jurisdiction to review the validity of acts of the EU authorities, but must always seek a ruling from the Court of Justice.[25]

Liability of community authorities

The Treaty provides for liability of the Community in tort:[26]

> In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

There are no restrictions as to standing and the time limit is five years. But the complainant must show 'a sufficiently serious breach of a superior rule of law for the protection of the individual' and that the EU authority has 'manifestly and gravely disregarded the limits on the exercise of its powers'.[27] 'A superior rule of law' appears to mean any rule of EU law. The mere illegality of an act by itself is not enough, but fault is not essential. Here there may be some conflict with British law, as is explained later.[28] In a series of decisions the Court of Justice has relaxed the strict conditions which it had at first imposed, such as that a reviewable act must first be annulled, so that there is now a wide-ranging remedy against abuse of the drastic powers of the EU authorities.[29]

An example is the second *Mulder* case,[30] in which a dairy farmer had discontinued production for five years under regulations made by the Council and had, as was held in the first case, a legitimate expectation that he would be allowed to resume production in later years. But he was refused licences on the ground that under the regulations they could be allotted only on the basis of the previous year's production, despite the fact that in the previous year he had produced nothing. In awarding damages the Court of Justice held that by failing to take account of the position of farmers in this situation 'the Community legislature manifestly and gravely disregarded the limits of its discretionary power, thereby committing a sufficiently serious breach of a superior rule of law'. Here the 'superior rule of law' was the principle of the protection of legitimate expectations. This may be

[25] *Foto-Frost* v. *Hauptzollamt Lubeck-Ost*, 314/85 [1988] 3 CMLR 57; *Woodspring DC* v. *Bakers of Nailsea Ltd.* 6–27/95, [1997] 2 CMLR 266 (ECJ). In *R.* v. *Secretary of State for Health ex p. Imperial Tobacco Ltd.* [2002] QB 161, the Court of Appeal questioned the validity of a directive but refused interim relief, Laws LJ (dissenting) holding that the directive was plainly unlawful.

[26] Art. 288 (ex 215).

[27] *HNL* v. *Council and Commission* [1978] ECR 1209, [1978] 3 CMLR 566. For this formula as the criterion of state liability see below, p. 208.

[28] Below, p. 779.

[29] See, e.g., *Funoc* v. *Commission* [1990] ECR 1–3669.

[30] *Mulder* v. *Council and Commission* [1992] ECR I–3061.

compared with British cases where regulations have been invalidated for unreasonableness.[31]

Effect on administrative law

The 'incoming tide' of community law, of which Lord Denning MR spoke thirty years ago,[32] has been gaining in strength and volume ever since, and has brought about profound changes both in the constitutional law and the administrative law of Britain. Wide new areas of governmental liability have been opened up and new rights against public authorities have been created, often in favour of private persons and concerns. The enforcement of freedom of establishment and of non-discrimination, to take only two examples, has benefited many plaintiffs, and other EU benefits have similarly added important dimensions to administrative law. An understanding of the source and operation of these new rules, as sketched briefly in the preceding pages, is now indispensable. Examples of their effects in administrative law will be found later in this book, for example in the areas of nullity[33] and breach of duty.[34] An inroad has been made in the doctrine of Parliamentary sovereignty, on which both constitutional and administrative law are founded.[35]

It is certain; also, that there will be increasing integration and convergence between the two legal systems, with EU law becoming more and more preponderant. Concepts such as proportionality, legitimate expectation and vertical and horizontal effect will infiltrate further into British law, and public authorities will have to be constantly more circumspect in keeping track of their EU obligations. Lawyers will be obliged to 'think European' on an ever-increasing scale. Combined with the new law of human rights, described in the preceding section, the European content of administrative law is both massive and vital.

[31] Below, p. 880.
[32] *Bulmer Ltd* v. *Bollinger SA* [1974] Ch. 401 at 418.
[33] Below, p. 300.
[34] Below, p. 773.
[35] Above, p. 26.

PART IV
POWERS AND JURISDICTION

7

LEGAL NATURE OF POWERS

SOURCES OF POWER

Statutory powers and duties

Public administration is carried out to a large extent under statutory powers, conferred upon public authorities by innumerable Acts of Parliament. Statutory duties, imposed similarly, also play their part, but it is a minor one in comparison with powers. This is because powers confer discretion whether to act or not to act, and also, in many cases, what action to take, whereas duties are obligatory and allow no option. It is the element of discretion which raises the most numerous and most difficult problems in the law.

When the question arises whether a public authority is acting lawfully or unlawfully, the nature and extent of its power or duty has to be found in most cases by seeking the intention of Parliament as expressed or implied in the relevant Act. The principles of administrative law are generalised rules of statutory interpretation. Since so much of this book is concerned with them, an abundance of examples will soon be found. The dominating source of power is Parliament, but there are certain other sources, to be mentioned below, which do not have a statutory basis. These are the royal prerogative; corporate and contractual powers; and non-legal and abnormal powers.

Acts reasonably incidental

A statutory power will be construed as impliedly authorising everything which can fairly be regarded as incidental or consequential to the power itself; and this doctrine is not applied narrowly.[1] For example, a local authority may do its own printing and bookbinding.[2] Buses may be run a short distance beyond the end of the authorised route if there is no other practicable way of turning them round.[3] Housing authorities may charge differential rents according to their tenants'

[1] *A.-G.* v. *Great Eastern Railway* (1880) 5 App. Cas. 473; *A.-G.* v. *Smethwick Cpn.* [1932] 1 Ch. 563.

[2] *A.-G.* v. *Smethwick Cpn.* (above).

[3] *A.-G.* v. *Leeds Cpn.* [1929] 2 Ch. 291.

means,[4] may subsidise their tenants,[5] and may insure their effects.[6] A Board charged with the organisation of the totalisator may make contracts with firms for the collection of off-the-course bets, but may not subsidise one of the firms.[7] The Home Secretary may make charges to prisoners for privileges allowed to them.[8] Statutory powers therefore have considerable latitude, and by reasonable construction the courts can soften the rigour of the ultra vires principle. Although this book contains so many instances of that principle being infringed, it must be remembered that the courts intervene only where the thing done goes beyond what can fairly be treated as incidental or consequential.[9]

Local authorities enjoy a wide 'incidental' power under the Local Government Act 1972: they may do anything 'which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'.[10]

European Union law

Membership of the European Union requires, as already emphasised, that EU law be given overriding legal force.[11] Accordingly it is provided by the European Communities Act 1972 that Community law shall prevail over United Kingdom law, including Acts of Parliament both past and future, in any case of conflict. The Act empowers the Crown (by Order in Council) and any designated minister or department (by regulations) to make any alterations in United Kingdom law that are needed for the purpose of implementing Community obligations or exercising Community rights, or matters related thereto, subject only to a short list of exceptions concerning taxation, retrospective legislation, delegated legislation and limits on criminal fines and imprisonment.[12] In general, therefore, the whole operation of subordinating domestic law to Community law, and of taking advantage of Community rights, can be carried out by ministerial order, and a great many such orders have been made for the purpose of giving effect to Community regulations and directives and to judgments of the European Court in Luxembourg.[13] In the

[4] *Smith* v. *Cardiff Cpn.* (No. 2) [1955] Ch. 159.
[5] *Evans* v. *Collins* [1965] 1 QB 580; and see *Luby* v. *Newcastle-under-Lyme Cpn.* [1965] 1 QB 214.
[6] *A.-G.* v. *Crayford Urban District Council* [1962] Ch. 575.
[7] *A.-G.* v. *Racecourse Betting Control Board* [1935] Ch. 34.
[8] *Becker* v. *Home Office* [1932] 2 QB 407.
[9] See *Ski Enterprises* v. *Tongariro National Park Board* [1964] NZLR 884 (exclusive concessions for long terms beyond powers of Board); *Felixstowe Dock & Rly Co.* v. *British Transport Docks Board* [1976] 2 Ll. R 656 (Board empowered to make agreements incidental to promotion of Bills in Parliament).
[10] s. 111. For the limits of this power see *Credit Suisse* v. *Allerdale BC* [1997] QB 306.
[11] Above, p. 198.
[12] s. 2(2) and 2nd sched.
[13] An example is the Package Travel Regulations 1992 (SI 1992 No. 3288).

Factortame case,[14] where parts of the Merchant Shipping Act 1988 proved to be contrary to Community law, the Act was amended by Order in Council after the European Court had pronounced.[15]

Here therefore is an important source of administrative power. Strictly speaking, and from the internal point of view, it is merely domestic statutory power, since it all flows from the Act of 1972. But that Act opened the door to an external and autonomous system of law beyond the control of Parliament, so that in reality Community law has acquired its own independent force. Regulations and directives issuing from the Council and the Commission in Brussels may have direct effect and so confer rights and duties upon individuals which they can enforce in the courts of this country. In particular, the doctrine of direct effect gives the citizen important rights to claim compensation or damages from the government. This is explained in the chapter on government liability.[16]

The royal prerogative

In earlier times the Crown[17] wielded extensive powers over its subjects under the royal prerogative, which was part of the common law. In the seventeenth century the Crown had power to imprison people[18] and to impose taxation[19] in its own discretion. But in the course of constitutional history the Crown's oppressive powers have been stripped away, and for administrative purposes the prerogative is now a much-attenuated remnant. Numerous statutes have expressly restricted it, and even where statute merely overlaps it the doctrine is that the prerogative goes into abeyance.[20] It is, in any case, defined by law, that is to say by judicial decisions.[21] Prerogative powers may also, it seems, be atrophied by mere disuse. Thus the Crown used to employ the prerogative writ ne exeat regno to prevent a person leaving the country; but the courts have now held for many years that this remedy is granted only to a creditor for the restraint of an absconding debtor.[22] Although the Crown has been deprived of its former powers of invading the rights and liberties of subjects, there are still a few prerogative powers which can have unwelcome legal effects on individuals. By declaring war the Crown can prevent

[14] For which see above, p. 199.
[15] SI 1989 No. 2006.
[16] Below, p. 778.
[17] Meaning the Monarch acting in a public or constitutional capacity and not merely as a private individual: see below, p. 814.
[18] *Darnel's Case* (1627) 3 St. Tr. 1.
[19] *Bate's Case* (1606) 2 St. Tr. 371.
[20] *A.-G.* v. *De Keyser's Royal Hotel* [1920] AC 508; *R.* v. *Home Secretary ex p. Northumbria Police Authority* (below). For the development of this rule see P. Craig in Forsyth and Hare (eds.), *The Golden Metwand*, 65.
[21] *Case of Proclamations* (1611) 12 Co. Rep. 74; *A.-G.* v. *De Keyser's Royal Hotel* (above); *Burmah Oil Co.* v. *Lord Advocate* [1965] AC 75. See [1973] *CLJ* 287 (B. S. Markesinis).
[22] See below, p. 593.

trade with the enemy and can intern enemy aliens—though in wartime these matters are normally covered by legislation.[23] The Crown has special powers in foreign affairs, e.g. under the doctrine of act of state, which is discussed later.[24] But there is no prerogative power to enforce treaties.[25] The prerogative, in fact, has ceased to be a significant source of administrative power as against the citizen. It still comprises power to take action to preserve the peace,[26] to grant legal favours such as pardons, corporate personality or peerage, and it comprises many constitutional powers, such as the power to summon and dissolve Parliament and to assent to bills.

'Prerogative' power is, properly speaking, legal power which appertains to the Crown but not to its subjects. Blackstone explained the correct use of the term.[27]

> It signifies, in its etymology (from prae and rogo) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in it's nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.

Although the courts may use the term 'prerogative' in this sense, they have adopted the habit of describing as 'prerogative' every power of the Crown which is not statutory,[28] without distinguishing between powers which are unique to the Crown, such as the power of pardon, from powers which the Crown shares equally with its subjects because of its legal personality,[29] such as the power to make contracts,[30] employ servants and convey land.

Thus the Court of Appeal described the original scheme for compensating

[23] Much wider powers than those of the prerogative are in fact conferred, as by the Emergency Powers (Defence) Act 1939.

[24] Below, p. 838.

[25] *Walker* v. *Baird* [1892] AC 491; below, p. 839.

[26] *R.* v. *Home Secretary ex p. Northumbria Police Authority* [1989] QB 26 (special riot equipment issued to police against wishes of police authority).

[27] Bl. Comm. 1.239. In *Re Ferdinand, Ex-Tsar of Bulgaria* [1921] 1 Ch. 107 at 139 Warrington LJ said that 'prerogative properly describes the power and authority of the king in relation to his own subjects' as opposed to 'persons owing no allegiance to him', and he doubted whether the Crown's power to seize the property of enemy aliens within the realm was a prerogative power. Since aliens within the jurisdiction in time of peace enjoy the same civil rights as subjects, the proposition is questionable.

[28] This loose usage may derive from Dicey, *The Law of the Constitution*, 10th edn., 425: see Wade, *Constitutional Fundamentals*, revised edn., 61.

[29] In law the Crown has two personalities, as a natural person and as a corporation sole: see below, p. 814. For its powers as a natural person see Hogg, *Liability of the Crown*, 2nd edn., 163.

[30] See *A.-G. of Quebec* v. *Labrecque* [1980] 2 SCR 1057 at 1082 (Crown, 'in addition to the prerogative', has general capacity to contract under ordinary law).

victims of violent crime as established 'under the prerogative'.[31] The scheme was at first set up by executive action without statutory authority, and the compensation distributed by the Criminal Injuries Compensation Board (out of monies voted by Parliament) consisted technically of ex gratia payments. But anyone may set up a trust or other organisation to distribute money, and for the government to do so involves no unique 'prerogative' power.[32] Similarly the House of Lords has held that the Crown's powers of control over the civil service are part of the royal prerogative,[33] although in their essence they are merely the powers which any employer has over his employees. A true prerogative power, such as the power to declare war or to create a peer, involves something which no subject may do. Similarly the issue or denial of passports is sometimes said to be a prerogative power, but more probably it is merely an administrative practice involving no legal power at all.[34] The Crown's power to make international treaties is also often called a prerogative power,[35] but since it cannot affect the law administered by the courts it is not, in the domestic sense, a true legal power either.

Questionable attribution of powers to the royal prerogative does not, however, put them beyond the reach of judicial review, as is explained later.[36]

Corporate powers

One lingering effect of the royal prerogative, at least in theory, is on the powers of corporations. The Crown has the prerogative power of incorporation and can thus incorporate bodies by royal charter, for example boroughs, universities and colleges, professional societies, and the British Broadcasting Corporation.[37] But the great majority of corporations, including most trading companies, and many governmental corporations such as county councils, are incorporated by statute. This leads to a difference in the scope of their powers which was thus expressed in a case about Leeds Corporation:[38]

[31] *R.* v. *Criminal Injuries Compensation Board ex p. Lain* [1967] 2 QB 864 at 881, 883. The scheme is now statutory under the Criminal Injuries Compensation Act 1995.

[32] As observed by Lloyd LJ in *R.* v. *Panel on Take-over and Mergers ex p. Datafin Plc* [1987] QB, 815 at 848; he added: 'strictly the term "prerogative" should be confined to those powers which are unique to the Crown'. In *R.* v. *Criminal Injuries Compensation Board ex p. P.* [1995] 1 WLR 845 the Court of Appeal treated the question as open and Gibson LJ said that the scheme was 'perhaps more correctly' described as set up merely by executive action. See similarly *Burt* v. *Governor General* [1989] 3 NZLR 64 at 67.

[33] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374. For these powers see above, p. 346. For a reservation made by Lord Diplock see Appendix 1.

[34] See below, p. 347.

[35] As in *Laker Airways Ltd.* v. *Dept. of Trade* [1977] QB 643.

[36] Below, p. 572.

[37] The Crown could also make an individual office-holder and his successors a corporation sole. One of the few examples is the Master of Pembroke College, Oxford: Halsbury's *Laws of England*, 4th edn., vol. ix, para. 1233.

[38] *A.-G.* v. *Leeds Cpn.* [1929] 2 Ch. 291.

The corporation was incorporated by royal charter in the year 1627 in the reign of King Charles I. The fact that it is incorporated by royal charter is of importance, because a corporation so constituted stands on a different footing from a statutory corporation, the difference being that the latter species of corporation can only do such acts as are authorised directly or indirectly by the statute creating it; whereas the former can, speaking generally, do anything that an ordinary individual can do.

In other words, the law allows the Crown to create only corporations with complete legal personality and with full power to hold property, make contracts, and so forth. Such corporations may be empowered by their charters to make byelaws, enforceable by fines, provided that they are reasonable.[39] There are remedies against violation of the charter: it is liable to be revoked in *scire facias* proceedings,[40] members of the corporation can apply for an injunction,[41] and so can the Attorney-General.[42] But the terms of the charter are regarded as a kind of bargain between the corporation and the Crown,[43] and unauthorised transactions are not void as against the rest of the world.[44]

A statutory corporation is entirely different. Its objects and powers are solely those which Parliament has laid down expressly or impliedly in the constituent Act;[45] beyond these it is legally incapable of doing anything, so that any act which is ultra vires is wholly void in law. If therefore it borrows money unlawfully it is not contractually liable to repay because it cannot contract such a debt.[46] If it covenants that it will not exercise a power of compulsory purchase, the covenant is entirely void.[47] This rigid doctrine has been radically modified in favour of persons dealing in good faith with a company;[48] but that applies only as regards companies incorporated under the Companies Acts and not to public authorities incorporated otherwise.

Most governmental corporations are statutory, for example incorporated government departments, county councils, district councils and parish councils. But

[39] See the *Ipswich Tailors' Case* (1614) 11 Co. Rep. 53; *Slattery* v. *Naylor* (1888) 13 App. Cas. 446 at 452. Subject to a few exceptions based on ancient custom or prescription, such byelaws could not bind non-members of the corporation unless empowered by statute: Halsbury's *Laws of England*, 4th edn., ix. 756.

[40] Halsbury (as above), paras. 1332, 1396. An affected person may sue with the Attorney-General's fiat.

[41] *Jenkin* v. *Pharmaceutical Society* [1921] 1 Ch. 392.

[42] Either on his own motion or on behalf of an affected person: Halsbury (as above), para. 1342.

[43] *Baroness Wenlock* v. *River Dee Co.* (1885) 36 Ch. D 674 at 685 n. (Bowen LJ).

[44] *A.-G.* v. *Leicester Cpn.* [1943] Ch. 86; *Hazell* v. *Hammersmith and Fulham LBC* [1992] 2 AC 1.

[45] See, e.g., *Re Westminster CC* [1986] AC 668 (unlawful payments by Greater London Council).

[46] *Baroness Wenlock* v. *River Dee Co.* (1885) 10 App. Cas. 354; *Hazell* v. *Hammersmith and Fulham LBC*, above; *Credit Suisse* v. *Allerdale BC* [1997] QB 306.

[47] *Triggs* v. *Staines UDC* [1969] 1 Ch. 10; below, p. 331.

[48] European Communities Act 1972, s. 9.

formerly there were boroughs created by royal charter, and these could sometimes successfully invoke the wider powers of chartered corporations. Thus the Corporation of Leicester, which had statutory power to run bus services within the city, was able to make a valid contract for the purpose of a bus undertaking operating outside the city; and although it could not pay the purchase money out of its bus service reserve fund, since that was restricted by statute, it could pay from its rate fund which was not (as it was held) so restricted.[49] This distinction is now of historical interest only as regards local authorities, all of which became statutory in 1974.[50] In any case it conferred little real liberty on borough corporations, since their powers were restricted by statute in many respects, and they are subject to a fiduciary duty to apply their funds for proper purposes only.[51] It is of more significance that a small margin of freedom to spend funds for purposes of their own has been given to local authorities generally by the Local Government Act 1972.[52]

Since a statutory authority's powers are confined by the terms of the statute, any wider powers which a private owner could exercise are not available to them. A dock company in which the docks are vested, accordingly, cannot prevent people from using the docks by relying on an owner's power to exclude whom he wills, if its statutory powers provide only for it to regulate the use of the docks by all comers.[53] A county council may not impose a ban on deer-hunting over its land, relying merely on its powers of ownership and disregarding statutory conditions requiring it to act for the benefit, improvement or development of its area.[54] A public authority's statutory powers must, moreover, be exercised reasonably and in accordance with natural justice, so that it cannot act arbitrarily, for example by denying the use of a football ground in a way that might be lawful for a private landlord or by discriminating unfairly in business transactions. These restraints are explained in later chapters.[55]

There may be traps for innocent parties who contract with local authorities whose undertakings later turn out to be ultra vires and void and therefore unenforceable. This also is explained later.[56]

[49] *A.-G.* v. *Leicester Cpn.* [1943] Ch. 86. See Hart, *Local Government and Administration*, 9th edn., 309.

[50] See above, p. 111. Where charters were granted under earlier Acts the authority was statutory: *Hazell* v. *Hammersmith and Fulham LBC*, above.

[51] Below, p. 400.

[52] Above, p. 120.

[53] *London Association of Shipowners* v. *London & India Docks Joint Committee* [1892] 3 Ch. 242; *British Trawlers Federation Ltd.* v. *L & NE Rly Co.* [1933] 2 KB 14.

[54] *R.* v. *Somerset CC ex p. Fewings* [1995] 1 WLR 1037.

[55] See below, p. 417.

[56] Below, p. 796.

Contractual powers

Public authorities, like other people, frequently acquire powers by contract, for example where a local authority lets houses on lease and under the terms of the lease has power to evict the tenant or to increase the rent. Frequently the contractual power will derive from a statutory power such as, taking the same example, the local authority's power to manage its housing estates, and then the rules of administrative law will apply.[57] Where a public body's contracts are made merely in the exercise of commercial liberty, like those made by privatised industries such as electricity or gas, they fall outside administrative law since the ordinary law of contract provides adequate machinery for their enforcement and control. They are not within the scope of the remedies discussed in this book or subject to the system of judicial review. Something will, however, be said later about the use of contracts in the mechanism of government.[58]

Non-legal and abnormal powers

In defiance of strict legal logic the remedies of judicial review have been extended to the control of various bodies which have no legal powers at all but have powerful positions in practice. Examples are the Criminal Injuries Compensation Board as at first created (it is now statutory),[59] the Civil Service Appeal Board and the Stock Exchange Panel on Take-overs and Mergers. The cases of these and other such bodies need to be explained later in the context of the limits of judicial review.[60] None of them were created or given powers by Parliament, so in theory none of them could do any legal act with which administrative law should be concerned. But the courts now treat them as de facto public authorities and hold that their actions are subject to judicial review and to legal remedies, thus recognising 'the realities of executive power'. Here therefore we encounter legally controllable power which has itself no legal basis. New vistas of judicial review have been opened and their boundaries are far from easy to define.

Another abnormal case is that of the police, who have certain powers and duties at common law in their capacity as officers of the peace, in addition to the many powers and duties conferred upon them by statute. Consequently the court may be able to order the police to carry out their duties even where these are not statutory, as several decisions indicate.[61]

There may even be cases where the principles of judicial review will be applied so as to restrict the powers of a private landowner without any element of contract,

[57] See *Jones* v. *Swansea City Council* [1990] 1 WLR 54 (reversed on other grounds [1990] 1 WLR 1453).
[58] Below, p. 793.
[59] See below, p. 640.
[60] Below, p. 638.
[61] Below, p. 360.

for example so as to prevent him from arbitrarily ejecting a race-goer from a racecourse.[62] But such cases, if they exist, lie outside the field of administrative law.

EXPRESS REQUIREMENTS AND CONDITIONS

Mandatory or directory conditions

Acts of Parliament conferring power on public authorities very commonly impose conditions about procedure, for example by requiring that a notice shall be served or that action shall be taken within a specified time or that the decision shall state reasons. If the authority fails to observe such a condition, is its action ultra vires? The answer depends upon whether the condition is held to be mandatory or directory. Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every omission or defect which entails the drastic penalty of invalidity.

The distinction is not quite so clear-cut as this suggests, since the same condition may be both mandatory and directory: mandatory as to substantial compliance, but directory as to precise compliance. Where, for example, a local authority were empowered to assess coast protection charges on landowners within six months but did so after twenty-three months, the delay was so excessive that there was total non-compliance with the condition, and the assessments were void; but had the excess been a few days only, they would probably have been valid.[63] The court may readily find reasons for overlooking irregularities which are trivial or unimportant or merely technical, or which lead to no unjust or unintended consequences.[64] But the court will not overlook non-compliance with a requirement that went to jurisdiction.[65]

Sometimes the legislation makes it plain what the effect of non-observance is to be. But more often it does not, and then the court must determine the question. This the court does by weighing the inconvenience of holding the condition

[62] See *Forbes* v. *New South Wales Trotting Club* (1979) 25 ALR 1 (below, p. 444).

[63] *Cullimore* v. *Lyme Regis Cpn.* [1962] 1 QB 718. Compare *James* v. *Minister of Housing and Local Government* [1968] AC 409.

[64] e.g. *Re Bowman* [1932] 2 KB 621; *R.* v. *Dacorum Gaming Licensing Committee* [1971] 3 All ER 666; *Sheffield CC* v. *Graingers Wines Ltd.* [1977] 1 WLR 1119; *R.* v. *Home Secretary ex p. Jeyeanthan* [2000] 1 WLR 354.

[65] *Rydvist* v. *Secretary of State for Work and Pensions* [2002]1 WLR 3343 (CA) restricting *ex p. Jayeanthan* (above) to procedural requirements capable of being waived. For waiver see below, p. 239. See also *Ahmed* v. *Kennedy* [2003] 2 All ER 440 (CA) (election petition under the Representation of the People Act 1983 held a nullity: a rule said that the prescribed time periods 'shall not be enlarged' and the notice in question was late and did not contain the required information).

ineffective against the inconvenience of insisting upon it rigidly.[66] It is a question of construction, to be settled by looking at the whole scheme and purpose of the Act and by weighing the importance of the condition, the prejudice to private rights, and the claims of the public interest.[67] Little reliable guidance can be drawn from rules which have been suggested in some cases, for example that conditions governing rights are to be applied more strictly than conditions governing duties—though this distinction helps to explain some of the decisions.[68] The construction of the Act should not be affected by the facts of the particular case, but those facts may induce the court to withhold a discretionary remedy.[69] The court must look for the statutory intention and seek to do what was just in all the circumstances.[70] In any case, judges faced with these questions of construction may regard categories such as mandatory and directory as presenting, in the well-known words of Lord Hailsham, 'not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another'.[71] But Lord Hailsham's suggestion that these compartments are not logically distinct, and that the choice between them is at the discretion of the court, is open to criticism as explained elsewhere.[72]

The courts also sometimes vary their terminology, as by contrasting 'imperative' with 'mandatory' (meaning mandatory and directory respectively).[73] In one case the Court of Appeal held that a planning authority could validly give a decision without stating reasons as required by the Act, but called the condition mandatory in the sense that the duty to state reasons could be enforced by mandamus.[74] But the availability of that remedy has nothing to do with the question whether the decision itself is valid.[75]

It is possible for whole areas of statutory law to be treated as merely directory. This has been held in respect of certain provisions of the Prison Act 1952 and the whole of the prison rules[76] made under it, so that a prisoner not treated in accordance with the Act or the rules has no legal remedy on that account.[77] Yet the same

[66] *R.* v. *Rochester (Mayor)* (1857) 7 E & B 910.

[67] *Howard* v. *Bodington* (1877) 2 PD 203; *Coney* v. *Choyce* [1975] 1 WLR 422; *R.* v. *Home Secretary ex p. Jeyeanthan* (above), where Lord Woolf MR expounds the rules. The Secretary of State had applied for leave to appeal in two asylum cases by letter instead of on the prescribed form and omitted the prescribed declaration of truth. Held: the applications were valid.

[68] See *Caldow* v. *Pixell* (1877) 2 CPD 562; *Montreal Street Railway Co.* v. *Normandin* [1917] AC 170; *Clayton* v. *Heffron* (1960) 105 CLR 214 at 247.

[69] *Coney* v. *Choyce* (above).

[70] See *ex p. Jeyeanthan* (above).

[71] *London & Clydeside Estates Ltd.* v. *Aberdeen DC* [1980] 1 WLR 226.

[72] Below, p. 302.

[73] As in *Howard* v. *Bodington* (above). See also below, p. 226.

[74] *Brayhead (Ascot) Ltd.* v. *Berks. CC* [1964] 2 QB 303.

[75] See below, p. 267.

[76] SI 1964 No. 388 as amended.

[77] *Becker* v. *Home Office* [1972] 2 QB 407; *R.* v. *Hull Prison Visitors ex p. St Germain* [1979] QB 425; *Williams* v. *Home Office* (No. 2) [1981] 1 All ER 1211; *R.* v. *Parkhurst Prison Deputy Governor ex p. Hague* [1992] 1 AC 58. For an exception see *R.* v. *Home Secretary ex p. Herbage* (No. 2) [1987] QB 1077 (below, p. 549).

rules have been treated as enforceable in determining a prisoner's right to correspond with his solicitor and to make an application to the court[78] and to receive prompt notice of a disciplinary charge.[79]

Procedural and formal requirements

Procedural safeguards, which are so often imposed for the benefit of persons affected by the exercise of administrative powers, are normally regarded as mandatory, so that it is fatal to disregard them. Where there is a statutory duty to consult persons affected, this must genuinely be done,[80] and reasonable opportunity for comment must be given.[81] Where a proposal or scheme is required to be published it must be accurately described[82] and any one entitled to object must be allowed adequate time. Four days' notice of a local authority's scheme for setting up comprehensive schools was held wholly unreasonable and inadequate, so that the scheme was void.[83] An identical scheme had previously been held void and prohibited by injunction, because public notice of it had not been given as required by the Education Act 1944.[84] The object of requiring notice was to give an opportunity for objections to be made to the Minister before he decided whether to confirm the scheme. But this procedure was required only where the scheme involved setting up new schools or ceasing to maintain old ones. The local authority had wrongly supposed that they were not ceasing to maintain their former schools. It was held to be clearly implicit in the design of the Act that the Minister could not approve the scheme until the statutory procedure had been observed, and it was said:[85]

> . . . it is imperative that the procedure laid down in the relevant statutes should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place.

[78] *Raymond* v. *Honey* [1983] 1 AC 1. See also *Guilfoyle* v. *Home Office* [1981] QB 309 (rules strictly construed by Court of Appeal in rejecting right to correspond with solicitor concerning petition to European Commission of Human Rights).

[79] *R.* v. *Board of Visitors of Dartmoor Prison ex p. Smith* [1987] QB 106. But see above, p. 73. See also *R.* v. *Home Secretary ex p. Anderson* [1984] QB 778 (prison rule restricting access to legal advisers held ultra vires).

[80] *Grunwick Processing Laboratories Ltd.* v. *ACAS* [1978] AC 277; *Agricultural etc. Training Board* v. *Aylesbury Mushrooms Ltd.* [1972] 1 WLR 190 (below, p. 887); *R.* v. *Camden LBC ex p. Cran* [1995] RTR 346.

[81] *Re Union of Benefices of Whippingham and East Cowes, St James'* [1954] AC 245; *Port Louis Cpn.* v. *A.-G. of Mauritius* [1965] AC 1111; and see below, p. 875 (delegated legislation).

[82] *Wilson* v. *Secretary of State for the Environment* [1973] 1 WLR 1083 (notice describing land wrongly). See also *Legg* v. *Inner London Education Authority* [1972] 1 WLR 1245; *Coney* v. *Choyce* (above).

[83] *Lee* v. *Dept. of Education and Science* (1967) 66 LGR 211. See similarly *R.* v. *Brent LBC ex p. Gunning* (1985) 84 LGR 168.

[84] *Bradbury* v. *Enfield LBC* [1967] 1 WLR 1311.

[85] At 1325 (Danckwerts LJ).

The same case contains a contrasting example of directory requirements. Objections had been duly invited in respect of other schools covered by the scheme, but the Act also required that their specifications should be approved by the Minister. The local authority was proceeding with its scheme without submitting specifications for approval, but it was held that the court would not intervene, in the absence of objection by the Minister, even though the local authority was 'flying in the face of the intention which Parliament manifested'.[86]

Contrasting examples also appeared in another comprehensive school case, where the regulations requiring public notice of the scheme were held to be mandatory as regards substantial compliance, but merely regulatory as to some minor details.[87] Substantial compliance also sufficed where a local authority, in arranging for the adoption of a child, failed to notify the mother in writing but in fact made the position clear to her.[88] In a planning case the requirement that a notice of appeal against an enforcement notice should state the grounds of appeal was held to be merely directory, but the time limit for appeal was held to be mandatory.[89] The requirement that a planning application involving a departure from the development plan should be advertised as such has been held to be merely directory;[90] but the omission from a planning authority's statutory advertisement of details about the lodging of objections resulted in the invalidity of a planning permission.[91]

In notices affecting private rights, particularly where the effect is penal, scrupulous observance of statutory conditions is normally required. A demand for industrial training levy[92] and a certificate of 'alternative development'[93] have both been held void for failure to indicate, as required by statute, that there was a right of appeal. An enforcement notice is void if it fails to state, as it should, the time allowed for compliance.[94] A demand for a payment is void if it is signed by the borough treasurer instead of by the town clerk.[95] Where an Act requires consent in writing from the local authority for carrying on an 'offensive trade', the requirement of writing is mandatory.[96]

[86] At 1335 (Diplock LJ).

[87] *Coney* v. *Choyce* [1975] 1 WLR 422. Contrast *Mukta Ben* v. *Suva CC* [1980] 1 WLR 767 (non-publication of notice of compulsory purchase order not fatal: directory only). See also *R.* v. *Immigration Appeal Tribunal ex p. Jayeanthan* [1999] 3 All ER 231 (irregularity cured by tribunal).

[88] *Re T* [1986] Fam. 160.

[89] *Howard* v. *Secretary of State for the Environment* [1975] QB 235.

[90] *R.* v. *St Edmundsbury BC ex p. Investors in Industry Commercial Properties Ltd.* [1985] 1 WLR 1168; and see *Co-operative Retail Services Ltd.* v. *Taff-Ely BC* (1979) 39 P & CR 223.

[91] *R.* v. *Lambeth LBC ex p. Sharp* (1984) 50 P & CR 284.

[92] *Agricultural etc. Industry Training Board* v. *Kent* [1970] 2 QB 19. See similarly *Rayner* v. *Stepney Corporation* [1911] 2 Ch. 312 (closing order void).

[93] *London & Clydeside Estates Ltd.* v. *Aberdeen DC* [1980] 1 WLR 182.

[94] *Burges* v. *Jarvis* [1952] 2 QB 41.

[95] *Graddage* v. *Haringey London Borough Council* [1975] 1 WLR 241.

[96] *Epping Forest DC* v. *Essex Rendering Ltd.* [1983] 1 WLR 158 (HL).

Requirements which are less substantial, and more like matters of mere formality, may fall on either side of the line. Some of the cases concern delegated legislation, and are discussed elsewhere.[97] The omission from a clearance order of a note giving directions for the filling up of the form of order was held to be immaterial.[98] The provision of the Rent Act 1965 that a rent officer should consider 'the rent specified in the application' was held to contain a mandatory condition, so that an application which did not specify the desired rent was a nullity and the defect could not be waived.[99] The court distinguished an earlier case in which the application to a rent tribunal had failed to give the name of the landlord as required by regulations made under the relevant Act. The regulations were held to be merely directory in this respect, since the Act itself contained no such requirement.[1] But many cases show that even where the requirement is in the Act itself, it is possible for it to be held directory only.[2] 'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience.'[3]

A requirement of the prison rules that a charge against a prisoner should be laid 'as soon as possible' was held by the Court of Appeal to be mandatory, thus invalidating a charge laid in May for an offence committed in February.[4]

The possibility that a public authority may have power to waive an otherwise mandatory procedural requirement is mentioned below.[5]

Time limits

It has often been held that an act may be validly done after the expiry of a statutory time limit. Thus a rating list was upheld even though made and transmitted after the required dates.[6] A local planning authority, which is required by regulations to give notice of its decision within two months, was held able to give a valid decision after three months.[7] An earlier case[8] holding that a delay of over two

[97] Below, p. 896.

[98] *Re Bowman* [1932] 2 KB 621.

[99] *Chapman* v. *Earl* [1968] 1 WLR 1315.

[1] *Jackson (Francis) Developments Ltd.* v. *Hall* [1951] 2 KB 488; and see *R.* v. *Lincolnshire Appeal Tribunal ex p. Stubbins* [1917] 1 KB 1; *R.* v. *Devon and Cornwall Rent Tribunal ex p. West* (1974) 29 P & CR 316.

[2] e.g. *Margate Pier Co.* v. *Hannam* (1819) 3 B & Ald. 266; *Caldow* v. *Pixell* (above); *Montreal Street Railway Co.* v. *Normandin* (above).

[3] *Liverpool Borough Bank* v. *Turner* (1861) 2 De GF & J 507 (Lord Campbell).

[4] *R.* v. *Board of Visitors of Dartmoor Prison ex p. Smith* [1987] QB 106.

[5] Below, p. 239.

[6] *R.* v. *Ingall* (1876) 2 QBD 199.

[7] *James* v. *Minister of Housing and Local Government* [1966] 1 WLR 135, approved on this point [1967] 1 WLR 171 (HL); and see *Chelmsford Rural District Council* v. *Powell* [1963] 1 WLR 123 (additional ground of appeal allowed out of time); *R.* v. *Inspector of Taxes ex p. Clarke* [1971] 2 QB 640.

[8] *Edwick* v. *Sunbury-on-Thames UDC* [1962] 1 QB 229.

years would invalidate the decision has been disapproved, but it is not entirely clear that so long a delay may not still be fatal.[9] Even where the time limit is designed as a safeguard of individual freedom the court may, by weighing the public interest against that of the individual, hold that the time limit is directory only, as did a divided Court of Appeal in the case of the ten-day period of notice required for applying for a disqualification notice against a company director.[10]

Time limits may be held to be mandatory where the rights of other persons depend on them or they are of special importance. In an oft-cited case a bishop received a complaint against a clergyman but failed to send a copy of it to the clergyman within the statutory twenty-one days. All subsequent proceedings in the case were void.[11] So was a planning appeal lodged out of time, as mentioned above.[12] So was a scheme of charges for coast protection works which was made long after the appointed time.[13] So was an election petition which was presented after the prescribed time had expired.[14] But time limits governing electoral procedure may sometimes be exceeded with impunity, as where a list of voters was revised after the time appointed by the Act.[15] In New Zealand the court understandably refused to invalidate a general election, even though the Governor-General's warrant was issued unduly late.[16] These are cases where public policy clearly requires some latitude.

Failure to state reasons

The great majority of statutory tribunals are required by the Tribunals and Inquiries Act 1992 to give reasons for their decisions on request. The qualified duty imposed by the Act is often supplemented by an unqualified duty imposed by procedural regulations. The Act likewise applies to decisions of Ministers taken after public inquiries. And other statutes and regulations sometimes impose a like duty. This duty may be broken either because no reasons are given or because the reasons given are inadequate. The general nature of this duty is discussed elsewhere.[17] Here we are concerned with the effect of a breach of it.

In the case already mentioned the Court of Appeal held that a condition attached to a grant of planning permission was not invalidated by the planning authority's omission to state reasons in writing as required by the General Devel-

[9] See [1966] 1 WLR at 142 (Lord Denning MR).
[10] *Secretary of State for Trade and Industry* v. *Langridge* [1991] Ch. 402 (9-day notice upheld).
[11] *Howard* v. *Bodington* (1877) 2 PD 203.
[12] *Howard* v. *Secretary of State for the Environment* (above).
[13] *Cullimore* v. *Lyme Regis Corporation* [1962] 1 QB 718.
[14] *Devan Nair* v. *Yong Kuan Teik* [1967] 2 AC 31.
[15] *R.* v. *Rochester (Mayor)* (1857) 7 E & B 910.
[16] *Simpson* v. *A.-G.* [1955] NZLR 271.
[17] Below, p. 938.

opment Order.[18] Though described as mandatory, the requirement was in effect held to be directory. This decision seems reasonable in the circumstances. Planning authorities impose common-form conditions in many cases, and it would be a serious inconvenience to invalidate any condition for which separate reasons were not given. On the other hand, where it is a case of failure to explain the authority's main decision, the court will intervene not merely if no reasons were given but also if they are unsatisfactory. In one such case, where the reasons given by an agricultural arbitrator did not explain what breaches of covenant had been committed by the tenant, this was held to be error on the face of the award and it was set aside.[19] And in a planning case, where the Minister's decision on an appeal was accompanied by obscure and unsatisfactory reasons, the decision was quashed for non-compliance with the procedural rules which govern these appeals and require decisions to be reasoned.[20]

Later decisions have clearly held that a statutory duty to give reasons is normally mandatory, so that in default of adequate reasons the decision is a nullity and will be quashed. Decisions of immigration appeal tribunals,[21] employment tribunals[22] and mental health review tribunals[23] have been invalidated accordingly. So have the decisions of ministers taken after statutory inquiries.[24] The whole tenor of the case law is that the duty to give satisfactory reasons is a duty of decisive importance which cannot lawfully be disregarded. They are supported by an earlier decision that where licensing justices were required by statute to specify the grounds of their decision, failure to do so made their proceedings wholly defective, so that they could be required by mandamus to rehear the application de novo.[25] The justices were empowered to refuse an application on one of four specified grounds, and it was held that this implied a duty to state the ground of refusal.[26]

[18] *Brayhead (Ascot) Ltd.* v. *Berks CC* [1964] 2 QB 303. See likewise *R.* v. *Liverpool CC ex p. Liverpool Taxi Fleet Operators' Association* [1975] 1 WLR 701, where however it is suggested that the court might intervene if the irregularity caused 'significant injury'. In *Greene* v. *Home Secretary* [1942] AC 284 failure to state reasons correctly did not invalidate a detention order.

[19] *Re Poyser and Mills' Arbitration* [1964] 2 QB 247; below, p. 939.

[20] *Givaudan & Co. Ltd.* v. *Minister of Housing and Local Government* [1967] 1 WLR 250.

[21] *R.* v. *Immigration Appeal Tribunal ex p. Khan (Mahmud)* [1983] QB 790.

[22] *Norton Tool Co. Ltd.* v. *Tewson* [1973] 1 WLR 45; *Alexander Machinery (Dudley) Ltd.* v. *Crabtree* [1974] ICR 120; *Guest* v. *Alpine Soft Drinks Ltd.* [1982] ICR 110; and other cases cited below, p. 939.

[23] *R.* v. *Mental Health Review Tribunal ex p. Clatworthy* [1985] 3 All ER 699; *R.* v. *Mental Health Review Tribunal ex p. Pickering* [1986] 1 All ER 99.

[24] Below, p. 974.

[25] *R.* v. *Thomas* [1892] 1 QB 426. See also *R.* v. *Sykes* (1875) 1 QBD 52; *ex p. Gorman* [1894] AC 23.

[26] The Licensing Act 1964, s. 12(6) now requires grounds of refusal to be specified.

Provisions as to irregularity

Statutes occasionally make specific provision for the effect of non-observance of their requirements. Thus the Licensing Act 1964, after setting out a list of disqualifying circumstances for justices sitting to grant liquor licences, provides: 'No objection shall be allowed to any justices' licence on the ground that it was granted by justices not qualified to grant it.'[27] The Agriculture Act 1947, after prescribing the mode of appointment of members of agricultural land tribunals, provides that the tribunal's acts shall be valid notwithstanding that it is afterwards discovered that there was a defect in the appointment of a member.[28] The latter provision has been successfully invoked where an appointment appeared to be defective.[29] Procedural regulations sometimes contain similar clauses to the effect that failure to comply with them shall not invalidate the proceedings.[30] It is open to doubt whether such clauses would protect serious procedural errors, and it is unlikely that they would validate any procedure which violated the principles of natural justice.[31]

Irregularities may also be cured under statutory powers of modification. Clearance orders under the Housing Acts, for example, may be confirmed by the Minister with or without modification, and he has power to modify an invalid order so as to make it a valid one. Thus where the local authority's order provided that the land acquired might be disposed of in ways not permitted by the Act, the Minister modified the order so as to confine the future use of the land to rehousing and thus saved it from invalidity.[32] Similarly an order has been validated by extending an excessively short time limit.[33] Under the Town and Country Planning Act 1990[34] the Secretary of State may correct an error in an enforcement notice in deciding an appeal against it, if satisfied that there will not be injustice.

The common form of enactment which allows the validity of housing, planning and other orders to be challenged only within six weeks gives the court power to quash the order if it is not within the powers of the Act or if failure to comply with requirements of the Act has caused the interests of the applicant to be substantially prejudiced. This formula is discussed in a later chapter, where it is suggested that its two limbs ('not within the powers' and 'failure to comply with requirements') should be interpreted as distinguishing between mandatory and directory conditions.[35]

[27] s. 193(8). For the restrictive interpretation given to this section see below, p. 462.
[28] Sched.
[29] *Woollett* v. *Minister of Agriculture and Fisheries* [1955] 1 QB 103.
[30] e.g. Plant Variety Rights Tribunal Rules 1965 (SI 1965 No. 1623), rule 21.
[31] See below, p. 439.
[32] *R.* v. *Minister of Health ex p. Yaffé* [1931] AC 494.
[33] *Re Bowman* [1932] 2 KB 621.
[34] s. 176(2). See *Miller-Mead* v. *Minister of Housing and Local Government* [1963] 2 QB 196.
[35] Below, p. 734.

CONCLUSIVENESS, MISTAKE AND FRAUD

Revocable and irrevocable action

It may be necessary to determine whether there is power to revoke or modify the decisions or orders of an administrative authority or tribunal.[36] The question here is whether the authority itself has power to do this. This is different from the question whether some other authority has power to do so, which may be affected by a statutory provision that the decision 'shall be final', as explained elsewhere.[37]

In the interpretation of statutory powers and duties there is a rule that, unless the contrary intention appears, 'the power may be exercised and the duty shall be performed from time to time as occasion requires'.[38] But this gives a highly misleading view of the law where the power is a power to decide questions affecting legal rights. In those cases the courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities.

For this purpose a distinction has to be drawn between powers of a continuing character and powers which, once exercised, are finally expended so far as concerns the particular case. An authority which has a duty to maintain highways or a power to take land by compulsory purchase may clearly act 'from time to time as occasion requires'. But if in a particular case it has to determine the amount of compensation or to fix the pension of an employee, there are equally clear reasons for imposing finality. Citizens whose legal rights are determined administratively are entitled to know where they stand.

There is a third class of cases where there is power to decide questions affecting private rights but where there is also an inherent power to vary an order[39] or power to entertain fresh proceedings and make a different decision. Decisions on licensing applications and other decisions of policy will usually fall into this class, since policy is essentially variable. Thus, decisions on planning applications may be varied at any time if a fresh application is submitted.

There are also cases where a power of review is expressly given by statute. The social security authorities, for example, have extensive powers to review their decisions on grounds of fresh evidence, change of circumstances, or mere

[36] On this subject see [1982] *PL* 613 (M. Akehurst).

[37] Below, p. 712.

[38] Interpretation Act 1978, s. 12.

[39] As in *Re Wilson* [1985] AC 750 (justices' order as to payment of fines; Interpretation Act 1978 invoked); *R.* v. *Hillingdon LBC ex p. London Regional Transport*, The Times, 20 January 1999 (bus shelter consent revocable).

mistakes.[40] Powers of much the same kind have been conferred on employment tribunals.[41] But if it proposes to vary its decision under such a power the tribunal should first hear any party prejudiced.[42] Even where such powers are not conferred, it is possible that statutory tribunals would have power, as has the High Court, to correct accidental mistakes; to set aside judgments obtained by fraud; and to review a decision where facts subsequently discovered have revealed a miscarriage of justice.[43] In the absence of such special circumstances the tribunal's decision is irrevocable as soon as it has been communicated to the parties, even though orally[44] and even though the reasons for it remain to be given later.[45]

A mistake may lead to action being taken upon a wholly wrong basis so that some different action needs to be substituted. This happened where a local education authority agreed to pay the cost of school transport for a girl, supposing that she lived more than three miles from the school and that they therefore had a statutory duty to pay. When it was found that the distance was less than three miles, so that they had a power to pay but no duty, they refused to do so. The Court of Appeal rejected the plea that the original decision was irrevocable, since it was not taken in the exercise of any power to determine a question of legal right and could not affect the duty to exercise discretion when the true facts appeared.[46]

Cases of irrevocability

The following cases illustrate situations in which the court will hold administrative decisions to be irrevocable. A local authority, proposing to make up a street and apportion the expense among the frontagers, gave notice that it would follow one of the two alternative statutory procedures. It was held unable to revoke this decision when it later wished to follow the other procedure.[47] Although the court said that the authority's notice would estop it, the true ground of decision was probably that the election, once formally made, was a legal act which there was no power to undo. That was certainly the operative ground where the Westminster Council was held unable to vary an excessive award of compensation to a

[40] Below, p. 938.
[41] Below, p. 938.
[42] *Times Newspapers Ltd.* v. *Fitt* [1981] ICR 637.
[43] CPR 40.12 (though the jurisdiction is inherent); *Hip Foong Hong* v. *H. Neotia & Co.* [1918] AC 888 (PC). For the position of tribunals see further below, p. 938.
[44] *Lamont* v. *Fry's Metals Ltd.* [1985] ICR 566.
[45] *Jowett* v. *Bradford (Earl)* [1977] ICR 342; *R.* v. *Cripps ex p. Muldoon* [1984] QB 686; *R* v. *Oxford Regional Mental Health Review Tribunal ex p. Home Secretary* [1988] AC 120. Contrast *Hanks* v. *Ace High Products* [1978] ICR 1155; *R.* v. *Greater Manchester Valuation Panel ex p. Shell Chemicals Ltd.* [1982] QB 255.
[46] *Rootkin* v. *Kent CC* [1981] 1 WLR 1186.
[47] *Gould* v. *Bacup Local Board* (1881) 50 LJMC 44.

redundant employee.[48] The district auditor had disallowed the excess as unlawful expenditure and surcharged the councillors; but the High Court discharged them for the reason that it was for them to find the facts, and even if they had done so wrongly they had acted within their jurisdiction and made a valid determination which they had no power to reconsider or reduce. Similarly where the War Damage Commission had written to the owner of damaged property saying that it had been classified as 'not total loss', so that the statutory compensation would be on a 'cost of works' basis, the Commission were held unable to alter the classification to 'total loss', which they later decided was right.[49] These might be represented as cases of estoppel, but in truth they depend on the principle that a statutory power to decide is often a power to decide once and once only. In the case last mentioned Vaisey J accepted the principle in these words.[50]

> ... where Parliament confers on a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot, in the absence of express statutory power or the consent of the person or persons affected, be altered or withdrawn by that body.

The suggestion that a conclusive decision can be altered with the consent of the person affected needs qualification, since consent by itself cannot confer power which does not exist.[51] If a public authority makes a grant or gives a licence, it will not normally be able to revoke or alter its decision. But if it refuses a grant or a licence, it may be able to allow a renewed application, not because its first decision was not conclusive, but because it has a continuing power, and perhaps duty, to allow applications at any time.[52]

In the War Damage Commission case it was held that the Commission's decision was nonetheless binding because it was conveyed by an informal letter.[53] Where formalities are not prescribed by the Act in such a way as to make them mandatory, there is no reason why informal notification of the decision should not be fully conclusive.

Similarly where an immigration officer gives an immigrant leave to enter and

[48] *Livingstone* v. *Westminster Cpn.* [1904] 2 KB 109. And see *Battelley* v. *Finsbury Borough Council* (1958) 56 LGR 165 (no power to revoke engagement of employee). Scots examples are *Campbell* v. *Glasgow Police Cmrs.* (1895) 22 R. 621; *Blackley* v. *Ayr CC* 1934 SLT 398.

[49] *Re 56 Denton Road, Twickenham* [1953] Ch. 51. See similarly *Akewushola* v. *Home Secretary* [2000] 1 WLR 2295; *Aparau* v. *Iceland Foods plc*, [2000] 1 All ER 228 (CA); *Employment and Immigration Commission* v. *Macdonald Tobacco Inc.* (1981) 121 DLR (3d) 546.

[50] At 56.

[51] Below, p. 239.

[52] See *R.* v. *Hertfordshire CC ex p. Cheung*, The Times, 4 April 1986 (student grants, previously refused, allowed after *R.* v. *Barnet LBC ex p. Shah* [1982] 2 AC 309 showed that refusals were wrong in law).

[53] As also in *A.-G.* v. *Hughes* (1889) 81 LT 679; *Robertson* v. *Minister of Pensions* [1949] 1 KB 227.

remain in the country, this is conclusive of his right to do so even if the immigration officer acts under a mistake.[54] It is otherwise, of course, if he has no legal authority to grant leave in the circumstances,[55] or if he grants it because of misrepresentation by the immigrant, as explained below.

Fraud and misrepresentation

An order or determination will not be conclusive if it has been obtained by fraud or misrepresentation. Denning LJ once said:[56]

> No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.

In administrative law, which was not the context of this statement, there is only scanty material to illustrate it, although in principle it ought to be correct. The only field in which there are examples is immigration law, where it is held that leave to enter given by an immigration officer is vitiated if it has been obtained by any kind of fraud, deception or misrepresentation on the part of the immigrant.[57] The House of Lords once went so far as to hold, in an exceptional decision, that an immigrant had a positive duty to disclose all material facts, even if he was not asked about them, and that if he failed to volunteer relevant information he was guilty of deception.[58] But in a later decision the House retracted this severe ruling.[59]

A decision of an inferior tribunal obtained by fraud, for example by perjured evidence, may be quashed by the High Court on certiorari.[60]

Misrepresentation by a public authority may bring into play the doctrine of estoppel[61] and it may amount to an abuse of power which the court will control.[62] It may also be a tort for which the court will award damages.[63]

[54] *R.* v. *Home Secretary ex p. Ram* [1979] 1 WLR 148.
[55] *R.* v. *Home Secretary ex p. Choudhary* [1978] 1 WLR 1177.
[56] *Lazarus Estates Ltd.* v. *Beasley* [1956] 1 QB 702 and 712. Cf. *R.* v. *Wolverhampton Crown Court ex p. Crofts* [1983] 1 WLR 204.
[57] *R.* v. *Home Secretary ex p. Hussain* [1978] 1 WLR 700; *Same ex p. Choudhary* (above); *Same ex p. Zamir* [1980] AC 930.
[58] *R.* v. *Home Secretary ex p. Zamir* (above). See below, p. 433. Contrast *R.* v. *Home Secretary ex p. Mangoo Khan* [1980] 1 WLR 569; *Same ex p. Jayakody* [1982] 1 WLR 405.
[59] *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74.
[60] *R.* v. *Gillyard* (1848) 12 QB 527; *R.* v. *Fulham (etc.) Rent Tribunal ex p. Gormly* [1951] 2 All ER 1030.
[61] Below, p. 236.
[62] Below, p. 372.
[63] As in *Bennett (Potatoes) Ltd.* v. *Secretary of State for Scotland* 1986 SLT 665 (government inspector without reasonable basis falsely certified potatoes as pest-free: damages awarded for fraudulent misrepresentation though without intent to deceive).

POWER OR DUTY—WORDS PERMISSIVE OR OBLIGATORY

When 'may' means 'must'

The hallmark of discretionary power is permissive language using words such as 'may' or 'it shall be lawful', as opposed to obligatory language such as 'shall'. But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case. Cotton LJ once said:[64]

> I think that great misconception is caused by saying that in some cases 'may' means 'must'. It never can mean 'must', so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a Judge has a power given him by the word 'may', it becomes his duty to exercise it.

This view of the matter was adopted in a case where the Act provided that the county court 'may' make an order for possession in proceedings by a landlord against a tenant: it was held that, on proof of the relevant facts, the court was bound to make the order.[65] There have been many similar decisions concerning the powers of courts of law, since they have a general duty to enforce legal rights.[66] Public authorities have a duty, likewise, to exercise their powers as the public interest requires. Coleridge J said in a case concerning the Tithe Commissioners:

> The words undoubtedly are only empowering; but it has been so often decided as to become an axiom that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice.[67]

The application of this doctrine to action of an administrative character is shown by two contrasting decisions of the House of Lords. In *Julius* v. *Lord Bishop of Oxford*[68] the statute said that 'it shall be lawful' for a bishop to issue a commission of inquiry in case of alleged misconduct by a clergyman, either on the application of a complainant or of his own motion; and the question was whether,

[64] *Re Baker* (1890) 44 Ch. D 262 at 270, following *Julius* v. *Lord Bishop of Oxford* (below).

[65] *Sheffield Cpn.* v. *Luxford* [1929] 2 KB 180.

[66] See cases catalogued under 'May' in Stroud's *Judicial Dictionary*. Examples are *Shelley* v. *London County Council* [1949] AC 56; *Peterborough Corporation* v. *Holdich* [1956] 1 QB 124; *Re Shuter* [1960] 1 QB 124.

[67] *R.* v. *Tithe Commissioners* (1849) 14 QB 459 at 474.

[68] (1880) LR 5 App. Cas. 214, reviewing cases going back to *Blackwell's Case* (1683) 1 Vern. 152, in which permissive words were held mandatory. See also *Lawrence Building Co.* v. *Lanarkshire CC* 1977 SLT 110.

complaint having been made by a parishioner, the bishop was entitled to refuse to act. The House of Lords held that the permissive wording gave the bishop discretion, and that he had no mandatory duty except, perhaps, to hear and consider the application—as he had done. For it was evident from the form and policy of the Act that the power was given to the bishop in order that he might exercise his judgment and disallow applications which were unsubstantial or unmeritorious. Otherwise clergymen might be harried with innumerable vexatious inquiries. In the contrasting case, *Padfield* v. *Minister of Agriculture, Fisheries and Food*,[69] the question was also whether action need be taken on a complaint. The Agricultural Marketing Act 1958 provided for the reference of certain complaints to a committee of investigation 'if the Minister in any case so directs'. The Minister refused to act on a complaint by a group of milk producers against the Milk Marketing Board. But his reasons were held to be inconsistent with the policy of the Act, which was that relevant and substantial complaints should go to the committee in the absence of good reasons to the contrary. The permissive words gave the Minister discretion, but he was not entitled to use his discretion in such a way as to thwart the policy of the Act. Primarily, therefore, this is a leading example of the abuse of discretion, and it is in that context that it is considered later.[70]

Statutory construction

Whether a power, expressed in merely permissive language, is accompanied by a duty to exercise it in certain circumstances requires consideration of the whole statutory context in which the power is given. A power to levy rates, for example, is often given in the form that the local authority 'may' levy them for particular purposes or in particular cases, yet the court will readily conclude that where the prescribed conditions exist, there is a duty to impose the rate.[71] Where a licensing authority 'may' grant a licence to an applicant with certain qualifications, the policy of the Act may be that licences are not to be withheld from qualified applicants unless there is some valid objection. Thus where the Home Secretary was given power to license cabs on such conditions as he might by order prescribe, the Court of Appeal doubted whether he was intended to have absolute discretion to put many thousands of cab-drivers out of business even where they fulfilled the conditions.[72] In fact the Home Secretary had validly delegated his power to the

[69] [1968] AC 997. See similarly *Car Owners' Mutual Insurance Co. Ltd.* v. *Treasurer of the Commonwealth of Australia* [1970] AC 527, where the Privy Council held that the Treasurer was obliged to certify that the company had satisfied the requirements for recovery of its deposited funds, despite the statutory condition 'if the Treasurer so certifies'.

[70] Below, p. 357.

[71] *R.* v. *Barlow* (1693) 2 Salk. 609; *R.* v. *Barclay* (1882) 8 QBD 486.

[72] *R.* v. *Metropolitan Police Commissioner ex p. Holloway* [1911] 2 KB 1131. See also *R.* v. *Tynemouth Rural District Council* [1896] 2 QB 451 (building plans disapproved for improper reasons: approval ordered). Contrast *Patmor Ltd.* v. *City of Edinburgh District Licensing Board* 1987 SLT 492.

commissioner of police subject to two specific reservations, and it was held that the commissioner was not therefore empowered to refuse licences on other grounds. So likewise, where the Act says that a licence 'may be issued' and 'may be revoked' without saying in what circumstances, there may be a duty to issue it and a duty not to revoke it except for a good legal reason: an arbitrary revocation of a television licence by the Home Secretary was accordingly declared unlawful by the Court of Appeal.[73]

Where the Home Secretary 'may by regulations provide' as to immigration appeal procedures, he is held to have a duty to make the regulations, as Parliament must have so intended.[74]

Where a local authority 'may grant permission' for land to be used as a caravan site, this must in some circumstances mean 'shall grant permission', where the context so implies.[75] And where a regulatory power is given for the purpose of policing the fulfilment of prescribed conditions, it is natural to infer a mandatory duty in other cases.[76] These exercises in statutory interpretation are only another facet of the principle that discretion must be exercised on proper legal grounds and in accord with the policy of the Act.[77] In this way the court may counteract the tendency of legislation to enlarge executive discretion by loosely using the language of power instead of that of duty, in the manner to which government draftsmen are addicted.

The interpretation of permissive language as mandatory in certain circumstances may be assisted by qualifying words in the context, such as 'unless sufficient cause is shown to the contrary'[78] or 'if satisfied that there is proper ground for doing so'.[79] It may also be assisted by the hardship that might otherwise be caused by indefinite delay and uncertainty. It was for this reason that a public authority's power to proceed with a compulsory purchase of land, once the compulsory purchase order was authorised, could be enforced as a duty by the person from whom the land was to be taken, and who might otherwise have been left with unmarketable land on his hands for an indefinite period.[80]

[73] *Congreve* v. *Home Office* [1976] QB 629; for this case see below, p. 362.

[74] *Singh* v. *Home Secretary* [1992] 1 WLR 1052 (HL).

[75] *Hartnell* v. *Minister of Housing and Local Government* [1965] AC 1134 at 1158 (Lord Reid). See similarly *A.-G.* v. *Antigua Times Ltd.* [1976] AC 16.

[76] As in *R.* v. *Newcastle on Tyne Corporation ex p. Veitch* (1889) 60 LT 963 (no discretion to withhold approval of plans conforming to building byelaws).

[77] Below, p. 388. For the *Tower Hamlets* case see below, p. 800.

[78] As in *Re Shuter* [1960] 1 QB 142.

[79] As in *Annison* v. *District Auditor for St Pancras* [1962] 1 QB 489 at 497.

[80] *Birch* v. *St Marylebone Vestry* (1869) 20 LT 697. The Compulsory Purchase Act 1965, s. 4, limits the powers of the acquiring authority to a period of three years from the operative date of the compulsory purchase order.

ESTOPPEL

Estoppel and public authorities

The basic principle of estoppel is that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. Justice here prevails over truth. Estoppel is often described as a rule of evidence, but more correctly it is a principle of law.[81] As a principle of common law it applies only to representations about past or present facts. But there is also an equitable principle of 'promissory estoppel' which can apply to public authorities.[82] In a class by itself is estoppel by judgment, res judicata, which is treated separately.[83] This last is also known as issue estoppel, since it is a rule against the relitigation of the same issue between the same parties.

Legal rules about estoppel and waiver are applicable to public authorities as well as to other persons. A city corporation may be estopped from denying that payments made to it in satisfaction of a liability for rates are 'rates actually levied',[84] and a county council may, by giving an employee a certain status for superannuation, estop itself from denying that status later.[85] Similarly a public authority which lets land on lease is bound by the usual rule that acceptance of rent with knowledge of a breach of covenant by the tenant amounts to waiver of the lessor's right of forfeiture for the breach.[86] A local authority which agrees that a landowner may have access to a road from a particular plot may not, after the owner has fenced the plot and agreed to sell it, revoke the permission given.[87] If they negotiate the purchase of land for road widening and encourage the owner to incur

[81] *Canada & Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steamships Ltd.* [1947] AC 46 at 56.

[82] *Robertson* v. *Minister of Pensions* [1949] 1 KB 227 (but see below, p. 337); *Roberts & Co. Ltd.* v. *Leicestershire CC* [1961] Ch. 555 (council estopped from denying terms of contract); the *Crabb* and *Salvation Army* cases (below). When affecting land, as in those cases, it may be called 'proprietary estoppel'.

[83] Below, p. 243.

[84] *North Western Gas Board* v. *Manchester Corporation* [1964] 1 WLR 64. Cf. *Gould* v. *Bacup Local Board* (1881) 50 LJMC 44 (election to follow one of the alternative statutory procedures held binding); *Roberts & Co. Ltd.* v. *Leicestershire CC* [1961] Ch. 555 (council estopped from denying terms of contract).

[85] *Algar* v. *Middlesex County Council* [1945] 2 All ER 243. But cases of this kind may be better explained by the rule that such determinations are inherently irrevocable: see above, p. 229.

[86] *Davenport* v. *R.* (1887) 3 App. Cas. 115; *R.* v. *Paulson* [1921] 1 AC 271. See also *Plimmer* v. *Wellington Cpn.* (1884) 9 App. Cas. 699; *Orient Steam Navigation Co.* v. *The Crown* (1925) 21 Ll. LR 301 (below, p. 831); *Canadian Pacific Railway Co.* v. *R.* [1931] AC 414.

[87] *Crabb* v. *Arun DC* [1976] Ch. 179.

expenditure on an alternative site, they may not then discontinue the purchase.[88] As several of these cases show, the principle of estoppel applies equally to the Crown.[89]

But, just as with contracts, the ordinary rules must give way where their application becomes incompatible with the free and proper exercise of an authority's powers or the due performance of its duties in the public interest. Where the normal principles of justice are forced to give way, hard cases naturally result. It is possible for a citizen to be seriously misled by a public authority in a manner which ought, under the normal rules, to give rise to an estoppel which would compel the authority to stand by its representations; but nevertheless there may be no legal remedy. These cases, where the rules of public and private law are irreconcilable, will be found in a later section on discretionary power.[90] Some of them concern the Crown.

An essential element in estoppel is that the aggrieved party should have been induced to act to his detriment. In one case, where a planning application had been refused by a planning authority, but by mistake their planning officer notified the applicant that it had been granted, no estoppel was possible because the mistake was discovered and corrected before the applicant had acted to his detriment in any way.[91]

Estoppel and ultra vires

In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority powers which it does not in law possess. In other words, no estoppel can legitimate action which is ultra vires. Thus where an electricity authority, by misreading a meter, undercharged its customer for two years, it was held that the accounts it delivered did not estop it from demanding payment in full,[92] for the authority had a statutory duty to collect the full amount, and had no power to release the customer, expressly or otherwise. Where a local planning authority served an invalid discontinuance notice, the landowner's acquiescence could not estop him from later denying its validity.[93] Nor could a parish council, which had no power to undertake to allow a neighbouring district to make use of its sewers, be estopped by its long acquiescence from terminating such an arrangement.[94] Where a minister took possession of

[88] *Salvation Army Trustee Co.* v. *West Yorkshire CC* (1980) 41 P & CR 179, explained in *A.-G. of Hong Kong* v. *Humphreys Estate (Queen's Gardens) Ltd.* [1987] AC 114.

[89] See n. 85.

[90] Below, p. 336.

[91] *Norfolk CC* v. *Secretary of State for the Environment* [1973] 1 WLR 1400.

[92] *Maritime Electric Company* v. *General Dairies Ltd.* [1937] AC 610. See likewise *R.* v. *Blenkinsop* [1892] 1 QB 43 (rate demand too low: no estoppel); *Norfolk County Council* v. *Secretary of State for the Environment* (above).

[93] *Swallow and Pearson* v. *Middlesex County Council* [1953] 1 WLR 422.

[94] *Islington Vestry* v. *Hornsey Urban Council* [1900] 1 Ch. 695.

land under statutory powers of occupation which did not extend to the grant of leases, he was not estopped from denying that he had granted a lease, even though he had expressly purported to 'let' the land to a 'tenant'.[95] The result was the same where the supposed landlord was a local authority which had failed to obtain the requisite consent from the minister, so that the lease was void. Accordingly the local authority were at liberty to deny the validity of their own 'lease', contrary to the rules which govern private lettings.[96] No arrangement between the parties could prevent either of them from asserting the fact that the lease was ultra vires and void. Nor can any kind of estoppel give a tribunal wider jurisdiction than it possesses.[97]

Another limitation is that the principle of estoppel does not operate at the level of government policy. A government department which encourages an airline to invest in aircraft on the understanding that its licence will be continued is not estopped, if there is a change of government and a reversal of policy, from withdrawing the licence.[98] Many people may be victims of political vicissitudes, and 'estoppel cannot be allowed to hinder the formation of government policy'.

Estoppels have, however, been allowed to operate against public authorities in minor matters of formality, where no question of ultra vires arises. In one case Lord Denning MR said:[99]

> Now I know that a public authority cannot be estopped from doing its public duty, but I do think it can be estopped from relying on technicalities . . .

He then held that the court could ignore the fact that the proper statutory application had not been made before a planning authority's determination, since the authority itself had led the landowner to suppose that it was not required; and the authority was therefore estopped from taking the objection. The same doctrine was applied in a case where a mother was out of time in lodging a statutory notice of objection to a local authority's order assuming parental rights over her child; the authority was estopped from insisting on the time limit because its officers had misled the mother into supposing that a previous notice of objection was still effective.[1]

[95] *Minister of Agriculture and Fisheries* v. *Matthews* [1950] 1 KB 148, citing an unreported decision of the Court of Appeal; *R.* v. *Rushbrooke* [1958] NZLR 877.

[96] *Rhyl UDC* v. *Rhyl Amusements Ltd.* [1959] 1 WLR 465.

[97] *Secretary of State for Employment* v. *Globe Elastic Thread Co. Ltd.* [1980] AC 506.

[98] *Laker Airways Ltd.* v. *Department of Trade* [1977] QB 643. The quotation is from Lawton LJ.

[99] *Wells* v. *Minister of Housing and Local Government* [1967] 1 WLR 1000 at 1007, approved in *Western Fish Products Ltd.* v. *Penwith DC* (1978) 38 P & CR 7 (see below, p. 338). *Wells* v. *Minister of Housing and Local Government* was, however, distinguished (but not overruled) in *R. (Reprotech (Pebsham) Ltd)* v. *East Sussex County Council* [2003] 1 WLR 348 (HL) discussed in full above, pp. 339–40.

[1] *Re L (AC) (an infant)* [1971] 3 All ER 743; *R.* v. *Immigration Appeal Tribunal ex p. Patel* [1988] AC 910, where a plea of estoppel was accepted, was plainly a case of abuse of power (below, p. 374).

Estoppel will need further discussion in the context of misleading official advice, where its place is being taken by the doctrine of legitimate expectations.[2]

WAIVER AND CONSENT

Primary rules

Waiver and consent are in their effects closely akin to estoppel, and not always clearly distinguishable from it. But no rigid distinction need be made, since for present purposes the law is similar. The primary rule is that no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses. Once again, the principle of ultra vires must prevail when it comes into conflict with the ordinary rules of law. A contrasting rule is that a public authority which has made some order or regulation is not normally at liberty to waive the observance of it by exercising a dispensing power. The principle here is that law which exists for the general public benefit may not be waived with the same freedom as the rights of a private person. In other cases, where neither of these rules is infringed, waiver and consent may operate in a normal way so as to modify rights and duties.

It has often been laid down that no amount of waiver or consent can extend a public authority's powers or validate action which is ultra vires. In one case a tenant had applied to a rent tribunal and obtained an order substantially reducing his rent, but later discovered that the house had been let at a date which put it outside the tribunal's jurisdiction. He then applied to the county court, which in that case would have had jurisdiction. The High Court granted mandamus to compel the county court to decide the case, despite the fact that both parties had previously acquiesced in the rent tribunal's order.[3] The issue was one of jurisdictional fact and the court before which it was raised was obliged to determine it. For the same reasons an agreement with the landlord that the tenancy is furnished, when in fact it is not, cannot estop the tenant from later claiming an unfurnished tenancy.[4] In a planning case concerning a caravan site, the Court of Appeal held that the site-owner could apply for a declaration that the planning authority's enforcement notice was bad in law, even though he had pleaded guilty to contravention of the notice in previous criminal proceedings.[5] If the notice was in

[2] Below, p. 374.

[3] *R.* v. *Judge Pugh ex p. Graham* [1951] 2 KB 623. See similarly *Farquharson* v. *Morgan* [1894] 1 QB 552; *Wilkinson* v. *Barking Corporation* [1948] 1 KB 721.

[4] *Welch* v. *Nagy* [1950] 1 KB 455; likewise *Chapman* v. *Earl* [1968] 1 WLR 1315 (invalid application by tenant to rent officer: landlord's participation in proceedings not waiver).

[5] *Munnich* v. *Godstone Rural District Council* [1966] 1 WLR 427.

reality bad, no previous acquiescence could preclude him from contesting it. Exactly the same point determined an earlier enforcement notice case in which the landowners on whom the notice had been served applied for planning permission on the footing that the notice was valid. They were held entitled, nevertheless, to dispute its validity subsequently.[6] Parker J said: 'I do not think that any amount of so-called waiver or approbation can make a document like this, which is patently and wholly invalid, into a valid document.' The House of Lords confirmed this principle in a case where a party had acquiesced in proceedings before the Lands Tribunal which were later held to be outside that tribunal's jurisdiction. Lord Reid said: '. . . in my judgment, it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.'[7]

It follows that resort to a statutory remedy cannot be a waiver of the right to seek judicial review later.[8]

Procedure and jurisdiction

The primary rule is subject to various qualifications. One of these concerns conditions which are merely procedural, but which may nevertheless be mandatory and so affect jurisdiction. Thus where a county court, which for this purpose is analogous to a statutory tribunal, could entertain proceedings against persons residing outside its area only on condition that leave was obtained, it was held that such a person who appeared on the first day as defendant without raising objection could not challenge the court's jurisdiction on a later day.[9] Although the court held that the question 'would come under the head of procedure rather than under the head of jurisdiction', the condition was probably jurisdictional. In an earlier case[10] of a similar kind Erle J had said: 'But jurisdiction is sometimes contingent; in such a case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards.' This probably reveals the correct principle, that there are some conditions which are jurisdictional only if pleaded at the right time. This conforms, in particular, to the decisions on the rules of natural justice. If a person disqualified by interest or bias takes part in an adjudication, that goes to jurisdiction and renders the decision void. But if the party affected knows the facts and raises no objection at the outset, he is taken to

[6] *Swallow & Pearson* v. *Middlesex County Council* [1953] 1 WLR 422.

[7] *Essex Incorporated Congregational Church Union* v. *Essex County Council* [1963] AC 808. See also *London Cpn.* v. *Cox* (1867) LR 2 HL 239 at 283; *Bradford City MC* v. *Secretary of State for the Environment* (1986) 53 P & CR 55.

[8] See below, p. 705.

[9] *Moore* v. *Gamgee* (1890) 25 QBD 244.

[10] *Jones* v. *James* (1850) 19 LJQB 257.

have waived it and cannot raise it later. As explained elsewhere,[11] there is nothing illogical in this. The correct rule, it must be assumed, is that jurisdiction is lost if the objection is raised at the proper time, but not otherwise. Erle J's remark explains why it is fallacious to suppose that a condition cannot be jurisdictional merely because it can be waived. In the House of Lords, in the case already cited, Lord Hodson said: 'Had the question been procedural only no difficulty would have arisen, for the parties had consented to the course taken before the Lands Tribunal.'[12] But he then held that the statutory condition was absolute so that the parties had no power to confer jurisdiction where none existed.

Non-jurisdictional waiver

Where problems of jurisdiction do not arise, a person entitled to the benefit of some statutory rule or condition may be able to waive the benefit of it. Thus one party to an action in the county court may waive the statutory time limit on his opponent's right of appeal.[13] But this doctrine does not apply to planning permission, which under the planning legislation enures for the benefit of the land and its successive owners, so that termination of the permitted operations by one owner does not amount to waiver or abandonment of the permission.[14]

Personal benefit and public policy

It may be difficult to decide whether a statutory condition exists solely for a person's benefit so that he may waive it on the principle *quilibet potest renuntiare juri pro se introducto*. It may, on the contrary, embody some public policy which an individual has no power to modify. On this latter ground the Court of Appeal of New Zealand held that the Commissioner of Inland Revenue had no power to waive the thirty-day time limit on appeals from the Taxation Board of Review to the High Court, even though he was willing to do so in a case where the taxpayer's solicitor had been ill.[15] As Turner J put it, 'the due and impartial administration of a revenue statute' is 'a matter in which every citizen has an interest'. In this decision a sound principle may have been carried too far, since it must surely be even more in the public interest that accidents should not prevent tax liability from being

[11] Below, p. 464.

[12] *Essex Incorporated Congregational Church Union* v. *Essex County Council* [1963] AC 808 at 828. See likewise *Thomas* v. *University of Bradford* (No. 2) [1992] 1 All ER 964 (waiver of irregular procedure by acquiescence).

[13] *Park Gate Iron Co. Ltd.* v. *Coates* (1870) LR 5 CP 634.

[14] *Pioneer Aggregates (UK) Ltd.* v. *Secretary of State for the Environment* [1985] AC 132.

[15] *Reckitt & Colman (New Zealand) Ltd.* v. *Taxation Board of Review* [1966] NZLR 1032, following earlier New Zealand and Canadian cases.

correctly adjudicated. In contrast, the Court of Appeal in England in two controversial decisions has shown itself favourable to the contention that a planning authority may waive the prescribed formalities for applications in planning matters.[16] But these decisions were strongly motivated by the court's desire to contrive some binding legal basis for the informal advice often given to enquirers by planning authorities and their officers; but to this, as will be shown, there are serious legal objections.[17] The dissenting view of Russell LJ that a planning authority, as 'the guardian of the planning system', is 'not a free agent to waive statutory requirements', and that the law should not be made to conform to 'a thoroughly bad administrative practice',[18] is correct in principle.[19]

No power to dispense

Where something more than mere procedure or formality is in question, a public authority cannot exercise a dispensing power by waiving compliance with the law. For this would amount to an unauthorised power of legislation. There is therefore no power for a local authority to waive compliance with its binding byelaws;[20] nor is any such power possessed by the minister with whose consent the byelaws are made.[21] Still less is there any power to grant dispensations from the ordinary law, e.g. as to obstruction of the highway.[22]

Abandonment

A public authority which fails to proceed with a compulsory purchase order may be held to have abandoned it and so to have lost the power to enforce it.[23]

[16] *Wells* v. *Minister of Housing and Local Government* [1967] 1 WLR 1000; *Lever Finance Ltd.* v. *Westminster London Borough Council* [1971] 1 QB 222. But both these cases were distinguished (but not overruled) in *R. (Reprotech (Pebsham) Ltd)* v. *East Sussex County Council* [2003] 1 WLR 348 (HL) discussed in full below, pp. 339–40.

[17] Below, p. 336.

[18] In the *Wells* case (above) at 1015.

[19] And in the ascendency following the *Reprotech* case (above), discussed below at pp. 339–40.

[20] *Yabbicom* v. *King* [1899] 1 QB 444; *Bean (William) & Sons* v. *Flaxton Rural District Council* [1929] 1 KB 450; below, p. 874.

[21] *Bean (William) & Sons* v. *Flaxton Rural District Council* (above).

[22] *Redbridge London Borough Council* v. *Jacques* [1970] 1 WLR 1604; *Cambridgeshire County Council* v. *Rust* [1972] 2 QB 426.

[23] *Tiverton and North Devon Railway Co.* v. *Loosemore* (1884) 9 App. Cas. 480; *Grice* v. *Dudley Corporation* [1958] Ch. 329; *Simpsons Motor Sales Ltd.* v. *Hendon Cpn.* [1964] AC 1088.

RES JUDICATA

Principles and distinctions

One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an essential element in the decision. These two aspects are sometimes distinguished as 'cause of action estoppel' and 'issue estoppel'. It is the latter which presents most difficulty, since an issue 'directly upon the point' has to be distinguished from one which 'came collaterally in question' or was 'incidentally cognisable'.[24] In any case, 'there must a lis or issue and there must be a decision'.[25]

Like other forms of estoppel already discussed, res judicata plays a restricted role in administrative law, since it must yield to two fundamental principles of public law: that jurisdiction cannot be exceeded; and that statutory powers and duties cannot be fettered.[26] Within those limits, however, it can extend to a wide variety of statutory tribunals and authorities which have power to give binding decisions, such as employment tribunals[27] and commons commissioners.[28] It can extend likewise to the decisions of inspectors in planning appeals, so as to prevent an inspector from ruling that houses were used as hostels when another inspector three years earlier had ruled that they were used as hotels and no change of use had occurred meanwhile.[29]

Res judicata is sometimes confused with the principle of finality of statutory decisions and acts, and thus with the general theory of judicial control. If a public authority has statutory power to determine some question, for example the compensation payable to an employee for loss of office,[30] its decision once made is

[24] These phrases were used in *The Duchess of Kingston's Case* (1776) 20 St. Tr. 355, 538 n., in which the rules were laid down. See Spencer Bower and Turner, *Res Judicata.*

[25] *Vernon* v. *Inland Revenue Commissioners* [1956] 1 WLR 1169 at 1178, holding that the Attorney-General was not estopped from disputing the purposes of a charity by having been party to an order of the court which did not put that question in issue.

[26] Above, p. 354.

[27] *McLoughlin* v. *Gordons (Stockport) Ltd.* [1978] ICR 561; *Munir* v. *Jang Publications Ltd.* [1989] ICR 1; *O'Laoire* v. *Jackel International Ltd.* (No. 2) [1991] ICR 718.

[28] *Crown Estate Commissioners* v. *Dorset CC* [1990] Ch. 297.

[29] *Thrasyvoulou* v. *Secretary of State for the Environment* [1990] 2 AC 273. See similarly *Hammond* v. *Secretary of State for the Environment,* (1997) 74 P & CR 134. But a certificate of appropriate alternative development creates no estoppel by res judicata or otherwise: *Porter* v. *Secretary of State for Transport* [1996] 3 All ER 693.

[30] As in *Livingstone* v. *Westminster Corporation* [1904] 2 KB 109.

normally final and irrevocable. This is not because the authority and the employee are estopped from disputing it, but because, as explained elsewhere,[31] the authority has power to decide only once and thereafter is without jurisdiction in the case. Conversely, where a statutory authority determines some matter within its jurisdiction, its determination is binding not because of any estoppel but because it is a valid exercise of statutory power. The numerous cases which hold that a decision within jurisdiction is unchallengeable[32] have therefore no necessary connection with res judicata. Res judicata does nothing to make the initial decision binding: it is only because the decision is for some other reason binding that it may operate as res judicata in later proceedings raising the same issue between the same parties.

How easily these questions may appear to overlap may be seen in a case where a schoolteacher, who had enlisted for war service, claimed additional pay from the local authority which had undertaken to make up his service pay to the level of his teacher's pay. The dispute was referred to the National Arbitration Tribunal, which ruled against him, and he then brought proceedings in the High Court. The questions were whether there was a 'trade dispute' within the Tribunal's statutory jurisdiction, and whether it had jurisdiction over private (as opposed to national) service agreements. These being answered in the affirmative, the Tribunal's award was held conclusive[33]—from which it followed, the judge said, that it was res judicata.[34] But in fact the case seems to belong to the common class where a specific matter is allotted by statute to a specific tribunal so that the tribunal's award, within its jurisdiction, is conclusive.[35] Where the question in issue is one of jurisdiction, no estoppel can prevent the court from determining it.[36] Once it is determined in favour of the tribunal, no estoppel is needed to bind the parties conclusively. If in the case of the teacher there had been an 'issue estoppel'—if, for example, the tribunal had determined that he belonged to a particular category, and he disputed this in later proceedings against the local authority—a true res judicata might have been pleaded. So where an industrial tribunal found that an employee had been fairly dismissed, he was not allowed to litigate substantially the same issue in a High Court action for breach of contract.[37]

[31] Above, p. 229.
[32] See above, p. 35.
[33] *Re Birkenhead Cpn.* [1952] Ch. 359.
[34] At 379.
[35] e.g. *IRC* v. *Pearlberg* [1953] 1 WLR 331; *Healey* v. *Minister of Health* [1955] 1 QB 221; *R.* v. *Paddington etc. Rent Tribunal ex p. Perry* [1956] 1 QB 229; *Davies* v. *Price* [1958] 1 WLR 434.
[36] See above, p. 237.
[37] *Green* v. *Hampshire CC* [1979] ICR 861.

Administrative cases

Res judicata in an administrative context is illustrated by a decision of the House of Lords about the making up of Sludge Lane, Wakefield. Adjoining landowners disputed their liability to contribute to the costs incurred by the Corporation on the ground that Sludge Lane was a public rather than a private road, and so chargeable to the ratepayers generally rather than to the frontagers. A local Act empowered two justices to determine the objection, and they determined it in favour of the frontagers. Three years later the Corporation undertook further works and again attempted to charge the frontagers, who were mostly the same persons as before. The justices refused to reconsider the matter, holding it to be res judicata; and after being reversed in the King's Bench Division and upheld in the Court of Appeal, their decision was upheld in the House of Lords.[38] The House of Lords was prepared to treat the original decision as a judgment in rem,[39] binding on everyone. Lord Davey said that, alternatively, it would bind all who were given notice and an opportunity to object. Such an estoppel would, on ordinary principles, bind their successors in title also.[40]

The House of Lords distinguished *R* v. *Hutchings*,[41] a superficially similar case where the justices had held that the disputed road was a public highway and had dismissed the local board's application for the enforcement of its levy on the frontager. Five years later the same board made another levy on the same frontager which a magistrate upheld. The Court of Appeal held that this was correct and that there was no res judicata. The reason was that the Public Health Act 1875, unlike the local Act in Wakefield, gave the justices no power to determine finally whether the street was public or private. Their only power was to decide whether the levy was properly assessed or not. If its validity was disputed on the ground that it was ultra vires, the magistrate had indeed to determine that issue before proceeding further; but it was only a matter 'incidentally cognisable'. It was thus a point of 'jurisdictional fact' upon which jurisdiction depended, and upon which no estoppel could operate so as to make a wrong decision unchallengeable.[42] It illustrates the 'constitutional principle that a tribunal of limited jurisdiction cannot be permitted conclusively to determine the limits of its own jurisdiction'.[43]

The reasoning of the last-mentioned case has played an important part in a

[38] *Wakefield Cpn.* v. *Cooke* [1904] AC 31. See similarly *Armstrong* v. *Whitfield* (1973) 71 LGR 282 (determination as to public right of way conclusive in later proceedings).

[39] For this see also *A.-G.* v. *Honeywill* (1972) 71 LGR 81; *Armstrong* v. *Whitfield* (above); *Emms* v. *R.* [1979] 2 SCR 1148 (judgment invalidating regulation held binding upon all affected by it).

[40] See Halsbury's *Laws of England*, 4th edn., xvi. 1041.

[41] (1881) 6 QBD 300.

[42] For this see below, p. 252.

[43] *Crown Estate Commissioners* v. *Dorset CC* [1990] Ch. 297 at 312 (Millett J), so explaining *R.* v. *Hutchings*.

series of later decisions about assessments for rates and taxes. In these it has been repeatedly held that matters decided for the purposes of one year's assessment or of one rating list do not amount to res judicata for the purposes of later assessments or lists. A medical society successfully established before the Lands Tribunal in 1951 that it was entitled to exemption from rates under the Scientific Societies Act 1843. In 1956 a new valuation list had to be made and the valuation officer again attempted to assess the society, and on his appeal to the Lands Tribunal the society pleaded res judicata. Although it was admitted that there had been no relevant change of circumstances, the House of Lords disallowed this plea and ruled that the question must again be decided on its merits.[44] It was held that decisions relating to a different list were irrelevant, since the local valuation court had jurisdiction to determine cases for the purpose of one list only at any one time. The same point has been settled, after some difference of opinion, in a line of income tax cases. Thus where a trust in Ceylon had been held to be a charity, and so exempt from income tax, by the statutory board of review, this was held to be conclusive only in the relevant year of assessment, and to be open to challenge by the Commissioner of Income Tax in any subsequent year.[45] The Privy Council emphasised that the important consideration was the limited nature of the question that was within the tribunal's jurisdiction: each year's assessment was a different operation and there was no 'eadem quaestio' of the kind required for res judicata.

The search for a principle

The above-mentioned decisions on rates and taxes have carried the doctrine of *R* v. *Hutchings*,[46] which they profess to follow, far beyond its apparent boundaries. That case merely illustrates the familiar principle that where jurisdictional questions are raised before a tribunal of limited jurisdiction, the tribunal must necessarily determine them for its own purposes but its determination may always be reviewed in the High Court.[47] It follows that the tribunal's determination cannot be conclusive, whether as res judicata or otherwise. But it is plain that the question whether a taxpayer or ratepayer is entitled to exemption, if raised before a revenue tribunal, is not 'collateral' or 'jurisdictional' in any such sense: it falls squarely within the range of questions which it is the tribunal's business to decide conclusively. The tax and rate cases observe no such distinction, and it is generally

[44] *Society of Medical Officers of Health* v. *Hope* [1960] AC 551.

[45] *Caffoor* v. *Commissioner of Income Tax* [1961] AC 584, following *Broken Hill Proprietary Company Ltd.* v. *Broken Hill Municipal Council* [1926] AC 94 and *Inland Revenue Commissioners* v. *Sneath* [1932] 2 KB 362; not following *Hoystead* v. *Commissioner of Taxation* [1926] AC 155.

[46] Above.

[47] Below, p. 254.

accepted that they are anomalous.[48] It should likewise be admitted that no help is to be derived from trying to distinguish judicial from administrative functions[49] (that favourite fallacy[50]): all that res judicata requires is some power to adjudicate. Nor does there appear to be merit in the argument that there is no *lis* because the taxing or rating officer is a neutral party rather than an opponent.[51] Law based on such sophistries must lack a firm foundation.

Yet a firm foundation exists, and can be traced through a series of judicial opinions. The principle is simply that an assessing officer has a statutory public duty to make a correct assessment on the taxpayer or ratepayer on each occasion, and that no estoppel can avail to prevent him doing so. Just as an electricity company cannot be estopped from charging the full price of electricity, if it has a statutory duty,[52] so an assessing officer 'cannot be estopped from carrying out his duties under the statute'.[53] A county court, similarly, must determine a statutory standard rent on the correct facts, and no estoppel or res judicata from earlier proceedings can discharge the court from this duty.[54] This doctrine fits easily into the framework of public law. It carries altogether more conviction that the formalistic distinctions discussed above, which fail to take account of the special character of public power and duty. Its force is all the more obvious if it is remembered that res judicata, like other forms of estoppel, is essentially a rule requiring a party to accept some determination of fact or law which is wrong.[55] For if the determination is right, no substantive question arises. There are self-evident objections to requiring public authorities to act on wrong assumptions. Public powers and duties, as has been seen elsewhere,[56] cannot be fettered in such ways. There is no inconsistency in giving conclusive force to a tax tribunal's decision on an assessment for the year in question, since that is given the force of law by statute, not by mere estoppel.

The same principle ought to apply in all situations where powers have to be exercised in the public interest. Suppose that certain disciplinary charges are made

[48] *Caffoor* (as above) at 599; *Crown Estate Commissioners* v. *Dorset CC* [1990] Ch. 297 at 311.

[49] *Caffoor* (as above); and see [1965] *PL* 237 at 241 (G. Ganz).

[50] See below, p. 490.

[51] The House of Lords lent countenance to this in *Society of Medical Officers of Health* v. *Hope* [1960] AC 551. Cf. *Inland Revenue Commissioners* v. *Sneath* [1932] 2 KB 362.

[52] See *Maritime Electric Company* v. *General Dairies Ltd.* [1937] AC 610; above, p. 237.

[53] *Society of Medical Officers of Health* v. *Hope* [1960] AC 551 at 568 (Lord Keith), citing the *Maritime Electric Company* case (above) and the opinion of Lord Parker of Waddington in *Inland Revenue Commissioners* v. *Brooke* [1915] AC 478 at 491. See also *Bradshaw* v. *M'Mullen* [1920] 2 IR (HL) 412 at 425; *Inland Revenue Commissioners* v. *Sneath* [1932] 2 KB 362 at 382 (Lord Hanworth MR). For a similar principle of public policy in matrimonial law see *Hudson* v. *Hudson* [1948] P 292.

[54] *Griffiths* v. *Davies* [1943] KB 618; *R.* v. *Pugh* [1951] 2 KB 623; above, p. 239.

[55] This was the reason for the old saying 'estoppels are odious': e.g. *Baxendale* v. *Bennett* (1878) 3 QBD 525 at 529. An instance is *Priestman* v. *Thomas* (1884) LR 9 PD 210, where the estoppel obliged the parties to accept a forged will.

[56] Above, p. 236.

against a schoolteacher whose removal can be required by the education authority only on educational grounds, that no educational grounds are shown before the authority's disciplinary committee, and that the complaint is dismissed. What is the position if it is later discovered that there were in fact good educational grounds on which the teacher ought to have been removed? The answer should be that the education authority always has the power to require removal when such grounds in fact exist; that this is a power which it must exercise in the public interest; that its powers cannot be fettered by any estoppel, by res judicata or otherwise; and that it is therefore free to act on the fresh evidence. The additional dimension of the public interest is what makes the difference.

Where, on the other hand, an immigrant's right to an entry certificate was established in his favour by an adjudicator, but the Home Office later discovered evidence suggesting that he might be an illegal entrant, the court refused to admit that evidence in later proceedings and held that the adjudicator's decision came very close to rendering the immigrant's status res judicata.[57] Thus they treated his status as a matter more of private right than of public interest. The doctrine of res judicata is not entirely rigid and exceptions are sometimes made when the court is unwilling to compel a party to remain bound by a wrong decision.[58]

Jurisdictional and other limits

No question of res judicata can derogate from the rules that a determination which is ultra vires may always be challenged in the High Court and that no tribunal can give itself jurisdiction which it does not possess. There can therefore be no such thing as jurisdiction by estoppel. But since so many kinds of error, including now mere error of law,[59] are held to go to jurisdiction, the scope of res judicata in administrative law will be restricted unless the courts decide not to press the jurisdictional logic to the limit.

A large class of administrative cases must also be ruled out because they involve public policy. In licensing cases of all kinds it is usually inherent in the system of control that applications may be made at any time and may be renewed. Thus planning permission may be sought repeatedly over many years and each application must be considered on its merits.[60] As will be seen, the discretionary power of a public authority cannot normally be fettered, even by its own decisions.[61] Res judicata rests on the theory of an unchanging law, whereas policy must be free to change at any moment, as the public interest may require.

[57] *R.* v. *Home Secretary ex p. Momin Ali* [1984] 1 WLR 663, no doubt assisted by the fact that the fresh evidence was weak.
[58] See *Arnold* v. *National Westminster Bank Plc* [1991] 2 AC 93.
[59] See below, p. 264.
[60] As in *Westminster Bank Ltd.* v. *Beverley BC* [1971] AC 551.
[61] Below, p. 324.

Prerogative remedies

It is probable that the doctrine of res judicata is inherently inapplicable to proceedings for habeas corpus,[62] certiorari and the other prerogative remedies. Formerly there were grounds for holding that the court's rulings in such cases were not technically judgments capable of producing res judicata.[63] A more persuasive reason is that in these procedures the court 'is not finally determining the validity of the tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction or not'.[64] They are a special class of remedies designed to maintain due order in the legal system, nominally at the suit of the Crown,[65] and they may well fall outside the ambit of the ordinary doctrine of res judicata. But the court may refuse to entertain questions which were or could have been litigated in earlier proceedings, when this would be an abuse of legal process;[66] and in the case of habeas corpus there is a statutory bar against repeated applications made on the same grounds.[67]

This reasoning was approved by a Divisional Court and by the Court of Appeal in a case where a London borough, after securing the quashing of the Secretary of State's order to reduce their rate support grant, failed in a further claim that their success in the first proceedings precluded the Secretary of State from later making a similar reduction order. Both courts were of the opinion that the doctrine of issue estoppel was not to be relied upon in proceedings for judicial review.[68]

Another consideration is that the requirement of identity of parties will seldom be satisfied where prerogative remedies are employed. In a wartime case a detainee obtained release on habeas corpus on grounds which the House of Lords in another case held to be insufficient. In an action against the Home Secretary for false imprisonment he claimed that the illegality of his detention was res judicata. The judge held that this plea failed, 'if only because the parties are different'.[69]

[62] *Re Hastings* (No. 2) [1959] 1 QB 358 at 371; *R.* v. *Pentonville Prison Governor ex p. Tarling* [1979] 1 WLR 1417 at 1422.

[63] See Lord Goddard CJ, 'A Note on Habeas Corpus' (1949) 65 *LQR* 30 at 35.

[64] *R.* v. *Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1 (Devlin J).

[65] See below, p. 591.

[66] See the *Tarling* case (above) and the *Momin Ali* case (below).

[67] Below, p. 594.

[68] *R.* v. *Secretary of State for the Environment ex p. Hackney LBC* [1983] 1 WLR 524, [1984] 1 WLR 592, approving the last 10 lines of the preceding paragraph, and confirmed in *R.* v. *Home Secretary ex p. Momin Ali* [1984] 1 WLR 663.

[69] *Budd* v. *Anderson* [1943] KB 642. The report does not say who were the parties to the habeas corpus proceedings. Cf. *R.* v. *Brixton Prison Governor ex p. Savarkar* [1910] 2 KB 1056 (different issue).

8

JURISDICTION OVER FACT AND LAW

ERROR OUTSIDE JURISDICTION

Objective boundaries of subjective powers

The inherent jurisdiction which the courts possess, as a matter of common law, over administrative authorities is frequently brought into play by errors of fact or law. The doctrine of ultra vires and the principle of objectivity are the primary forces at work. In the case, for example, of the Home Secretary's power to deport an alien, the principle of objectivity ordains that the question whether some person is truly an alien should, if disputed, be determined by the court. If the Act had said 'any person who in the opinion of the Home Secretary is an alien' the decision would be for the Home Secretary, though subject to judicial review on various grounds. Subjective expressions of that kind extend the area of discretion.

Wide discretionary powers are very commonly conferred upon ministers and other public bodies, and the courts' powers of review over them are explained in later chapters. Here we must investigate the objective boundaries of these powers and the way in which the courts police them.[1] All discretionary powers have objective limits of some kind, but the problem lies in identifying them. It is easy to see that the question whether an alien ought to be deported is for decision by the Home Secretary but that the question whether a person is really an alien must be determined by the court.[2] Other cases, unfortunately, are often less clear.

The same distinction is sometimes expressed in terms of the liberty to err. It is inherent in all discretionary power that it includes the power to decide freely, whether rightly or wrongly, without liability to correction, within the area of discretion allowed by the law. The principle was clearly expressed long ago by Holt CJ,[3] who spoke of

[1] We are not here concerned with appeals, which are always statutory.

[2] As explained in *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74 in terms of the power to deport an illegal entrant (below, p. 430).

[3] *Fuller* v. *Fotch* (1695) Carthew 346.

this diversity, (viz.) that if the commissioners had intermeddled with a thing which was not within their jurisdiction, then all is coram non judice,[4] and that may be given in evidence upon this action; but 'tis otherwise if they are only mistaken in their judgment in a matter within their conusance, for that is not inquirable, otherwise than upon an appeal.

Until fairly recently[5] this liberty to make mistakes within jurisdiction extended to significant mistakes both of law and of fact. Even though these have now been brought within the scope of judicial review, it still remains true that there is some area of discretion within which the administrator has a free hand.[6] When the Home Secretary has complied with all legal requirements for deporting an alien, it remains for him to decide whether to deport or not. As to this the law cannot control him, however mistaken his decision may be thought to be.[7]

The principle of objectivity authorises the courts to define that area of freedom. It is only one of the many weapons in their armoury, but it is of primary importance. Without it they would be powerless to prevent serious usurpations. A public authority might then, by making some mistake as to the extent of its powers, do something which the statute never intended to permit. The object of the courts is to prevent this at all costs by standing guard over the frontiers of free discretion. In other words, the minister or other body must not be allowed to be the judge of the extent of his own powers.

In this area 'jurisdiction' is a hard-worked word. Commonly it is used in its broadest sense, meaning simply 'power'. In some contexts it will bear the narrower sense of 'power to decide' or 'power to determine', but there will be no technical difference. In fact, except in the special case of error on the face of the record, the principle here at work is basically that of ultra vires, which is synonymous with 'outside jurisdiction' or 'in excess of power'.[8]

A difficulty in this chapter is to know how much attention should be paid to rules which are classical but obsolescent. These rules have been fundamental to judicial review since the seventeenth century, but in the last half-century their restrictions have been pared away to the point where little is left. From time to time, however, judges need to refer to them, and since they have for so long been at the heart of administrative law, and do much to explain problems of jurisdiction, it still seems right to give them a prominent place. An overall view of their present status will be found in the summary at the end of this chapter.

[4] i.e. null and void.
[5] The watershed was the *Anisminic* case (below).
[6] See, e.g., *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 at 207 (Lord Wilberforce).
[7] See, e.g., *R.* v. *Home Secretary ex p. Cheblak* [1991] 1 WLR 890.
[8] See above, p. 38.

Jurisdictional and non-jurisdictional fact

Certain mistakes of fact can carry an administrative authority or tribunal outside its jurisdiction.[9] A rent tribunal, for example, may have power to reduce the rent of a dwelling-house. If it mistakenly finds that the property is a dwelling-house when in fact it is let for business purposes,[10] and then purports to reduce the rent, its order will be ultra vires and void. For its jurisdiction depends upon facts which must exist objectively before the tribunal has power to act. As to these 'jurisdictional facts' the tribunal's decision cannot be conclusive, for otherwise it could by its own error give itself powers which were never conferred upon it by Parliament. The fact that the tribunal's order appears good on its face can avail nothing. It will be quashed on certiorari if the applicant can show that the true facts do not justify it. For this purpose, accordingly, any available evidence may be put before the court.[11]

Although 'jurisdictional fact' and its synonym 'precedent fact' are part of the currency of administrative law,[12] English judges have in the past preferred to speak of 'collateral questions'. A classic statement comes from a case of 1853[13] in which Coleridge J said:

> Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court.

This is merely to say that it is always for the court to enforce the statutory conditions limiting the extent of a power, i.e. to enforce the principle of ultra vires.

[9] The earliest recognisable case appears to be *Terry* v. *Huntington* (1668) Hardr. 480 (successful action against commissioners of excise for levying duty on 'low wines' when they had powers only as to 'strong wines'). Hale CB called this 'a stinted, limited jurisdiction' and said: 'though the information before them supposes the matter to be within their power and jurisdiction; yet the party is not thereby concluded, but that he may aver the contrary.' See likewise *Fuller* v. *Fotch* (1695) Carth. 346. In (1929) 45 *LQR* 479 (D. M. Gordon) *St. John's Case* (1601) 5 Co. Rep. 61b is cited as an early example of collateral fact, but the report is inadequate for this purpose; so is the report of the same case as *Gardener's Case* (1600) Cro. Eliz. 821: see Rubinstein, *Jurisdiction and Illegality*, 62, 212. On the subject generally see [1984] *OJLS* 22 (J. Beatson); (1987) 103 *LQR* 66 (G. L. Peiris).

[10] As in *R.* v. *Hackney (etc.) Rent Tribunal ex p. Keats* [1951] 2 KB 15.

[11] See below, p. 260. Formerly the order had to show jurisdiction.

[12] Probably the first appearance of 'jurisdictional fact' in an English law report was in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 at 208, 242 (Lord Wilberforce and Browne J). See also *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74 where Lord Fraser and Lord Wilberforce use 'precedent fact' also.

[13] *Bunbury* v. *Fuller* (1853) 9 Ex. 111 (assistant tithe commissioner's jurisdiction dependent on fact that land was not previously discharged from tithe; this fact held collateral). Contrast *Tithe Redemption Commission* v. *Wynne* [1943] KB 756, where the Tithe Act 1936 gave the Commission conclusive jurisdiction over a similar question.

Under the classical doctrine many facts would not be jurisdictional, since they would have no bearing on the limits of the power. A rent tribunal's findings as to the state of repair of the property, the terms of the tenancy, and the defaults of landlord or tenant would probably not affect its jurisdiction in any way and would therefore be immune from jurisdictional challenge.[14]

The distinction which has to be made in these cases is that between the primary or central question which the tribunal has power to decide conclusively itself, and other questions which circumscribe the scope of that power. This is what is meant by the contrast made in the above quotation between 'the merits of the case' and a point which is 'collateral', and by the contrasts made by Lord Goddard CJ, as quoted below,[15] between 'the main question which the tribunal have to decide' and other questions on which 'the existence of jurisdiction depends'. In the above examples the central question for the rent tribunal's decision is whether the rent ought to be reduced. No court of law can review their decision on this question if it is validly made within their jurisdiction. The collateral questions, such as whether the letting is furnished or unfurnished, or whether it is for residential or business purposes, or whether a premium has been paid, are questions which determine whether a situation has arisen in which the tribunal may proceed to exercise its primary power. These are therefore questions which a court of law may review in order to keep the tribunal within its proper sphere. Difficult as this distinction may be to apply in some cases, it is clear in principle and fundamental in importance.

Jurisdictional law

In the past the same distinction was applied to questions of law. For example, a rent tribunal had power to reduce a rent where it appeared that a premium had been paid; but where the payment had in fact been made in respect of work done by the landlord and not in respect of the grant of the lease, it was not in law a premium. By treating it as such the tribunal made a mistake of law and acted in excess of its powers, and its order was quashed.[16] If the payment had truly been a premium, but the tribunal had mistakenly held that it was not one in law and had made no order, their error would have amounted to refusal of jurisdiction and the court could have ordered them to hear and decide the case.

Now, however, the courts have taken a new position, holding that every error of law by a tribunal must necessarily be jurisdictional. This is a deduction from the

[14] Thus in *Terry* v. *Huntington* (above) Hale CB said: 'But if they should commit a mistake in a thing that were within their power, that would not be examinable here.'

[15] Below, p. 255.

[16] *R.* v. *Fulham (etc.) Rent Tribunal ex p. Philippe* [1950] 2 All ER 211. Another example is *R.* v. *Tottenham District Rent Tribunal ex p. Fryer Ltd.* [1971] 2 QB 681 (question whether reference to tribunal validly withdrawn).

decision of the House of Lords in the *Anisminic* case, which stretched the concept of jurisdictional error of law to such a point that the possibility of non-jurisdictional error was eliminated. This complication, which has important repercussions in several areas, must be explained later.[17] For present purposes it means that any error of law made by a tribunal, if material to its decision, may render the decision ultra vires. The distinction between errors which do and do not affect jurisdiction would then apply only to errors of fact—if, indeed, the courts do not jettison that concept also, as it already seems that they are doing.[18]

Power to determine jurisdictional questions

Where a jurisdictional question is disputed before a tribunal, the tribunal must necessarily decide it.[19] If it refuses to do so, it is wrongfully declining jurisdiction and the court will order it to act properly.[20] Otherwise the tribunal or other authority 'would be able to wield an absolutely despotic power, which the legislature never intended that it should exercise'.[21] It follows that the question is within the tribunal's own jurisdiction, but with this difference, that the tribunal's decision about it cannot be conclusive. This also was explained in the classic case:[22]

> Suppose a judge with jurisdiction limited to a particular hundred, and the matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits; on its being presented, the judge must not immediately forbear to proceed, but must inquire into its truth or falsehood, and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake.[23]

[17] Below, p. 264.

[18] See below, p. 276.

[19] Unless, perhaps, trial by a court is more suitable: see the *Zerek* case (below) at 13 (Devlin J); or unless statute provides otherwise: *R.* v. *Kensington Rent Officer ex p. Noel* [1978] QB 1. For a statutory tribunal's jurisdiction to question the validity of regulations see *Chief Adjudication Officer* v. *Foster* [1993] AC 754, noted below, p. 282.

[20] *R.* v. *Marsham* [1892] 1 QB 371; *R.* v. *Pugh (Judge) ex p. Graham* [1951] 2 KB 623; *R.* v. *Camden LB Rent Officer ex p. Ebiri* [1981] 1 WLR 881.

[21] *R.* v. *Marsham* (above) at 379. See likewise the quotation from Farwell LJ in the *Shoreditch* case, below, p. 263.

[22] *Bunbury* v *Fuller* (1853) 9 Ex. 111 (above). See also *R.* v. *Special Commissioners of Income Tax* (1888) 21 QBD 313 at 319, quoted below, p. 257.

[23] On territorial error see *Vevers* v. *Mains* (1888) 4 TLR 724; contrast *Re Smith* (1858) 3 H & N 227 and see (1929) 45 *LQR* at p. 486, (1966) 82 *LQR* at p. 518 (D. M. Gordon).

Similarly Lord Goddard CJ explained that[24]

> if a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this court may, by means of proceedings for certiorari, inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal have to decide.

A collateral question is thus to be contrasted with 'the main question', or 'the actual matter committed to its decision',[25] upon which the tribunal's own decision is conclusive.

This doctrine applies just as much to ordinary administrative action as it does to the decisions of courts and tribunals. Jurisdictional questions are less likely to be raised in the former case, since normally no power to determine questions of fact or law will have been given. Nevertheless such powers are occasionally claimed. One instance was where a local authority had power to take land compulsorily for housing provided that it was not 'part of any park, garden or pleasure ground'.[26] An order made by the authority and confirmed by the minister was quashed on the ground that the land was in fact parkland. This on its face was a simple case of ultra vires. But the minister contended that it was for the acquiring authority and himself to determine the facts, and that their findings of fact were conclusive. The Court of Appeal rejected this argument, holding that the fact in question was collateral and applying the classic rule that collateral facts must be determinable ultimately by the court. Luxmoore LJ said:

> In such a case it seems almost self-evident that the court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital findings on which the existence of the jurisdiction relied upon depends.

It is obvious that, if this were not so, the statutory exemption in favour of parkland would, legally speaking, be illusory.

The Home Secretary's statutory power to deport aliens is similarly limited by the word 'alien'. Whether a person is, in fact or in law, an alien or a British subject is a

[24] *R.* v. *Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1 at 6 (Devlin J at 10 is equally clear). See similarly *R.* v. *Lincolnshire Justices ex p. Brett* [1926] 2 KB 192 at 202; *R.* v. *Pugh (Judge) ex p. Graham* [1951] 2 KB 623; *Re Purkiss' Application* [1962] 1 WLR 902 at 914 (Diplock LJ); *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 at 174 (Lord Reid); *R.* v. *Croydon etc. Rent Tribunal ex p. Ryzewska* [1977] QB 876; *R.* v. *Camden LBC Rent Officer ex p. Ebiri* [1981] 1 WLR 881.

[25] *R.* v. *Lincolnshire Justices* (above) at 202 (Atkin LJ).

[26] *White and Collins* v. *Minister of Health* [1939] 2 KB 838. Another such case is *R.* v. *Bradford* [1908] 1 KB 365 (power to license surveyor of highways to excavate from enclosed lands 'not being a . . . park'. Held: land was a park, so licence was quashed). See the statement of principle by Channell J at 372. See similarly *R.* v. *Armagh JJ* [1924] 2 IR 55; *Re Newhill Compulsory Purchase Order* [1938] 2 All ER 163; *R.* v. *Blakely ex p. Association of Architects of Australia* (1950) 82 CLR 54; *State* v. *Durcan* [1964] IR 279.

question which the court must determine in the case of dispute.[27] Alien nationality is the preliminary or collateral condition on which the Home Secretary's power depends. If he could determine this himself conclusively, a British subject mistakenly taken for an alien would have no legal protection, and plainly this would be intolerable. The Home Secretary's power to deport an 'illegal entrant' is limited in the same way, so that it is for the court to decide objectively on the evidence whether a person has or has not entered the country illegally. The House of Lords made a grave error, fortunately since corrected, when they held that this decision was for the Home Secretary, provided only that he was not acting on no evidence and not acting unreasonably.[28] If the court fails to stand guard over facts and requirements expressed objectively in the Act, it surrenders the rule of law to the rule of executive discretion. It is essential, therefore, that 'where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied'.[29]

There are many other possible examples.[30] Any ultra vires case can raise questions of jurisdictional fact if the public authority claims power to decide any question which defines the scope and limits of its power. Where a minister must have 'reasonable cause to believe' something, he may claim that it is for him to decide the question of reasonableness, whereas it is a jurisdictional matter to be decided by the court.[31] It must be remembered that the courts often show themselves unwilling to resign their control of such questions merely because the power is conferred in subjective terms such as 'if the minister is satisfied'. In the rent tribunal case already cited the words were 'where it appears to the tribunal that a

[27] *R.* v. *Home Secretary ex p. Duke of Chateau Thierry* [1917] 1 KB 922 at 930; *Eshugbayi Eleko* v. *Officer Administering Government of Nigeria* [1931] AC 662 at 670; *R.* v. *Home Secretary ex p. Budd* [1942] 2 KB 14 at 22. In *Khawaja's* case (below) Lord Wilberforce said: 'The best known example of this is *Eshugbayi Eleko* v. *Government of Nigeria* [1931] AC 662, where the discretionary power was exercisable only if the person affected was a native chief, so that whether he was such a chief or not was what is sometimes called a jurisdictional or collateral fact.'

[28] *R.* v. *Home Secretary ex p. Zamir* [1980] AC 930, corrected in *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74 (below, p. 433); and see *R.* v. *Secretary of State for the Environment ex p. Tower Hamlets LBC* [1993] QB 632 (council must determine whether homeless person is illegal entrant; Secretary of State's claim to exclusive jurisdiction rejected).

[29] *Khawaja's* case (above) at 110 (Lord Scarman). In *R.* v. *Hillingdon LBC ex p. Puhlhofer* [1986] AC 484 the House of Lords treated 'accommodation' under the Housing (Homeless Persons Act) 1977 subjectively, but the report fails to make it clear that this was in accordance with the Act, which gives discretion to the housing authority 'if they are satisfied'.

[30] Numerous examples of questions held to be collateral or not are collected in (1929) 45 *LQR* at pp. 479–82 and in (1960) 1 UBCLR 185 (D. M. Gordon). Recent examples are *R.* v. *Secretary of State for the Environment ex p. Davies* (1990) 61 P & CR 487 (CA) ('person having an interest in the land to which an enforcement notice relates'); *State of Queensland* v. *Wyvill* (1989) 90 ALR 611 (whether deceased person 'aboriginal'). But see *Barber* v. *Thames Television Plc.* [1991] ICR 253 (jurisdictional point first raised on appeal: court refused, in discretion, to consider it).

[31] See the *Liversidge* and *Rossminster* cases, below, pp. 429. *Liversidge* was the most notorious of the lapses from objectivity.

premium has been paid', but the court quashed the tribunal's order nevertheless when it was shown that the payment made was not in law a premium, so that the tribunal had misdirected itself in law.[32] Decisions of this kind have become more frequent as the developing law of judicial review has brought discretionary powers under stricter control, as will appear when subjective language is more fully discussed later.[33]

Borderline cases

As a general rule, limiting conditions stated in objective terms will be treated as jurisdictional, so that the court will consider any admissible evidence of their non-fulfilment.[34] In the majority of cases these 'limiting conditions' are easy to identify. But there are borderline cases where the question may, on a true view, be part of the matter which the administrative authority is empowered to decide conclusively, so that it is squarely within its jurisdiction. One such was where a taxpayer was entitled to a repayment if 'within or at the end of the year' he could show to the assessing commissioners that he had overpaid. The claims were made two years and more after the relevant year, but passed by the assessing commissioners. The Special Commissioners then refused to pay, holding that the assessing commissioners had no power to accept the claims in the circumstances. But Lord Esher MR held that it was for the assessing commissioners to determine conclusively whether the conditions of claim were satisfied, and that the Special Commissioners were therefore obliged to make the repayment.[35] He distinguished in abstract terms the two situations which the legislature might create:[36]

> It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of

[32] *R.* v. *Fulham etc. Rent Tribunal ex p. Philippe* [1950] 2 All ER 211; above, p. 253. See also *Relton & Sons (Contracts) Ltd.* v. *Whitstable Urban District Council* (1967) 201 EG 955 ('where it appears to the appropriate authority that an existing highway should be converted into a new street . . .': no power to decide conclusively that highway was not already a new street, since this was a 'fundamental matter').

[33] Below, p. 419.

[34] The cases usually refer to affidavit evidence since prerogative remedies are in question: e.g. *R.* v. *Bolton* (1841) 1 QB 66; *Re Baker* (1857) 2 H & N 219; *R.* v. *Bradley* (1894) 70 LT 379; *R.* v. *Radcliffe (Judge) ex p. Oxfordshire County Council* [1915] 3 KB 418; *R.* v. *Board of Control ex p. Rutty* [1956] 2 QB 109: *R.* v. *Northumberland Compensation Appeal Tribunal ex p. Shaw* [1952] 1 KB 338 at 352, 353.

[35] *R.* v. *Special Commissioners of Income Tax* (1888) 21 QBD 313. Lindley LJ was doubtful on this question.

[36] At 319. This passage was approved by the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147.

things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more.

A case which naturally falls into the latter category is where a magistrate has jurisdiction to convict on certain facts being proved before him. This is the explanation of the famous 'bum-boat case',[37] in which the magistrates had power to order the forfeiture of any boat suspected of carrying stolen cargo. They were sued in trespass by the owner of a boat so condemned, who wished to show that his vessel was too large to be a boat within the meaning of the Act. The court refused to hear this evidence, holding that the question was within the jurisdiction of the magistrates and that their order, being good on its face, was therefore conclusive. Whether the boat was within the Act was no more jurisdictional than any other ingredient in the situation which the magistrates had to adjudge. In other words, it was within the central area of their jurisdiction and not in any way collateral.

Administrative cases

In administrative cases the prescribed statutory ingredients will more readily be found to be collateral. This is probably because, in contrast to the judicial cases just discussed, the central question committed to the administrative authority will commonly be whether to exercise some discretionary power, and the prescribed statutory ingredients will more naturally be regarded as preliminary or collateral conditions. For example, where licensing justices are empowered to grant extensions of hours on 'special occasions', the court will review the question whether there really was a special occasion within the meaning of the Act, which it treats as a jurisdictional condition.[38] As usual with administrative powers, the court is determined to enforce their legal limits and to prevent their abuse. But however strict the court may be, there will always be a residuum of jurisdiction within which the power of determination is conclusive. Perhaps the most frequently cited such case was where justices made an order for the removal of a pauper, who had been in prison for smuggling, from a house belonging to the parish. It was contended that the occupant was not a pauper and that the decision was wrong on the evidence. The court refused to investigate the evidence, holding that the whole

[37] *Brittain* v. *Kinnaird* (1819) 1 Br. & B 432. See likewise *Cave* v. *Mountain* (1840) 1 M & G 257; *Allen* v. *Sharp* (1848) 2 Ex. 352; *R.* v. *Dayman* (1857) 7 E & B 672 ('new street'); *Ex p. Vaughan* (1866) LR 2 QB 114; *R.* v. *Bradley* (1894) 70 LT 379 (justices empowered to determine conclusively what is 'highway').

[38] *R.* v. *Sussex JJ* [1933] 2 KB 707 (period of summer time: 'clearly . . . excess of jurisdiction'); *R.* v. *Metropolitan Police Commissioner ex p. Ruxton* [1972] 1 WLR 232. Similarly as to 'special reasons': *R.* v. *Liverpool City Council ex p. Liverpool Taxi Fleet Operators' Association* [1975] 1 WLR 701: and as to 'special circumstances': *R.* v. *Home Secretary ex p. Mehta* [1975] 1 WLR 1087.

matter was within the jurisdiction of the justices and distinguishing cases where their jurisdiction depended upon some objective fact.[39] The statute was not even recited, and no collateral or jurisdictional question was raised—even though it would seem that there might have been room for such questions. The case is one of the long series which fall into the second category distinguished by Lord Esher MR and which establish that where the whole matter is considered to be within the jurisdiction of the adjudicating body, its order cannot be quashed by the court merely on the ground that it is mistaken.[40] This elementary rule was often stated in the form that where the subject matter was within the jurisdiction, an order valid on its face was conclusive.[41]

In practice the decisions allow some latitude, providing examples of questions which might have been considered to be collateral being held to be conclusively determinable by an administrative authority.[42] The determining factor is the supposed intention of Parliament. Where the Price Commission had to calculate the net profits of a business 'in accordance with generally accepted accounting principles' the Court of Appeal declined to review the Commission's findings of fact as to what these principles were and as to what items were consequently allowable, holding that the legislation clearly implied that these were matters for the Commission and not for the courts; for the statutory scheme of price control required expert, quick and final decisions.[43] But the same court granted a declaration that a method of calculating depreciation, though used only by few companies, would qualify, as a matter of law, as falling within 'generally accepted accounting principles'.[44] The fine distinction between these cases is perhaps that the second, but

[39] *R.* v. *Bolton* (1841) 1 QB 66 (Lord Denman CJ). See similarly *Ex. p. Vaughan* (1866) LR 2 QB 114. Cf. *Allen* v. *Sharp* (1848) 2 Ex. 352; *R.* v. *Young* (1883) 52 LJMC 55.

[40] The case is put into correct perspective, and contrasted with cases where jurisdiction is in issue, by Lord Denman CJ himself in *R.* v. *Justices of Buckinghamshire* (1843) 3 QB 800; by all the judges in *Ex. p. Vaughan* (1866) LR 2 QB 114; by Sir J. Colville in *Colonial Bank of Australasia* v. *Willan* (1874) LR 5 PC 417 at 443; by Gibson J in *R.* v. *Mahony* [1910] 2 IR 695 at 739; by Lord Sumner in *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 AC 128 at 154; and by Browne J in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 at 242. None of these decisions conflicts in any way with the principle of *Bunbury* v. *Fuller*, above, p. 252. This is explained particularly clearly in *Colonial Bank of Australasia* v. *Willan* (above).

[41] As in *Brittain* v. *Kinnaird* (above); *R.* v. *Bolton* (above); *Colonial Bank of Australasia* v. *Willan* (above).

[42] Examples are *R.* v. *Dayman, Ex p. Vaughan*, and *R.* v. *Bradley*, cited above. But *Liversidge* v. *Anderson* [1942] AC 206 and *R.* v. *Home Secretary ex p. Zamir* [1980] AC 930 might be added. For these cases see below, p. 430. Recent examples are *R.* v. *South Hams DC ex p. Gibb* [1995] QB 158 at 170 (whether applicants 'gipsies'); *R.* v. *Radio Authority ex p. Bull* [1996] QB 169 (whether organisation's objects 'mainly of a political nature'); *R.* v. *Home Secretary ex p. Onibiyo* [1996] QB 768 at 785 (whether fresh 'claim for asylum').

[43] *General Electric Co. Ltd.* v. *Price Commission* [1975] ICR 1.

[44] *Associated Portland Cement Manufacturers Ltd.* v. *Price Commission* [1975] ICR 27, decided within a month of the previous case but not referring to it. In principle the decisions appear contradictory, since in the second the Commission should have been able to find as a fact that generally accepted accounting principles did not admit the method in question. But this does not seem to have been pleaded.

not the first, raised a question of law on the interpretation of the price code, which the court treated as a reviewable question of law; but this would seem to be a matter of presentation rather than of substance.

Whether the meaning of 'houses' was a collateral question for the purposes of clearance orders (now abolished) was a matter of some doubt under decisions of the Court of Appeal. A local authority might make a clearance order where they were satisfied 'that the houses in that area are unfit for human habitation', and the order required confirmation by the minister. In one case the court treated the meaning of 'house' as a matter entirely for the court, i.e. as a jurisdictional condition, and it seems to have been assumed without argument that this was correct.[45] In a later case the court held that the question 'house or not a house', just like the question 'fit or unfit', was a question for the minister to determine finally, provided that he did not commit other errors of the kind that the court can control on other grounds.[46] But this was in the context of the minister's power to modify a clearance order 'if the minister is of opinion' that any land ought not to have been included in it, and this subjective language naturally influenced the court.

In addition, the court will be ready to condemn any decision that savours of abuse of power. Quashing a decision where a rent tribunal had found, contrary to the evidence, that a business letting was a mere sham to disguise the letting of a dwelling-house, Lord Goddard CJ said: 'A more dangerous usurpation of power by one of these tribunals it is impossible to imagine.'[47]

Disputed questions of fact

Although the contrast between questions which do and do not go to jurisdiction was in principle clear-cut, it was softened by the court's unwillingness to enter upon disputed questions of fact in proceedings for judicial review.[48] Evidence of facts is normally given on affidavit; and although the rules of court made provision for cross-examination, interrogatories and discovery of documents, and for the trial of issues of fact,[49] the court did not often order them.[50] The procedure was

[45] *Re Butler* [1939] 1 KB 570. See likewise *Quiltotex Co. Ltd.* v. *Minister of Housing and Local Government* [1966] 1 QB 704. Compare *Lake* v. *Bennett* [1970] 1 QB 663; *R.* v. *Monopolies and Mergers Commission ex p. South Yorkshire Transport Ltd.* [1993] 1 WLR 23 (HL) ('a substantial part of the United Kingdom'); *R.* v. *Tower Hamlets LBC ex p. Ferdous Begum* [1993] QB 447 ('applicant' held to be jurisdictional fact).

[46] *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 WLR 1320 (unreserved judgments, reversing the High Court's decision that 'house' was jurisdictional); for this case see below, p. 275.

[47] *R. v. Hackney (etc.) Rent Tribunal ex p. Keats* [1951] 2 KB 15. But it is not right that the tribunal may not enter into the question: see the correction in the *Zerek* case (above) at 7.

[48] For the procedure see below, p. 655.

[49] Under RSC 1965, Ord. 33 r. 3; Ord. 53 r. 8 now incorporated in CPR 1998, Sched. 1.

[50] A rare instance in *R.* v. *Stokesley, Yorkshire, Justices ex p. Bartram* [1956] 1 WLR 254.

thus not well adapted for trying disputed facts. If the inferior tribunal had itself tried them, 'the court will not interfere except upon very strong grounds'.[51] There had to be 'a clear excess of jurisdiction' without the trial of disputed facts de novo.[52] Questions of law and questions of fact were therefore to be distinguished, as was explained by Devlin J:[53]

> Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. But where the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere.

Lord Wilberforce similarly described the position of the court which hears applications for judicial review:[54]

> It considers the case on affidavit evidence, as to which cross-examination, though allowable, does not take place in practice. It is, as this case well exemplifies, not in a position to find out the truth between conflicting statements.

In cases of conflict of evidence, therefore, the court was disinclined to do more than ascertain that there was evidence before the tribunal which would justify a reasonable tribunal reaching the same conclusion.[55] It appears also that the same doctrine was applied to statutory applications to quash, since these are in principle similar to applications for judicial review.[56] It applies also in cases where the jurisdictional condition is so imprecise that there is a range of reasonable conclusions.[57]

A system of judicial review which cannot cope with crucial questions of fact (as jurisdictional facts necessarily are) is seriously defective. One purpose of the procedural reforms made in 1977, and described later,[58] was to remove this defect by providing for cross-examination, etc., so that disputed facts could be tried. Lord Wilberforce's above-quoted statement comes from an unfortunate and discredited decision of the House of Lords.[59] The correct rule, it is submitted, is that stated by

[51] *Elston* v. *Rose* (1868) LR 4 QB 4 at 7.

[52] *R.* v. *Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1 at 11, reviewing the authorities. See also *Colonial Bank of Australasia* v. *Willan* (1874) LR 5 PC 417 at 442 ('a manifest defect of jurisdiction').

[53] In the *Zerek* case (above). See likewise *Elston* v. *Rose* (above).

[54] *R.* v. *Home Secretary ex p. Zamir* [1980] AC 930 at 949. See also below, p. 433.

[55] *Brown* v. *Cocking* (1868) LR 3 QB 672 at 675 (stating the rule somewhat strictly); *R.* v. *Hackney etc. Rent Tribunal ex p. Keats* as explained in *R.* v. *Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1 at 7.

[56] *Re Bowman* [1932] 2 KB 621 at 634; *Re Newhill Compulsory Purchase Order 1937* [1938] 2 All ER 163; *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 WLR 1320; *Coleen Properties Ltd.* v. *Minister of Housing and Local Government* [1971] 1 WLR 433. For these cases see below, p. 275.

[57] *R.* v. *Monopolies and Mergers Commission ex p. South Yorkshire Transport Ltd.* [1993] 1 WLR 23 (HL) ('a substantial part of the United Kingdom').

[58] Below, p. 650.

[59] The *Zamir* case, above.

Lord Diplock in a later case, that cross-examination should now be allowed whenever the justice of the case so requires, and on the same basis as in ordinary proceedings.[60]

The 'original jurisdiction' fallacy

Many judges have made a contrast between jurisdictional questions determinable at the outset and mere error made within jurisdiction during the course of the inquiry. Thus Lord Sumner said of a magistrate:[61]

> . . . if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of jurisdiction which he has not . . .

And Lord Reid also once said:[62]

> If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.

In their own time and context,[63] and in relation to errors of fact and law, these statements were unexceptionable. But it does not follow that no sort of error made in the course of the proceedings can affect jurisdiction. Some question may arise which the tribunal is incompetent to determine;[64] or some point may be decided in bad faith or in breach of natural justice or on irrelevant grounds or unreasonably, all of which faults go to jurisdiction and render the proceedings a nullity.[65]

Lord Reid guarded himself with this necessary qualification in a later case,[66]

[60] *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 282; below, p. 663.

[61] *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 AC 128 at 151.

[62] *R.* v. *Governor of Brixton Prison ex p. Armah* [1968] AC 192 at 234. Contrast Lord Upjohn's remarks at 257. See also Lord Devlin's opinion in *Essex Incorporated Congregation Church Union* v. *Essex County Council* [1963] AC 808, cited above, p. 241.

[63] And under the law as it stood before the *Anisminic* case (below).

[64] See *Colonial Bank of Australasia* v. *Willan* (1874) LR 5 PC 417 at 444: 'There is a third class of cases, in which the Judge of the inferior court, having legitimately commenced the inquiry, is met by some fact which, if established, would oust his jurisdiction and place the subject-matter of the inquiry beyond it.' Examples are then given of question of title to land arising before a tribunal incompetent to try them.

[65] This comment was endorsed by Lord Mustill in *Neill* v. *North Antrim Magistrates' Court* [1992] 1 WLR 1220 (HL).

[66] *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 at 171. Lord Reid also said: 'I understand that some confusion has been caused by my having said . . . that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong.' But more probably confusion would be caused by 'Neither an error in fact nor an error in law will destroy his jurisdiction', a statement inconsistent with Lord Reid's own decision in the *Anisminic* case, unless limited to its proper context.

pointing out that 'the word "jurisdiction" has been used in a very wide sense' and would be better confined to 'the narrow and original sense of the tribunal being entitled to enter on the inquiry in question'. In fact 'jurisdiction' has traditionally borne the wide sense, synonymous with 'power'; for plainly a tribunal must not only have jurisdiction at the outset but must retain it unimpaired until it has discharged its task. Lord Pearce explained this with impeccable logic in the same case, in words already quoted, pointing out that if a tribunal in the course of its inquiry addressed itself to the wrong question or violated the rules of natural justice, it thereby stepped outside its jurisdiction.[67] If the tribunal's determination is in the end a nullity, it must at some point have exceeded its powers. In the same case Diplock LJ said:[68]

'Jurisdiction' is an expression which is used in a variety of senses and takes its colour from its context.

But any attempt to confine 'jurisdiction' to one sort of power rather than another is certain to produce confusion.

The essential legal policy

The distinction between jurisdictional (or collateral) and other questions, emphasised so strongly in the foregoing discussion, is the lynch-pin of the fundamental policy of the law, that no inferior tribunal or authority can conclusively determine the limits of its own jurisdiction.[69] If it could so determine them, it would be uncontrollable and the system of jurisdictions would become incoherent. It is essentially the task of the superior courts to keep all governmental bodies within the bounds of their true powers. Their reasons for clinging so faithfully to their principles have never been given better expression from the bench than in a judgment of Farwell LJ:[70]

No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which

[67] At 195, quoted above, p. 38. Lord Wilberforce at 210 was equally impeccable.

[68] In the *Anisminic* case in the Court of Appeal, [1968] 2 QB 862 at 889.

[69] For this reason it is necessary to reject the so-called 'pure theory of jurisdiction' advocated with great ability and learning by D. M. Gordon QC in articles ranging from (1931) 47 *LQR* 386, 557 to (1966) 82 *LQR* 515, but never adopted or even discussed by an English court. This theory would allow tribunals to determine all relevant questions of fact and law conclusively. For details and criticism see the previous edition of this book, p. 300.

[70] *R.* v. *Shoreditch Assessment Committee ex p. Morgan* [1910] 2 KB 859 at 880; approved in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 at 197, 209 and 233 by Lords Pearce and Wilberforce and by Browne J, who cited it with reference to (1966) 82 *LQR* 226 (Wade). It has often been cited since. It was applied to the Crown Court in *R.* v. *Manchester Crown Court ex p. Director of Public Prosecutions* [1993] 1 WLR 693.

it does not possess . . . or to refuse to exercise a jurisdiction which it has . . . Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure—such a tribunal would be autocratic, not limited—and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact . . .

If administrative tribunals and authorities could trespass uncontrollably outside their proper fields, there would no longer be order in the legal system. Order can be preserved only if jurisdictional demarcation disputes can always be carried to the regular courts of law, and so brought within a unified hierarchy of authority.

All error of law now reviewable

The *Anisminic* case[71] became the leading example of jurisdictional error by a tribunal in the course of its proceedings. It is also an extreme case of an error of law, which might have been considered an error within jurisdiction, being held to be jurisdictional. The Foreign Compensation Commission had rejected a claim for compensation for a property already sold to a foreign buyer on the erroneous ground that the statutory Order in Council required that the successor in title should have been of British nationality at a certain date. The majority of the House of Lords held that this error destroyed the Commission's jurisdiction and rendered their decision a nullity, since on a true view of the law they had no jurisdiction to take the successor in title's nationality into account. By asking themselves the wrong question, and by imposing a requirement which they had no authority to impose, they had overstepped their powers.

But it was soon seen that the concept of jurisdictional error had been stretched to breaking-point. For it requires only a simple verbal manipulation to represent any error of law as the result of the tribunal asking itself a wrong question or imposing some wrong requirement. By such logic (if logic it be) any and every error of law could be shown to involve excess of jurisdiction. Thus the House of Lords, while purporting to uphold the distinction between errors of law which went to jurisdiction and errors of law which did not, in fact undermined it. A tribunal had now, in effect, no power to decide any question of law incorrectly: any error of law would render its decision liable to be quashed as ultra vires.[72]

This radical conclusion was first drawn by Lord Diplock in a published lecture, saying that the *Anisminic* case 'renders obsolete the technical distinction between

[71] Above. The case is discussed in (1969) 85 *LQR* 198 (Wade); [1970] *PL* 358 (B. C. Gould); (1971) 34 *MLR* 1 (D. M. Gordon).

[72] For discussion see (1984) 4 *OJLS* 22 (J. Beatson); I. Hare in Forsyth and Hare (eds.), *The Golden Metwand*, 113.

errors of law which go to "jurisdiction" and errors of law which do not'.[73] Then it was adopted by Lord Denning MR (supported by Eveleigh LJ but opposed by Geoffrey Lane LJ) in the *Pearlman* case, holding that the decision of a county court could be quashed for error of law, the normal right of appeal having been cut off by statute.[74] Observing that the House of Lords had reduced the former distinction to a mere matter of words, Lord Denning said:

> I would suggest that this distinction should now be discarded. . . . The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.'

Geoffrey Lane LJ, dissenting, pointed out that (as is undoubtedly true) the House of Lords in the *Anisminic* case intended to maintain the established distinction between error of law within jurisdiction and error of law outside jurisdiction;[75] and he held that the county court's error was within jurisdiction, and not therefore subject to judicial review. His opinion was followed, in preference to that of Lord Denning, by the Privy Council in a case from Malaysia, in which they reached the same conclusion as regards the error (if any) in an award of an industrial court.[76] The High Court of Australia has followed the Privy Council.[77]

Lord Denning's opinion was upheld in two important speeches by Lord Diplock in the House of Lords. The first of these[78] was concerned with a decision of a High Court judge which statute had made unappealable. A decision of the High Court is

[73] [1974] *CLJ* 233 at 243 (the de Smith memorial lecture). For a similar comment see (1969) 85 *LQR* at 211.

[74] *Pearlman* v. *Harrow School Governors* [1979] QB 56 (the county court had determined that the installation of central heating was not a 'structural alteration or addition' by a tenant). Lord Denning repeated his proposition, aligning it with Lord Diplock's in the *Racal* case (below), in *R.* v. *Chief Immigration Officer, Gatwick Airport ex p. Kharrazi* [1980] 1 WLR 1396. See also *Watt* v. *Lord Advocate* 1979 SLT 137.

[75] Lord Wilberforce had called it 'a crucial distinction which the court has to make': [1969] 2 AC at 210.

[76] *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363, decided 10 days before the House of Lords gave judgment in the *Racal* case, below.

[77] *Housein* v. *Under Secretary, Department of Industrial Relations* (1982) 38 ALR 577; *Hockey* v. *Yelland* (1984) 56 ALR 215. See also *Glenvill Homes Pty Ltd.* v. *Builders Licensing Board* [1981] 2 NSWLR 608; *New Zealand Engineering etc. Union* v. *Court of Arbitration* [1976] 2 NZLR 283; *Eastern (Auckland) Rugby Football Club Inc.* v. *Licensing Control Commission* [1979] 1 NZLR 367, where Speight J follows Geoffrey Lane LJ's dissent as preferable 'for conservatively-minded people'.

[78] *Re Racal Communications Ltd.*, reported as *Re A Company* [1981] AC 374 (challenge to order of High Court judge authorising compulsory inspection of company's books). Lord Keith concurred with Lord Diplock in general terms. Lord Edmund-Davies supported the Privy Council (in which he had sat) and Geoffrey Lane LJ, and therefore disagreed with Lord Diplock as to the effect of *Anisminic*. Lords Salmon and Scarman merely held (with respect, correctly) that *Anisminic* had nothing to do with the case. *Anisminic* was concerned with judicial review of an inferior tribunal. *Racal* was concerned with appeal from a High Court judge.

not subject to judicial review, so the case did not raise any question of error by an inferior tribunal. But Lord Diplock, taking the opportunity to corroborate the view expressed in his lecture, said:

> The break-through made by *Anisminic* was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity.

In the second case,[79] in which prisoners complained of breaches of natural justice in the award of punishments by prison visitors, Lord Diplock said that the decision in *Anisminic*

> has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity.

In 1992 and again in 1998 the House of Lords confirmed these categorical pronouncements. Although both were made in cases where no question of error of law arose, it is clear now that they made an important extension of judicial review in English law. It is clear also that the change was made, once again, by stretching the doctrine of ultra vires. In the case of 1992, Lord Browne-Wilkinson said in the leading speech:[80]

> Thenceforward it was to be taken that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires.

And in broader terms he said:

> The fundamental principle is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully.

In the case of 1998[81] Lord Irvine LC said in the leading speech that *Anisminic*

[79] *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 278 (below, p. 663).
[80] *R.* v. *Hull University Visitor ex p. Page* [1993] AC 682.
[81] *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 154.

made obsolete the historic distinction between error of law on the face of the record and other errors of law. It did so by extending the doctrine of ultra vires, so that any misdirection in law would render the decision ultra vires and a nullity.

Lord Diplock himself had similarly said that unless the decision-maker understood the law correctly and gave effect to it, the court would review for illegality.[82] In the result, the judges have taken a further step in making the courts the conclusive arbiters on all questions of law. In Australia and Canada the law has moved in the same direction, assisted by legislation,[83] although the High Court of Australia rejects Lord Diplock's reasoning as a matter of common law.[84]

An exception—courts of law

In the longer of the quotations from Lord Diplock's speeches above it will be seen that he bracketed together 'inferior courts and statutory tribunals' as liberated by *Anisminic* from the old jurisdictional test for reviewable error of law. But in his earlier speech he had said that in the case of courts, such as the county court, there should be no presumption that Parliament had not given them jurisdiction to decide points of law conclusively:[85] it was a matter of construction, and where the Act provided that the court's decision should be final, or final and conclusive, the 'subtle distinctions formerly drawn' might still operate, so that some errors of law might be ultra vires and reviewable but others not—though the reviewing court should be tolerant and not astute to intervene.[86] But when the question arose in the case of a coroner's inquest, which is held to be a court,[87] a divisional court followed Lord Diplock's later opinion and decided that any mistake of law would destroy jurisdiction.[88]

In its latest decision[89] the House of Lords has adopted Lord Diplock's earlier view, so that inferior courts must be distinguished from tribunals and other administrative authorities. An error of law by an inferior court, therefore, may still give rise to an argument whether it is jurisdictional or not, and in the latter

[82] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 at 410 (see Appendix 1). See likewise *R.* v. *Governors of the Bishop Challoner Roman Catholic Comprehensive Girls' School ex p. Choudhury* [1992] 2 AC 182.

[83] e.g. Canada (Federal Court Act 1970, s. 28); Australia (Administrative Decisions (Judicial Review) Act 1977, s. 5). These Acts empower the court to quash for error of law generally.

[84] *Public Service Association of South Australia* v. *Federal Clerks' Union* (1991) 102 ALR 161.

[85] In *Bulk Gas Users Group* v. *Attorney-General* [1983] NZLR 129 Cooke J suggests that the rival *Pearlman/Racal* and *South East Asia Fire Bricks* propositions can thus be reconciled by regarding the tribunal in the latter case as akin to a court.

[86] In the *Racal* case, above, at 386.

[87] *R.* v. *Surrey Coroner ex p. Campbell* [1982] QB 661.

[88] *R.* v. *Greater Manchester Coroner ex p. Tal* [1985] QB 67, where the application failed since no mistake was shown.

[89] *R.* v. *Hull University Visitor ex p. Page*, above; see also *R.* v. *Visitors to the Inns of Court ex p. Calder* [1994] QB1.

case it may be immune from review. To that extent the old rule may still have life in it.

Peculiar jurisdictions

Exceptional also are peculiar jurisdictions where the courts are concerned to ensure only that the tribunal acts properly within its area of power but are not otherwise concerned with it. This is the position with ecclesiastical courts and with the visitorial jurisdiction over universities, the Inns of Court and similar bodies, which enjoy exemption from judicial review on the merits of their decisions. Those cases are explained later.[90]

ERROR ON THE FACE OF THE RECORD

Error within jurisdiction

In administrative law, both ancient and modern, an important role has been played by the doctrine that the Court of Queen's Bench could quash any decision of an inferior court or tribunal which displayed error of law upon its face. This ancient head of judicial review has now been made redundant by the wide interpretation of the *Anisminic* case by the House of Lords, under which error of law has become a species of ultra vires, as explained in the preceding section. But until the law was so extended, error on the face was a useful weapon for attacking decisions which, though within jurisdiction, were vitiated by self-evident error. Although the doctrine can now be consigned to the limbo of history, it ought not to pass altogether into oblivion, since until the *Anisminic* era arrived it was an important head of judicial review. But there is no longer a need for the detailed account given in earlier editions of this book.

When in the seventeenth century certiorari was first used to control statutory powers, its primary object was to call up the record of the proceedings into the Court of King's Bench; and if the record displayed error, the decision was quashed. But if the applicant wanted to go outside the record, and bring other evidence to show some abuse of the power, the court would quash only where an excess of jurisdiction could be shown.[91] If the record itself showed an excess of jurisdiction, the court could as well quash for that as for any other defect. If the record did not

[90] Below, p. 633.

[91] Parts of this passage were adopted by Lawton LJ in *R. v. West Sussex Quarter Sessions ex p. Johnson Trust Ltd.* [1974] 1 QB 24 at 40.

show it, additional evidence had to be given, and in proceedings for certiorari that had to be done by affidavit. Hence came the rule that affidavits were admitted only to show want of jurisdiction.[92] But that rule emerged only gradually in the eighteenth century.[93] Although it provided the opening through which the wide ultra vires doctrine made its way into the law, this was a development which came later than the jurisdiction to review the record for error of any description, a jurisdiction firmly established in the time of Lord Holt CJ, about the year 1700. Review of the record was therefore the original system of judicial control adopted when the Court of King's Bench took over the work of supervising inferior tribunals and administrative bodies, such as Justices of the Peace and Commissioners of Sewers, after the Star Chamber and the conciliar courts had been abolished.[94]

Decline of non-jurisdictional review

The development of this early system was blighted by parliamentary interference, prompted by judicial pedantry. Review of the record became excessively formal, and many orders were quashed on what one judge described as 'lamentable and disgraceful technicalities'.[95] Parliament remedied this abuse in two different ways: first by inserting 'no-certiorari clauses' in many statutes from the seventeenth century onwards;[96] and secondly by enacting in the nineteenth century that criminal convictions need be supported only by a very short record, omitting the charge and the evidence and the reasoning which were required to be set out previously.[97] No-certiorari clauses simply forbade the court to grant this remedy in many particular cases. The short form of conviction, on the other hand (to quote a celebrated judgment of Lord Sumner),[98]

did not stint the jurisdiction of the Queen's Bench, or alter the actual law of certiorari. What it did was to disarm its exercise. The effect was not to make that which had been error, error

[92] *R.* v. *Bolton* (1841) 1 QB 66; *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 AC 128 at 155–56, 160; *R.* v. *Northumberland Compensation Appeal Tribunal ex p. Shaw* [1951] 1 KB 711 at 719.

[93] Rubinstein, *Jurisdiction and Illegality*, 70. At p. 69 it is said that *R.* v. *Oulton Inhabitants* (1735) Cas. t. Hard. 169 shows that affidavits were still then refused; but the case does not seem to concern jurisdictional error.

[94] Holdsworth, *History of English Law*, vi. 56, 112, 263; x. 155. The Court of Session has deplored the lack of any corresponding jurisdiction in Scotland: *Watt* v. *Lord Advocate* 1979 SLT 137.

[95] *R.* v. *Ruyton (Inhabitants)* (1861) 1 B & S 534 at 545.

[96] For these see below, p. 715. Another remedy was to empower the court to correct defects in the record that were not material, as was done by the Quarter Sessions Act 1849 (12 & 13 Vict. c. 45), s. 7.

[97] Summary Jurisdiction Act 1848. The Summary Jurisdiction Act 1857 provided for an appeal by case stated on a point of law; this rendered certiorari unnecessary in many cases (see s. 10).

[98] *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 AC 128 at 159. See also the account given by Cave J in *R.* v. *Bradley* (1894) 70 LT 379.

no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer: it was the inscrutable face of a sphinx.

The combined effect of these measures was to divert the energies of the courts away from control of the record and towards the development of the ultra vires doctrine. Furthermore, the courts circumvented the no-certiorari clauses by holding that they were intended only to prevent quashing for errors on the formal record within jurisdiction, and not to protect excesses of jurisdiction at all—a doctrine which still plays an important part today.[99] It was for these reasons that the courts were led to concentrate on jurisdictional control, which had a firm constitutional basis,[1] rather than on review of the record, which was often merely formalistic.

The doctrine revived

The result of this process of evolution was that the power of review for mere error on the face of the record was almost wholly forgotten after 1848 until it was dramatically revived in the *Northumberland* case in 1950.[2] That case[3] turned upon the amount of compensation payable to the clerk to a hospital board in Northumberland who had lost his post in 1949 after the national health service was introduced. The Compensation Appeal Tribunal, misconstruing the regulations, failed to allow him his full period of service, and stated their reasons in their decision. Dismissing the appeal the tribunal stated that there had been these two periods of service, but that in their judgment it was only the second period which should count. The order therefore contained a manifest error of law, and on this ground it was quashed in one of Lord Denning's most celebrated judgments.

This was a timely decision, since there was general dissatisfaction with the numerous tribunals set up under the welfare state which often had to interpret very difficult legislation[4] and from which Parliament had provided few rights of appeal. The reform of the tribunal system is a separate story, related later.[5] The importance of the *Northumberland* decision was that it appeased, at least partially, the public demand for better justice in the welfare state. It also marked the beginning of a new era of judicial review in which the courts became conscious of their powers.

[99] See below, p. 716.

[1] Above, p. 38.

[2] The Court of Appeal denied its existence in *Racecourse Betting Control Board* v. *Secretary for Air* [1944] Ch. 114. The Canadian courts did not fall into this error: *R.* v. *Logan ex p. McAllister* [1974] 4 DLR 676; *John East Ironworks* v. *Labour Relations Board of Saskatchewan* [1949] 3 DLR 51.

[3] *R.* v. *Northumberland Compensation Appeal Tribunal ex p. Shaw* [1952] 1 KB 338. See Sawer (1956) U of WALR 24; Abel (1963) 15 U Tor. LJ 102.

[4] Sometimes almost too difficult for the House of Lords: see *R.* v. *National Insurance Commissioner ex p. Hudson* [1972] AC 944.

[5] See below, p. 921.

In exercising their control the courts adopted a tolerant standard, recognising that the intention of Parliament was that the new tribunal system should be as free as possible from technical and legalistic disputes. Even where some error of law was shown, the court might decline to intervene.

Specialised tribunals could thus rely upon being leniently judged. But at the same time the *Northumberland* case opened the door to a mass of litigation in which the content of 'the record' was amplified and explained. It came to include not only the formal pleadings and the adjudication but all documentary evidence and any papers referred to in the primary documents.[6] Even spoken words might be part of 'the record' where mistakes were made in oral judgments and statements of reasons.[7]

Judicial review by certiorari had always extended to 'speaking orders' i.e. decisions which contained a statement of reasons, and it was naturally in the reasons that error was most likely to be found. But when this species of review was revived in 1951, and was much in demand, it was often frustrated by the failure of a tribunal to state its reasons, there being usually no obligation to do so. This obstacle was removed in large part by the Tribunals and Inquiries Act 1958 which, as explained elsewhere,[8] introduced a legal right to reasoned decisions from tribunals and inquiries, so that speaking orders could be obtained on demand. It also provided expressly that reasons given under the Act should be treated as incorporated in the record. This made it clear that Parliament accepted the reassertion of the High Court's powers.

Review of the record in wider context

In the light of later events, the rediscovery of the power of review for error on the face of the record can be seen as the first stage of the movement towards bringing all decisions on questions of law back within the superintendence of the ordinary courts. In the social legislation of the late 1940s statutory tribunals were given an excessive degree of independence, and the lack of rights of appeal was strongly felt.[9] Eventually the Tribunals and Inquiries Act 1958 gave many new rights of appeal on questions of law,[10] thus reducing the need for applications to quash by certiorari. The Act also safeguarded the remedy by certiorari, which was the only remedy for this form of error, against earlier Acts which had taken it away.[11] This

[6] *R.* v. *Medical Appeal Tribunal ex p. Gilmore* [1957] 1 QB 574.
[7] *R.* v. *Chertsey Justices ex p. Franks* [1961] 2 QB 152.
[8] See below, p. 938.
[9] See e.g. *R.* v. *Northumberland Compensation Appeal Tribunal ex p. Shaw* [1952] 1 KB 338 at 346 (Singleton LJ); *R.* v. *Medical Appeal Tribunal ex p. Gilmore* [1957] 1 QB 574 at 587 (Romer LJ).
[10] Below, p. 917.
[11] Below, p. 722.

machinery enabled virtually any error of law to be dragged forth into the light for judicial inspection and correction; and the notion that statutory tribunals could be final arbiters on matters of law fell far back from the high-water mark which it had previously attained.

It remained only for the House of Lords, by establishing that all error of law, regardless of the record, was excess of jurisdiction, to widen the powers of the courts still further and to bring to an end, as already explained, the period in which review for error on the face had played such a useful role.

FINDINGS, EVIDENCE AND JURISDICTION

Non-jurisdictional fact

It is now necessary to return to questions of fact, in so far as they fall outside the doctrine of jurisdictional fact, already explained. Relatively few findings of fact are jurisdictional, and the question now is how far the large residuum of findings by tribunals and other authorities is subject to judicial review. It must be remembered that the courts have a long-standing dislike of investigating questions of fact in judicial review proceedings,[12] even though the facilities for doing so have been improved.[13]

The 'no evidence' rule

Findings of fact are traditionally the domain where a deciding authority or tribunal is master in its own house. Provided only that it stays within its jurisdiction, its findings are in general exempt from review by the courts, which will in any case respect the decision of the body that saw and heard the witnesses or took evidence directly. Just as the courts look jealously on decisions by other bodies on matters of law, so they look indulgently on their decisions on matters of fact.

But the limit of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly.[14] It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.

[12] See above, p. 260.
[13] See below, p. 655.
[14] *R.* v. *Criminal Injuries Compensation Board* 1997 SLT 291.

'No evidence' does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding;[15] or where, in other words, no tribunal could reasonably reach that conclusion on that evidence.[16] This 'no evidence' principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires.[17] It also has some affinity with the substantial evidence rule of American law, which requires that findings be supported by substantial evidence on the record as a whole.[18] In the United States this rule has virtually eliminated the need to inquire whether facts are jurisdictional, since the same test is applied whether they are so or not. English law has not gone so far, since it retains the strict test for jurisdictional fact, but allows a margin of error for other findings which have evidential support.

The basis of review

It was held at one time that there could not be a 'no evidence' rule because it could not be forced into the mould of ultra vires. The locus classicus is the celebrated opinion given by Lord Sumner in a Privy Council case from Canada, where a firm had been convicted before a magistrate for selling liquor contrary to the local Liquor Act. The only evidence of the fact of sale was that of an *agent provocateur* of the police. Could the inferior court's decision be quashed as ultra vires (as opposed to being challenged on appeal) because they had no proper evidence before them? In rejecting the contention that 'want of evidence on which to convict is the same as want of jurisdiction to take evidence at all', Lord Sumner said:[19]

> This, clearly, is erroneous. A justice who convicts without evidence is doing something which he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. . . . To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong.

[15] *Allinson* v. *General Medical Council* [1894] 1 QB 750 at 760, 763; *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 QB 329 at 345.

[16] *R.* v. *Roberts* [1908] 1 KB 407 at 423.

[17] Below, p. 362.

[18] Administrative Procedure Act (USA, 1946), s. 10(e); *Universal Camera Corporation* v. *National Labor Relations Board*, 340 US 474 (1951); Schwartz and Wade, *Legal Control of Government*, 228. American administrative procedure facilitates this control by providing a full record of evidence. For the position in Canada see (1972) 37 *Sask LR* 48 (D. W. Elliott).

[19] *R.* v. *Nat Bell Liquors Ltd.* [1922] AC 128 at 151, described by Lord Denning MR as the darkest moment of the 'black-out of any development of administrative law': *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 253.

The principle was the same for administrative authorities and tribunals and was often stated by Lord Goddard CJ, both in approving a favourite quotation[20] about error within jurisdiction and also when he said:[21]

> If it is acting within its jurisdiction, it is now settled law that absence of evidence does not affect the jurisdiction of the tribunal to try the case, nor does a misdirection by the tribunal to itself in considering the evidence nor what might be held on appeal to be a wrong decision in point of law.

To these authorities can be added statements by Lord Reid and Lord Diplock that lack of evidence raises no question of jurisdiction.[22] And there is no dearth of similar judicial rulings.[23]

But a contrary current of opinion has been gathering force for many years. Lord Atkinson said in 1914 that 'an order made without any evidence to support it is in truth, in my view, made without jurisdiction'.[24] A 'no evidence' doctrine has become established in habeas corpus cases, where in principle the court should intervene on grounds of jurisdiction only.[25] Sometimes judges generalise as if that doctrine was of universal application.[26] Or they may hold that decisions unsupported by evidence are capricious or unreasonable,[27] or given upon wrong legal grounds,[28] and so ultra vires for other reasons. The House of Lords has held that an immigration officer, who has power to refuse leave to enter the country if satisfied of certain facts, is on 'normal principles' not at liberty to refuse it if there is no evidence to support his decision.[29] The House has similarly quashed a local

[20] From Halsbury's *Laws of England*, 3rd edn., xi. 62.

[21] *R.* v. *Ludlow* [1947] KB 634.

[22] *R.* v. *Governor of Brixton Prison ex p. Armah* [1968] AC 192 at 234; *R.* v. *Governor of Pentonville Prison ex p. Sotiriadis* [1975] AC 1 at 30.

[23] A notable instance is *R.* v. *Mahony* [1910] 2 IR 695, where the older law is very fully discussed by Gibson J.

[24] *Folkestone Cpn.* v. *Brockman* [1914] AC 338 at 367.

[25] For these see below, p. 598.

[26] As in *R.* v. *Board of Control ex p. Rutty* [1956] 2 QB 109 at 124; *R.* v. *Birmingham Compensation Appeal Tribunal* [1952] 2 All ER 100 (error of statutory interpretation represented as 'no evidence'); *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 WLR 1320 at 1327–8 (representing the case of *White and Collins* v. *Minister of Health*, discussed above, p. 255, as one of 'no evidence', whereas it was expressly decided on the ground of excess of jurisdiction); *R.* v. *Governor of Brixton Prison ex p. Armah* [1968] AC 192 at 257 (wide statement by Lord Upjohn); *R.* v. *Governor of Brixton Prison ex p. Ahsan* [1969] 2 QB 222.

[27] As suggested in *Osgood* v. *Nelson* (1872) LR 5 HL 636 and as held in *R.* v. *Attorney-General ex p. Imperial Chemical Industries Plc* (1986) 60 TC 1. See also *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* [1947] AC 109; *Argosy Co. Ltd.* v. *IRC* [1971] 1 WLR 514.

[28] Examples are *R.* v. *Flintshire CC Licensing Committee* [1957] 1 QB 350; *R.* v. *Australian Stevedoring Industry Board ex p. Melbourne Stevedoring Co.* (1953) 88 CLR 100 at 119–20; *Gavaghan* v. *Secretary of State for the Environment* (1989) 60 P & CR 515 (unsupported finding 'not within the powers of this Act').

[29] *R.* v. *Home Secretary ex p. Zamir* [1980] AC 930.

authority's determination that an immigrant from Bangladesh was 'intentionally homeless' when there was no evidence that the home which he was supposed to have left was ever available to him.[30] The Court of Appeal has quashed a decision of the Secretary of State for Transport when his decision letter stated that he was not satisfied on a number of matters without showing any basis of evidence for his conclusions.[31] In none of these cases was the legal basis of a 'no evidence' rule discussed: it was simply assumed to exist. In one of them Lord Denning MR put 'no evidence' at the head of a list of vitiating errors, saying:[32]

> the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a decision to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law.

This was followed by the first clear case in which a minister's order was quashed for 'no evidence'.[33]

Furthermore, the proposition scorned by Lord Sumner ('there is jurisdiction if the decision is right and none if it is wrong') is precisely what the House of Lords has adopted in the case of error of law.[34] If this is combined with the familiar rule that to find facts on no evidence is to err in law, a rule constantly applied in appeals, a simple basis for a no evidence rule emerges. The House of Lords has given it strong corroboration in quashing a decision of magistrates who committed a defendant for trial without any admissible evidence.[35] Although this decision was in a judicial rather than administrative context, the speech of Lord Cooke draws upon administrative law where the logic is identical.

The principles of natural justice may also be invoked, according to a series of opinions of Lord Diplock. In the first of these he indicated that the principles of natural justice require that a tribunal's decisions be based on some evidence of probative value.[36] Speaking in two cases for the Privy Council he held that a minister dealing with an application for registration of citizenship must act on

[30] *R.* v. *Hillingdon LBC ex p. Islam* [1983] 1 AC 688.

[31] *R.* v. *Secretary of State for Transport ex p. Cumbria CC* [1983] RTR 129; see similarly *R.* v. *Secretary of State for the Environment ex p. Knowsley BC*, The Times, 28 May 1991.

[32] *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 WLR 1320 at 1326.

[33] *Coleen Properties Ltd.* v. *Minister of Housing and Local Government* [1971] 1 WLR 433 (no evidence that purchase of adjacent land for clearance area was reasonably necessary).

[34] Above, p. 264.

[35] *R.* v. *Bedwellty JJ ex p. Williams* [1997] AC 225, relying on the *Anisminic* and *Page* cases (above, p. 266) as invalidating the committal for error of law.

[36] *R.* v. *Deputy Industrial Injuries Commissioner ex p. Moore* [1965] 1 QB 456. See also *Burwoods (Caterers) Ltd* v. *SS for Environment* [1972] Est. Gaz. Dig. 1007.

'evidential material of probative value' if his decision is to be valid,[37] and that the same rule applied, as a matter of natural justice, to a judge acting as a statutory royal commissioner.[38]

The 'no evidence' rule now established

Despite lack of any decision reviewing the old authorities against a 'no evidence' rule, it seems clear that this ground of judicial review is now firmly established. There have been so many sporadic references to it on this assumption, and it conforms so well to other developments in administrative law, that the older authorities to the contrary, impressive though they are, must now be consigned to the scrapheap of history. 'No evidence' thus takes its place as yet a further branch of the principle of ultra vires.

The time is ripe for this development as part of the judicial policy of preventing abuse of discretionary power. To find facts without evidence is itself an abuse of power and a source of injustice, and it ought to be within the scope of judicial review. This is recognised in other jurisdictions where the grounds of review have been codified by statute. In Australia the Administrative Decisions (Judicial Review) Act 1977 expressly authorises review on the ground that there was 'no evidence or other material' to justify the decision where some particular matter has to be established,[39] and a somewhat analogous provision has been enacted in Canada.[40]

Error of material fact

Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact',[41] or acting 'upon an incorrect basis of fact'.[42] In a case where the Secretary of State had power to give directions if he was satisfied that the local education authority were acting unreasonably, Lord Wilberforce, in explaining that such powers were to some extent subject to judicial review, said:[43]

[37] *A.-G.* v. *Ryan* [1980] AC 718. See also *Ong Ah Chuan* v. *Public Prosecutor* [1981] AC 648 at 671.

[38] *Mahon* v. *Air New Zealand Ltd.* [1984] AC 808, where this was a principal ground of decision.

[39] ss. 5, 6. See similarly the Administrative Justice Act 1980 of Barbados, s. 4.

[40] Federal Court Act 1971, s. 28(1). See also Law Reform Commission of Canada, Report No. 14 (1980), recommendation 4. 3.

[41] *Secretary of State for Education and Science* v. *Tameside MBC* [1977] AC 1014 at 1030 (Scarman LJ, giving examples). See [1990] *PL* 507 (T. H. Jones) and [2004] JR 36 (D. Blundell).

[42] At 1047 (Lord Wilberforce). See similarly *Laker Airways Ltd.* v. *Department of Trade* [1977] QB 643 at 706 (Lord Denning MR).

[43] The *Tameside* case (above) at 1047.

If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If those requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.

Lord Wilberforce approved a remark by Lord Denning MR in another case that the court could intervene if a minister 'plainly misdirects himself in fact or in law'.[44] Effect was given to these ideas when the court quashed a Secretary of State's decision owing to a mistake of fact in his inspector's report which said that a site had never been proposed as green belt when in fact it had been;[45] and when the Court of Appeal held that it could quash a local authority's decision which was 'flawed by an error of fact' as to the content of a judgment of the House of Lords.[46] Similarly in New Zealand it was held that a minister's decision was invalid for failure to take into account the true facts, a medical referee having misled him by an inadequate report.[47]

This ground of review has long been familiar in French law,[48] it has been adopted by statute in Australia,[49] and it is accepted by the European Court of Human Rights.[50] It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or

[44] *Secretary of State for Employment* v. *ASLEF* (No. 2) [1972] 2 QB 455 at 493, repeated in *Smith* v. *Inner London Education Authority* [1978] 1 All ER 411.

[45] *Hollis* v. *Secretary of State for the Environment* (1982) 47 P & CR 351. See similarly *Simpex (G. E.) Ltd.* v. *Secretary of State for the Environment* (1988) 57 P & CR 306, holding that a decision based on error of fact was ultra vires; *R.* v. *Legal Aid Committee No. 10 (East Midlands) ex p. McKenna* [1990] COD 358. But for a restrictive interpretation of Lord Wilberforce's words see *R.* v. *London Residuary Body ex p. Inner London Education Authority*, The Times, 24 July 1987.

[46] *R.* v. *Hertfordshire CC ex p. Cheung*, The Times, 4 April 1986 and Lexis (refusal to reconsider students' grant applications quashed). See similarly *R.* v. *Home Secretary ex p. Awuku*, The Times, 3 October 1987 (immigration officer's decision quashed for 'material errors of fact' and breach of natural justice); *R.* v. *Parliamentary Commissioner for Administration ex p. Balchin* [1997] COD 146. Contrast *Shetland Line (1984) Ltd.* v. *Secretary of State for Scotland* 1996 SLT 653 (error subsequently discovered: relief refused).

[47] *Daganayasi* v. *Minister of Immigration* [1980] 2 NZLR 130 (Cooke J, Richardson J preferring to express no opinion).

[48] CE 20 Jan. 1922, *Trépont*, established 'fait matériellement inexact' as a ground of review.

[49] Administrative Decisions (Judicial Review) Act 1977 (Cth), s. 5(3)(b), allowing judicial review where 'the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist'; similarly s. 6(3)(b). See *Singh* v. *Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4.

[50] *Vogt* v. *Germany* A-323 (1996) 21 EHRR 205, requiring 'an acceptable assessment of the relevant facts'.

acting upon a misapprehension of law.[51] Quoting this passage, the House of Lords has accepted the doctrine but has not as yet applied it.[52] It was emphatically restated, though again not applied, by Lord Slynn in the *Alconbury* case,[53] and has been fully accepted, with both judicial and academic support, by the Court of Appeal.[54] It now seems clear that it has arrived, and that it should consign much of the old law about jurisdictional fact etc., to well-deserved oblivion.

Wrongful rejection of evidence

It was an established rule that if a tribunal wrongly refused to receive evidence on the ground that it was irrelevant or inadmissible, this error did not go to jurisdiction.[55] But there was jurisdictional error if the reason for rejecting the evidence was a mistaken belief by the tribunal that it had no business to investigate the question at all. This was the case where a magistrate refused to hear evidence, in defence to a charge of failing to pay the apportioned cost of paving a street, to the effect that the apportionment by the board of works included improper items.[56] He was thus improperly refusing to allow jurisdictional facts to be disputed. Going somewhat further, the court quashed the refusal of an inspector, conducting an inquiry into a compulsory purchase order, to hear relevant evidence relating to the owner's conduct as landlord;[57] the court emphasised that the inspector's error was fundamental to the conduct and utility of the inquiry as distinct from a mere error of judgment. In Ontario a labour board's order was quashed where it had refused to receive evidence about resignations from a trade union where the question was whether a majority of employees were members in good standing.[58] In such cases the tribunal can be ordered to determine the question properly.[59]

[51] See above, p. 275.

[52] *R.* v. *Criminal Injuries Compensation Board ex p. A* [1999] 2 AC 330, preferring to decide the case on grounds of natural justice.

[53] *R. (Alconbury Development Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para. 53.

[54] *E.* v. *Home Secretary* [2004] EWCA Civ. 49 (2 February) (Phillips MR, Mantell and Carnwath LJJ). But the Court of Appeal was not referred to *Adan* v. *Newham LBC* [2001] EWCA Civ. 1916; [2002] 1 WLR 2120 (CA) where the jurisdiction had been doubted (Brooke LJ and Steel J; Hale LJ willing to extend *ex p. A*). For further authority supporting material error of fact as ground of review, see *R. (Marsh)* v. *Lincoln District Magistrates' Court* [2003] EWHC 956 (Admin).

[55] Subject to the new rule for error of law (above, p. 264) and to the possibility that self-misdirection as to law may be equivalent to declining jurisdiction: *R.* v. *Wells Street Magistrate ex p. Westminster CC* [1986] 1 WLR 1046.

[56] *R.* v. *Marsham* [1892] 1 QB 371.

[57] *R.* v. *Secretary of State for the Environment ex p. Kensington and Chelsea RBC*, The Times, 30 January 1987.

[58] *Toronto Newspaper Guild* v. *Globe Printing Co.* [1953] 3 DLR 561.

[59] As in *R.* v. *Marsham* (above) (mandamus).

Whether this 'rather nice'[60] distinction still survives must be doubtful, in the light of the new doctrine that all error of law is ultra vires.[61] It seems most probable that wrongful rejection of evidence, and also wrongful admission of evidence, will be subject to judicial review under the new doctrine.

Discovery of fresh evidence

Where some tribunal or authority has power to decide questions of fact, and no power to reopen its own decisions,[62] its decision cannot be reviewed by the High Court merely on the ground that fresh evidence, which might alter the decision, has since been discovered. This is because the decision is within jurisdiction and there is no basis on which the court can intervene. The remedy of certiorari will therefore not lie in such a case.[63] But, for the same reason, there is an important exception: if the fresh evidence relates to a fact which goes to jurisdiction, so that it may be possible to show subsequently that the decision was without jurisdiction and void, this evidence may be used in later proceedings to invalidate the decision, as explained in the context of res judicata.[64] This is a necessary consequence of the doctrine of jurisdictional fact.[65]

Where it is later discovered that an order was outside jurisdiction, the court has inherent power to quash consequential orders made on the footing that the original order was valid, even though the later orders, taken by themselves, were within jurisdiction.[66]

SUMMARY OF RULES

Jurisdiction over fact and law: summary

At the end of a chapter which is top-heavy with obsolescent material it may be useful to summarise the position as shortly as possible. The overall picture is of an

[60] *R.* v. *Marsham* (above) at 378 (Lord Esher MR).

[61] Above, p. 264.

[62] See above, p. 229.

[63] *R.* v. *West Sussex Quarter Sessions ex p. Johnson Trust Ltd.* [1974] QB 24 (Lord Denning MR dissenting); and see *R.* v. *Home Secretary ex p. Momin Ali* [1984] 1 WLR 663; *Shetland Line (1984) Ltd.* v. *Secretary of State for Scotland* 1996 SLT 653.

[64] See above, p. 245, and *R.* v. *Pugh (Judge)* [1951] 2 KB 623; *R.* v. *Secretary of State for the Environment ex p. Powis* [1981] 1 WLR 584. Fraud or perjury by a party may also be proved by fresh evidence; ibid.

[65] See above, p. 252.

[66] *R.* v. *Middleton, Bromley and Bexley Justices ex p. Collins* [1970] 1 QB 216 (pleas of guilty on mistaken assumption that earlier conviction was valid; later conviction quashed).

expanding system struggling to free itself from the trammels of classical doctrines laid down in the past. It is not safe to say that the classical doctrines are wholly obsolete and that the broad and simple principles of review, which clearly now commend themselves to the judiciary, will entirely supplant them. A summary can therefore only state the long-established rules together with the simpler and broader rules which have now superseded them, much for the benefit of the law. Together they are as follows.

Errors of fact

Old rule: The court would quash only if the erroneous fact was jurisdictional.[67]
New rule: The court will quash if an erroneous and decisive fact was

(a) jurisdictional;
(b) found on the basis of no evidence;[68] or
(c) wrong, misunderstood or ignored.[69]

Errors of law

Old rule: The court would quash only if the error was

(a) jurisdictional;[70] or
(b) on the face of the record.[71]

New rule: The court will quash for any decisive error, because all errors of law are now jurisdictional.[72]

[67] Above, p. 252.
[68] Above, p. 276.
[69] Above, p. 276.
[70] Above, p. 253.
[71] Above, p. 268.
[72] Above, p. 264.

9

PROBLEMS OF INVALIDITY

COLLATERAL PROCEEDINGS

Collateral challenges allowed

As will be stressed later in this chapter, the court will treat an administrative act or order as invalid only if the right remedy is sought by the right person in the right proceedings. The question now is what are the right proceedings in which the validity of the act or order can be challenged. It may be challenged directly, as in proceedings for certiorari to quash it or for a declaration that it is unlawful. But it may also be challenged collaterally, as for example by way of defence to a criminal charge, or by way of defence to a demand for some payment.[1]

There is some difficulty over terminology, since the House of Lords has held, in a case of the last-mentioned kind,[2] that an issue is not truly collateral if it is the central issue which has to be decided. But, as the examples in this section illustrate, it is not the central character of the issue which matters (for any decisive issue is necessarily central) but the nature of the proceedings in which the issue is raised. In the following discussion 'collateral' will be used in its customary sense, as applying to challenges made in proceedings which are not themselves designed to impeach the validity of some administrative act or order.

As a general rule, the court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Where some act or order is invalid or void, the consequences are followed out logically: consequential acts are also invalid. An illustration is the House of Lords' decision in the case, mentioned later, where a man prosecuted for carnal knowledge of a detained mental defective was able to plead that the detention order under which the defective was held had not been validly made: the detention order was therefore a nullity and an essential element of the offence was lacking.[3] Many comparable examples are to be found throughout the field of judicial review. A firm may resist a demand for purchase tax by showing that the assessment is made under an invalid regulation,[4] and a ratepayer

[1] On collateral challenge see Rubinstein, *Jurisdiction and Illegality*, ch. 3. For a wide-ranging discussion extending to human rights and EU law see [1992] *CLJ* 308 (C. Emery).

[2] The *Wandsworth* case (below).

[3] *Director of Public Prosecutions* v. *Head* [1959] AC 83 (below, p. 311); cf. *Dillon* v. *R.* [1982] AC 484.

[4] *Commissioners of Customs & Excise* v. *Cure and Deeley Ltd.* [1962] 1 QB 340; below, p. 861. See likewise *R.* v. *Commissioners of Customs and Excise ex p. Hedges and Butler Ltd.* [1986] 1 All ER 164.

may similarly resist a rate demand.[5] A local authority's tenant, sued for increased rent, may contend in his defence that the increase was ultra vires and void.[6] Gipsies occupying a local authority's land may resist proceedings for their ejection on the ground that the decision to eject them was unreasonable.[7] The validity of regulations about social security benefit may be disputed before a social security commissioner[8] and the validity of regulations about the registration of land charges may be disputed in proceedings for the recovery of compensation.[9] A local authority may plead the invalidity of its own repairs notices in resisting tenants' applications for grants to meet the cost of compliance.[10] The invalidity of a local planning authority's breach of condition notice served out of time may be pleaded in defence to a criminal charge of disobedience to it,[11] and so may the invalidity of a byelaw, in whatever court the plea is made.[12] An appeal against convictions for bribery before a statutory tribunal may succeed on the ground that the members of the tribunal were invalidly appointed, so that the tribunal was without jurisdiction.[13] In particular, any questions affecting the jurisdiction of a tribunal can normally be raised in collateral proceedings, for the reasons already explained.[14] The writ of habeas corpus allows a prisoner to raise all questions capable of affecting the validity of his detention, and in most of its applications can be considered a means of collateral attack.[15]

Two modern decisions of the House of Lords have emphatically reaffirmed the principle, laying stress on the citizen's right, under the rule of law, to defend himself in all respects as a matter of right and not (as in judicial review) as a matter of discretion. In the first case a landowner prosecuted for failure to comply with an enforcement notice served by the local planning authority pleaded that the notice

[5] *Daymond* v. *Plymouth City Council* [1976] AC 609.

[6] *Wandsworth LBC* v. *Winder* [1985] AC 461, where the House of Lords rejected an argument based on *O'Reilly* v. *Mackman* [1983] 2 AC 237 as to which see below, p. 663, and see similarly *R.* v. *Jenner* [1983] 1 WLR 873; *Pawlowski* v. *Dunnington* (1999) 11 Admin. LR 565.

[7] *West Glamorgan CC* v. *Rafferty* [1987] 1 WLR 457. Contrast *Waverley BC* v. *Hilden* [1981] 1 WLR 246.

[8] *Chief Adjudication Officer* v. *Foster* [1993] AC 754.

[9] *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 QB 223; below, p. 761.

[10] *R.* v. *Lambeth BC ex p. Clayhope Properties Ltd.* [1988] QB 563.

[11] *Dilieto* v. *Ealing LBC* [1998] 3 WLR 1403. As to enforcement notices see *R.* v. *Wicks* [1998] AC 92, discussed below.

[12] *Boddington* v. *British Transport Police* [1999] 2 AC 143, discussed below; *R.* v. *Reading Crown Court ex p. Hutchinson* [1988] QB 384; *Staden* v. *Tarjanyi* (1980) 78 LGR 614; *Director of Public Prosecutions* v. *Hutchinson* (below).

[13] *Bribery Commissioner* v. *Ranasinghe* [1965] AC 172; compare *Ranaweera* v. *Ramachandran* [1970] AC 962 (Lord Diplock, dissenting). But no mention was made of the doctrine of officers and judges de facto: see below, p. 287.

[14] Above, p. 254.

[15] As in *R.* v. *Board of Control ex p. Rutty* [1956] 2 QB 109; *R.* v. *Brixton Prison Governor ex p. Ahsan* [1969] 2 QB 22. For these cases see below, p. 594. Rubinstein, *Jurisdiction and Illegality*, 107.

was invalid because it was motivated by bad faith and immaterial considerations. It was held that magistrates' courts were by long usage entitled to allow collateral pleas in criminal cases, so that the validity of any relevant act or order could be challenged before them. In this case, however, there was found to be a contrary intention in the legislation, so that it belongs to the group of exceptional cases discussed below.[16] In the second case, where the defendant was fined for smoking in a railway carriage contrary to railway byelaws, and pleaded that the byelaws were excessively applied, the House of Lords categorically upheld his right to make that plea, though in fact they dismissed it on its merits.[17] Their reasoning, furthermore, applies as much to civil as to criminal cases.[18] They overruled an earlier decision, criticised in the previous edition of this book, which had distinguished between substantive and procedural invalidity and had held that the latter could not be pleaded in defence to a criminal charge but could be challenged only by way of judicial review.[19] In this leading case there are many important observations on the rule of law, ultra vires, 'void or voidable', and the consequences of illegal acts and orders, which are noted elsewhere.[20]

This doctrine cannot be carried to the point of dispensing altogether with some legal requirement such as a licence. If the licensing authority refuses a licence invalidly, for example unreasonably or in breach of natural justice, this cannot be pleaded in defence to a charge of acting without a licence.[21] The application for the licence will remain undetermined and there will be a duty to determine it validly. But no collateral plea can supply a licence which does not exist.

Conversely, but less reasonably, a person may be convicted for selling liquor where his licence is void because of some legal defect.[22] This again illustrates the error of regarding nullity as an absolute rather than a relative concept.[23] The correct attitude would probably be to treat the defective licence, at least if regular on its face, as a licence de facto, on the same principle as with officers de facto, mentioned below. In some situations the courts have sensibly adopted this type of solution, refraining from pushing the doctrine of nullity to extremes. A

[16] *R.* v. *Wicks* [1998] AC 92.

[17] *Boddington* v. *British Transport Police* [1999] 2 AC 143. The defence was that power to 'regulate' smoking did not extend to banning it entirely (see below, p. 434). The case is discussed in [1998] *PL* 364 (Forsyth).

[18] Lord Irvine LC argues (at 159) from the civil case of *Wandsworth LBC* v. *Winder* (above) to criminal cases which are a fortiori, as also does Lord Steyn (at 172).

[19] *Bugg* v. *Director of Public Prosecutions* [1993] QB 473.

[20] See below, p. 300.

[21] *Quietlynn Ltd.* v. *Plymouth CC* [1988] 1 QB 114, which involved such a situation (operation of sex shops without licence), was however decided on contrary intention in the statute, which made a formal decision conclusive: see *R.* v. *Wicks* (above) at 117 and *Boddington* v. *British Transport Police* (above) at 160. In fact no invalidity was found.

[22] *R.* v. *Downes* (1790) 3 TR 560 (licence granted in private instead of public session); *Pearson* v. *Broadbent* (1870) 36 JP 485 (licence granted under repealed section of Act). See Rubinstein (as above), 43.

[23] See below, p. 300.

case in point is that of officers executing warrants and other orders, who are in general protected if there is no evident invalidity on the face of the warrant or order.[24]

A comparable distinction was made where actions for damages were brought against magistrates and judges of inferior courts on account of orders made by them outside their jurisdiction.[25] If the order was bad on its face the court would treat it as invalid. But if the jurisdictional defect was not visible on the face, the court would require the order first to be quashed in separate proceedings before the action for damages could be entertained.[26] Collateral attack was thus allowed in the first case but not in the second.

Collateral challenges not allowed

There are a number of situations in which the court will not permit an order to be challenged in collateral proceedings. The most obvious is where such proceedings are expressly excluded by statute.[27] Other cases flow partly from the familiar distinctions based on jurisdiction, but partly also they are exceptions to the general rule stated above, made for reasons of convenience.

In some cases it is held that a specific statutory remedy, such as a right of appeal, is the only remedy available. No challenge to the validity of the order can therefore be made in any proceedings other than those prescribed. This class of cases is discussed in connection with remedies.[28] The House of Lords has supplied a strong example in holding that defences based upon bad faith and immaterial considerations cannot be pleaded in a prosecution for disobedience to a local planning authority's enforcement notice requiring the demolition of part of a building.[29] The legislation had its own system for appeals against enforcement notices and it had progressively restricted the issues which a defendant was permitted to raise otherwise than on appeal. This regime, designed to make enforcement notices speedily and conclusively effective, would be disrupted if collateral pleas were allowed. An earlier example was where a vestry served a notice requiring a householder to provide a water closet with proper doors and coverings under an Act which gave a right of appeal to the County Council. On the words of the Act it was

[24] *Shergold* v. *Holloway* (1735) 2 Str. 1002; *Andrews* v. *Marris* (1841) 1 QB 3; *Demer* v. *Cook* (1903) 88 LT 629. See also Constables Protection Act 1751; *Horsfield* v. *Brown* [1932] 1 KB 355; *Sirros* v. *Moore* [1975] QB 118; *Maharaj* v. *A.-G. of Trinidad and Tobago* (No. 2) [1979] AC 385 at 397.

[25] For their liability see below, p. 788.

[26] *O'Connor* v. *Isaacs* [1956] 2 QB 288 at 304 and cases there cited by Diplock J.

[27] As in *Manchester CC* v. *Cochrane* [1999] 1 WLR 809.

[28] Below, p. 727.

[29] *R.* v. *Wicks* [1998] AC 92, discussed in Forsyth and Hare (eds.), *The Golden Metwand*, 148 (Forsyth). The decision was distinguished in *Dilieto* v. *Ealing LBC* (above, p. 282) on the ground that there was no comparable system of appeals and the issue was one of law only.

held that the statutory appeal was the only remedy and that in enforcement proceedings before a magistrate the householder could not contest the validity of the notice.[30]

There may also be cases where, although there is no special statutory remedy, it would be contrary to the scheme of the Act to allow the validity of an order to be disputed collaterally in enforcement proceedings. Such a case was where the mother of a child with scarlet fever refused to obey a magistrate's order for the removal of the child to hospital: when prosecuted for obstructing execution of the order the mother was not allowed to contest its validity, since the intention of the Act was that there should be summary powers for dealing urgently with infectious diseases, without the usual right to notice and hearing; the removal order was therefore to be obeyed, whether right or wrong.[31] The court indicated, however, that its validity might have been challenged directly by certiorari or habeas corpus after the removal.

The findings of criminal convictions may not be attacked collaterally in civil proceedings or before disciplinary tribunals unless fresh evidence of sufficient weight has come to light since the conviction.[32]

The sparseness of these examples, contrasted with the abundance of successful collateral pleas, illustrates the operation of the rule of law in a highly technical area. As Lord Irvine LC has said in exactly this context:[33]

> it is well recognised to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so.

Officers and judges de facto

In one class of cases there is a long-standing doctrine that collateral challenge is not to be allowed: where there is some unknown flaw in the appointment or authority of some officer or judge. The acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power

[30] *Vestry of St James and St John, Clerkenwell* v. *Feary* (1890) 24 QBD 703.

[31] *R.* v. *Davey* [1899] 2 QB 301. Compare *Children's Aid Society of Metropolitan Toronto* v. *Lyttle* (1973) 34 DLR (3d) 127 (collateral challenge to wardship order by way of adoption proceedings not allowed). For discussion in Australian context see [1998] *Public Law Review* 237 (Aronson).

[32] *Hunter* v. *Chief Constable of the West Midlands Police* [1982] AC 529; *Smith* v. *Linskill*, [1996] 1 WLR 763; *Re a Solicitor*, The Times, 18 March 1996.

[33] *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 161. See also at 173 (Lord Steyn).

at all.[34] The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so.[34a] In such a case he is called an officer or judge de facto, as opposed to an officer or judge de jure.

The House of Lords applied this principle to an administrative authority so as to uphold a rate levied by a vestry although a number of the vestrymen had not been duly elected. Lord Truro LC described them as vestrymen de facto and said:[35]

> You will at once see to what it would lead if the validity of their acts, when in office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might lead also to persons, instead of resorting to ordinary legal remedies to set right anything done by the officers, taking the law into their own hands.

In another administrative case the court upheld a distress levied by a collector of land tax who did not have the residential qualification required for his appointment.[36] The same doctrine has been applied to invalidly appointed judges and magistrates; a distress warrant was held valid although granted by a magistrate who had not taken the necessary oath;[37] and when the appointment of a judge of the Supreme Court of New Zealand was found to be void,[38] that did not avail a prisoner whom he had sentenced at the time when he was supposed to be a judge.[39] Similarly, in the days when judges' appointments were automatically determined by the demise of the Crown, their judgments and acts remained valid until news of the monarch's death in fact arrived.[40]

The decisions indicate that the doctrine will apply only where the office-holder has 'colourable authority' or some colour of title to the appointment. Where the registrar of the Bedford Level company employed a deputy to register land titles within the Level, it was held that registrations effected by the deputy after the death of the registrar was known were invalid: the deputy's authority expired on the death of his principal, and once the death was generally known the deputy

[34] For discussion see Rubinstein, *Jurisdiction and Illegality*, 205; Owen Dixon (later Sir O. Dixon CJ), *Res Judicatae* (Melbourne, 1938), i. 285; (1955) 71 *LQR* 100 at 106 (R. B. Cooke); [1978] *PL* 42 (P. Mirfield). There are many American decisions, notably *State* v. *Carroll* (1871) 38 Conn. 449, 9 Am. 409, where early authorities are reviewed. For an example from Roman law see [1967] *Irish Jurist* 269 (A. M. Honoré), citing a case where a slave was elected praetor.

[34a] See *Fawdry & C.* v. *Murfitt (Lord Chancellor intervening)* [2002] 3 WLR 1354 (CA) approving the previous two sentences (at 1361; Hale LJ).

[35] *Scadding* v. *Lorant* (1851) 3 HLC 418 at 447.

[36] *Waterloo Bridge Co.* v. *Cull* (1859) 1 E & E 245.

[37] *Margate Pier Co.* v. *Hannam* (1819) 3 B & Ald. 266.

[38] See *Buckley* v. *Edwards* [1892] AC 387 (appointment invalid since no salary appropriated).

[39] *Re Aldridge* (1893) 15 NZLR 361. This case contains a learned review of the law, except that it makes no mention of *Scadding* v. *Lorant* (above).

[40] *Crew* v. *Vernon* (1627) Cro. Car. 97.

could not be taken to have any colour of authority to act. Lord Ellenborough CJ said:[41]

> An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.

So a divorce granted in 1970 by a Rhodesian judge, appointed under the unconstitutional Rhodesian regime established in 1965, was held to be invalid in England, since it was notorious in both countries that the Rhodesian regime had been declared unlawful by Act of Parliament and Order in Council;[42] accordingly the judge had no colour of title to his office in the eyes of English law. The basis of the de facto principle is that the public must be able to rely on the acts of judges and officers so long as there is no reason to suppose that they are not validly appointed. In another case a circuit judge sat in the Queen's Bench Division of the High Court in the wrongful belief that in the particular circumstances he was authorised.[43] His decision was upheld under the de facto doctrine. But the Court of Appeal made it clear the doctrine did not apply to an usurper, i.e. 'someone who knows, even if the world knows not, that he is not qualified to hold the office he is exercising.'[44]

The de facto doctrine has a long history and has been applied to a wide variety of officers. It was even said to have applied to the monarchy, so that it might validate acts done in the names of kings whose title to the throne was considered illegitimate and who were kings 'in fact and not in law'.[45] At the other end of the scale the doctrine was invoked from an early date to uphold copyhold titles enrolled by stewards of manors who were not properly appointed.[46] Offices were long considered to be a form of property,[47] and wrongful possession of an office may be compared with wrongful possession of land: just as a wrongful occupier of land may validly exercise an owner's powers (to convey, sue for trespass etc.)

[41] *R.* v. *Bedford Level Corporation* (1805) 56 East 356 at 368.

[42] *Adams* v. *Adams* [1971] P. 188. For criticism see Lord Denning MR (dissenting) in *Re James* [1977] Ch. 41 at 65. The law was changed by SI 1972 No. 1718. See also *Balmain Association Inc.* v. *Planning Administrator* (1991) 25 NSWLR 615.

[43] *Coppard* v. *Customs and Excise Commissioners* [2003] 2 WLR 1618 (CA). See also the scholarly treatment of the de facto doctrine in the similar case of *Fawdry & Co* v. *Murfitt (Lord Chancellor intervening)* [2002] 3 WLR 1354 (CA) where, in the event, the judge was held authorised.

[44] Sedley LJ (para. 17). With usurpers excluded, the court held that the operation of the doctrine did not breach the requirement of Article 6(1) of the European Convention that 'civil rights and obligations' should be determined by a tribunal 'established by law'. See above, p. 448.

[45] These words ('en fait et nient en droit') are from the Act of 1461 (1 Edw. IV, cap. I) which on the accession of Edward IV removed doubts as to the judgments given in the reigns of Henry IV, Henry V and Henry VI, then considered usurpers. This Act was said to be declaratory of the common law: see *Re Aldridge* (above) at 369; but this was doubted in *Adams* v. *Adams* (above) at 213. See [1967] *CLJ* 214 (A. M. Honoré); [1972B] *CLJ* at 150 (D. E. C. Yale).

[46] See *Knowles* v. *Luce* (1580) Moore (KB) 109 at 112; *Parker* v. *Kett* (1701) 1 Ld. Raym. 658.

[47] See (1945) 61 *LQR* 240 at 249 (D. W. Logan).

against all but the true owner, merely on the strength of the fact of possession,[48] so the wrongful occupier of an office may validly exercise its powers as against members of the public merely on the strength of his authority de facto. Both titles to land and unlawful administrative acts are subject to a similar principle of relativity.[49] In many legal situations it is a mistake to suppose that the consequences of invalidity should be worked out with rigid logic and without regard to facts. The de facto doctrine has even been applied to invalidly enacted legislation.[50]

In a number of reported cases the possibility of authority de facto does not seem to have been argued, for example where the Privy Council set aside penalties for bribery imposed by the Bribery Commission in Ceylon because the commissioners had not been appointed by the proper body,[51] and where the High Court declared a trial void because the deputy recorded was a solicitor and not a barrister as required by statute.[52]

PARTIAL INVALIDITY

Severance of good from bad

An administrative act may be partially good and partially bad. It often happens that a tribunal or authority makes a proper order but adds some direction or condition which is beyond its powers. If the bad can be cleanly severed from the good, the court will quash the bad part only and leave the good standing. One example was where a licensing authority allowed an applicant's appeal but wrongly ordered him to pay costs, which it had no power to do; the court quashed only the order as to costs.[53] Another was where a disciplinary board validly acquitted a public servant on some charges but invalidly convicted him on others.[54] Another was where the Home Secretary's 'tariff policy' for fixing the minimum term of imprisonment for life sentence prisoners contained an unlawful power to increase the term.[55] The same principle applies to orders of courts of law, as where an

[48] Megarry and Wade, *Real Property*, 6th edn., 87. The analogy was observed by Manwood CB in *Knowles* v. *Luce* (above) and *Leak* v. *Hall* (1597) Cro. Eliz. 533 (customs officer de facto), and by Sir Owen Dixon in *Res Judicatae* (1938) at 288.

[49] See below, p. 301; as to title to land, Megarry and Wade (as above).

[50] *Manitoba Language Rights Case* [1985] 1 SCR 721, upholding temporarily (until proper re-enactment) nearly a century of legislation not duly enacted in both English and French and citing similar solutions in other countries. See [1989] *PL* at 37 (S. Sedley).

[51] *Bribery Commissioner* v. *Ranasinghe* [1965] AC 172; above, p. 282.

[52] *R.* v. *Cronin* (1940) 27 Cr. App. R. 179. But here there may have been no 'colourable authority'. Contrast *Re James* [1977] Ch. 41 at 66; *Campbell* v. *Wallsend Engineering Co.* [1978] ICR 1015 and *Fawdry & Co.* v. *Murfitt* (*Cronin* of 'doubtful authority', para. 57 (Ward LJ)).

[53] *R.* v. *Bournemouth Licensing Justices ex p. Maggs* [1963] 1 WLR 320.

[54] *Bowman* v. *Stace and State Services Commission* [1972] NZLR 78.

[55] *R.* v. *Home Secretary ex p. Pierson* [1998] AC 539 at 592 (Lord Steyn).

unauthorised order for disqualification or forfeiture is added to a valid conviction.[56] It also seems possible that a single order may be good against some persons and bad against others. In one case, where a training board was under a mandatory duty to consult certain trade organisations and trade unions, the order was held to be good as against those that had been consulted and bad against those that had not been.[57] In this case the remedy was necessarily a declaratory judgment.

Where an order is not divisible into component parts but is a single whole the court may decline to sever the bad from the good, as it did where the Secretary of State for Transport miscalculated the sum which he ordered the Greater London Council to pay to London Regional Transport and unlawfully overcharged them by some £10 m.[58] But there is no 'blue pencil rule' requiring the bad part of the order to be identifiable in the order itself. Thus a local authority's order which appropriated land for planning purposes, but which included a small plot which was outside its powers, was held to be severable and valid as regards the remainder, even though it treated all the land as a single area.[59] These cases depend not upon rigid rules but upon the balance of advantage as perceived by the court.

It may be no easier to draw the line where the authority is empowered to demand information and demands more than is permitted. In the well-known case of *Dyson* v. *Attorney-General*,[60] where the Act required the taxpayer to make a return under penalty, it was held that the tax commissioners' demand was wholly invalid where they included an unauthorised question in the form of return which they required. This was because the penalties of the Act applied to a return which was one and indivisible and which could not be split into good and bad parts.[61] But where the power is to demand such information as is thought necessary or as may be required for some purpose, a demand which is partly within the power and partly in excess of it may be severed, so that it is valid to the extent that it falls within the Act and no further.[62] The mere inclusion of an unauthorised item will not therefore exonerate the recipient. But 'it may well be that if the excess is so entwined with the valid as to be separable from it only with difficulty, then the whole of the requirement will be bad: the subject ought not to be required to perform delicate feats of surgery upon what is in substance a single requirement.'[63]

The court may be particularly disinclined to perform feats of surgery where an invalid condition is one of the terms on which a discretionary power is exercised. If

[56] e.g. *R.* v. *Llandrindod Wells Justices ex p. Gibson* [1968] 1 WLR 598.

[57] *Agricultural, Horticultural and Forestry Industry Training Board* v. *Aylesbury Mushrooms Ltd.* [1972] 1 WLR 190. On this and other such cases see below, p. 887.

[58] *R.* v. *Secretary of State for Transport ex p. Greater London Council* [1986] QB 556, containing an extensive review of authorities by McNeill J, who quashed the whole order.

[59] *Thames Water Authority* v. *Elmbridge BC* [1983] QB 570.

[60] [1912] 1 Ch. 158; below, p. 570.

[61] See Farwell LJ at p. 171.

[62] *Potato Marketing Board* v. *Merricks* [1958] 2 QB 316; *Royal Bank of Canada* v. *IRC* [1972] Ch. 665.

[63] Megarry J in the *Royal Bank of Canada* case, above.

an invalid condition is attached to a licence or to planning permission, the permission without the condition may be such as the licensing authority would not have been willing to grant on grounds of public interest. The right course for the court is then to quash the whole permission, so that a fresh application may be made. An example is where a local authority, in granting a licence for open-air rock concerts, attached an invalid condition requiring the promoter to reimburse the cost of policing them. Since the court regarded the condition as an essential part of the permission, it quashed the whole licence.[64] The same was done in two planning cases, described elsewhere, where the permission was made subject to conditions which went beyond the proper scope of planning law.[65] The House of Lords approved this practice in a later case in which they held, though by a narrow majority, that they could not sever a planning condition requiring that the permission should lapse after three years unless in the meantime detailed plans were approved by the planning authority.[66] Lord Morris then said:[67]

> There might be cases where permission is granted and where some conditions, perhaps unimportant or perhaps incidental, are merely superimposed. In such cases if the conditions are held to be void the permission might be held to endure, just as a tree might survive with one or two of its branches pruned or lopped off. It will be otherwise if some condition is seen to be a part, so to speak, of the structure of the permission so that if the condition is hewn away the permission falls away with it.

Planning conditions do not all necessarily fall into the latter class. Conditions improperly restricting the 'existing use rights' of owners have been treated as severable;[68] so have conditions which imposed rent control and other excessive restrictions on a caravan site;[69] so has a condition requiring a developer to provide small shops in addition to a supermarket;[70] and so has a condition requiring any dispute about the observance of conditions to be referred to a consultant for conclusive determination.[71] A compulsory purchase order was severed where it wrongly included property which was in good condition and

[64] *R.* v. *North Hertfordshire DC ex p. Cobbold* [1985] 3 All ER 486; see likewise *R.* v. *Inner London Crown Court ex p. Sitki*, The Times, 26 October 1993.

[65] *Hall & Co. Ltd.* v. *Shoreham-by-Sea UDC* [1964] 1 WLR 240 (below, p. 405); *R.* v. *Hillingdon LBC ex p. Royco Homes Ltd.* [1974] QB 720 (below, p. 405). See similarly *British Airports Authority* v. *Secretary of State for Scotland* 1979 SLT 197.

[66] *Kingsway Investments (Kent) Ltd.* v. *Kent CC* [1971] AC 72 (the condition was in fact held valid). See similarly *Newbury District Council* v. *Secretary of State for the Environment* [1981] AC 578.

[67] At 102.

[68] *Hartnell* v. *Minister of Housing and Local Government* [1965] AC 1134 (severability assumed without discussion); *Allnat London Properties Ltd.* v. *Middlesex CC* (1964) 62 LGR 304.

[69] *Mixnam's Properties Ltd.* v. *Chertsey UDC* [1965] AC 735; below, p. 404. Here also severability was assumed without discussion.

[70] *R.* v. *St Edmundsbury BC ex p. Investors in Industry Commercial Properties Ltd.* [1985] 1 WLR 1168.

[71] *Turner* v. *Allison* [1971] NZLR 833.

which was not reasonably necessary for the development of the adjacent clearance area.[72]

Statutory rules and regulations may be partially invalid and raise the same problems as those considered in this section. That subject is discussed later,[73] but both sections should be read together.

STANDARD AND BURDEN OF PROOF

The standard of proof

Nearly all the cases which concern administrative law are civil, as opposed to criminal, proceedings. The standard of proof of facts, accordingly, is the civil standard, based on the balance of probabilities, as contrasted with the criminal standard which requires proof beyond reasonable doubt. Even where, as sometimes in disciplinary proceedings, the language of the Act or regulations has a criminal flavour, speaking of 'offences', 'charges' and 'punishments', the standard of proof remains the civil standard.[74]

But the civil standard is flexible, so that the degree of probability required is proportionate to the nature and gravity of the issue. Where personal liberty is at stake, for example, the court will require a high degree of probability before it will be satisfied as to the facts justifying detention;[75] and the requirement will not be much lower in matters affecting livelihood and professional reputation, or where there is a charge of fraud or moral turpitude.[76] Lord Scarman has indeed said that the choice between the two standards is largely a matter of words, asking how, if a court has to be satisfied of some crucial fact, it can entertain a reasonable doubt.[77]

Disciplinary offences in prisons are evidently treated as criminal, so that the criminal standard applies.[78]

[72] *Colen Properties Ltd.* v. *Minister of Housing and Local Government* [1971] 1 WLR 433.

[73] Below, p. 887.

[74] *R.* v. *Hampshire CC ex p. Ellerton* [1985] 1 WLR 749 (disciplinary proceedings against fire officer).

[75] *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74; and see *Eshugbayi Eleko* v. *Government of Nigeria* [1931] AC 662.

[76] *Bhandari* v. *Advocates Committee* [1956] 1 WLR 1442; *R.* v. *Milk Marketing Board ex p. Austin*, The Times, 21 March 1983; and see *R.* v. *South Glamorgan Health Authority ex p. Phillips*, The Times, 21 November 1986 (tribunal's rules specified criminal standard).

[77] [1984] AC at 112, 113.

[78] *R.* v. *Home Secretary ex p. Tarrant* [1985] QB 251 at 285.

The burden of proof

Where the validity of an administrative act or order is attacked, the incidence of the burden of proof may vary with the circumstances. The burden of proof naturally lies in the first instance upon the plaintiff or complainant. Whether he can transfer it to the defendant public authority depends upon the nature of the act.

If the act is one which in the absence of statutory power would be a trespass or other wrongful injury, the plaintiff has only to prove the facts which would constitute the wrong and the burden of proof then passes to the public authority, which has to show justification. Thus a government official seizing a man's goods bears the onus of proof that he had power to do so.[79] A highway authority which removes a supposed obstruction can be put to proof of its power, and if it cannot show this it will be liable in damages for trespass.[80] A local authority empowered to eject a tenant for housing purposes must give some evidence that it is acting for those purposes.[81] An immigrant detained on the ground that he landed unlawfully within the previous twenty-four hours is entitled to release by habeas corpus if there is no proof either way of the time at which he landed.[82] Lord Atkin once said:[83]

> In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.

This was in a case where a Nigerian chief had been deported to another area but the power to do so depended on a number of conditions. The Privy Council held that it was for the executive to show that these conditions existed and they remitted the case to the court in Nigeria.

Where, on the other hand, the administrative act is some decision or order which in itself inflicts no legal wrong, the complainant's task will be to raise a prima facie case of irregularity, and the burden of proof lies upon him. This is equally so where there is an invasion of his liberty or property but he alleges not that the statutory conditions are not satisfied but that there is some ulterior defect, for example bad faith.[84] It has often been laid down that the onus of proof rests upon the party alleging invalidity.[85] In other words, there is a presumption that the

[79] *R.* v. *Inland Revenue Cmrs ex p. Rossminster Ltd.* [1980] AC 952 at 1011. Likewise with compulsory purchase: *Prest* v. *Secretary of State for Wales* (1983) 81 LGR 193.

[80] *Murray* v. *Epsom Local Board* [1897] 1 Ch. 35 at 40.

[81] *St Pancras Borough Council* v. *Frey* [1963] 2 QB 586; *Harpin* v. *St Albans Cpn.* (1969) 67 LGR 479. For doubt on these decisions see *Bristol District Council* v. *Clark* [1975] 1 WLR 1443 at 1448 (CA).

[82] *R.* v. *Governor of Brixton Prison ex p. Ahsan* [1969] 2 QB 222.

[83] *Eshugbayi Eleko* v. *Government of Nigeria* [1931] AC 662 at 670. See to the same effect *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74 (below, p. 433).

[84] *Greene* v. *Home Secretary* [1942] AC 284 as explained in *Ahsan*'s case, above.

[85] *Minister of National Revenue* v. *Wright's Canadian Ropes Ltd.* [1947] AC 109 at 122; *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Cpn.* [1948] 1 KB 223 at 228; *Fawcett Properties Ltd.* v. *Buckingham County Council* [1959] Ch. 543 at 575, affirmed [1961] AC 636.

decision or order is properly and validly made, a presumption sometimes expressed in the maxim *omnia praesumuntur rite esse acta*. In a war-time case where it was unsuccessfully contended that the minister had no adequate grounds connected with national defence for making an order taking control of a colliery business, Lord Greene MR said:[86]

> It is a settled principle, in dealing with documents of this kind, that the rule of *omnia rite esse acta* is to be applied and, therefore, when it is stated by the Ministry in the proper way that it appears to the Minister of Fuel and Power that certain things are so, it is to be taken that that is an accurate statement unless and until the contrary is proved.

The House of Lords has more recently approved an earlier version of this rule:[87]

> In the absence of any proof to the contrary, credit ought to be given to public officers, who have acted prima facie within the limits of their authority, for having done so with honesty and discretion.

Judges have likewise spoken of 'the clearly established presumption that statutory duties are duly and properly performed'.[88] An administrative authority cannot therefore be put to proof of the facts or conditions on which the validity of its order must depend, unless the party attacking it can produce evidence which will shift the burden of proof off his own shoulders. How much evidence is required for this purpose will always depend upon the nature of the case. If an order has an apparent fault on its face, the burden is easily transferred. But if the grounds of attack are bad faith or unreasonableness,[89] the plaintiff's task is heavier. So it is also where the authority must be satisfied of something or form some opinion.[90] If no evidence to the contrary is offered, it will be presumed in favour of the authority that it was duly satisfied or of opinion accordingly.[91] Likewise where tax commissioners were empowered to require 'such particulars as they think necessary', but gave no supporting evidence beyond affirming that they did so think, their order was upheld in the absence of positive evidence from the taxpayer that their wide powers had been in any way abused.[92]

A situation in which the presumption of regularity does not apply is where the jurisdiction of an inferior tribunal is challenged in collateral proceedings.[93] This

[86] *Point of Ayr Collieries Ltd.* v. *Lloyd-George* [1943] 2 All ER 546.

[87] *Earl of Derby* v. *Bury Improvement Commissioners* (1869) LR 4 Exch. 222, approved in *R.* v. *Inland Revenue Commissioners ex p. T. C. Coombs & Co.* [1991] 2 AC 283.

[88] *Wilover Nominees Ltd.* v. *Inland Revenue Commissioners* [1973] 1 WLR 1393 at 1399 (Goulding J), affirmed [1974] 1 WLR 1342.

[89] See *Potato Marketing Board* v. *Merricks* [1958] 2 QB 316 at 331; *Cannock Chase DC* v. *Kelly* [1978] 1 WLR 1 (no obligation on council to justify reasonableness of eviction of tenant).

[90] See the *Point of Ayr Collieries* case, above.

[91] *Stoke-on-Trent CC* v. *B & Q (Retail) Ltd.* [1984] Ch. 1, affirmed [1984] AC 754.

[92] *Wilover Nominees Ltd.* v. *Inland Revenue Commissioners* [1974] 1 WLR 1342; *R.* v. *Inland Revenue Commissioners ex p. T. C. Coombs & Co.* (above).

[93] There seems even to have been a presumption of irregularity, in that the order was presumed void unless it showed jurisdiction upon its face: *Taylor* v. *Clemson* (1842) 2 QB 978 at 1031.

rule, however, is concerned not so much with the initial burden of proof as with the matters that may be put in issue. Willes J expressed it as follows:[94]

> Another distinction is, that whereas the judgment of a superior Court unreversed is conclusive as to all relevant matters thereby decided, the judgment of an inferior Court, involving a question of jurisdiction, is not final.

And he added, quoting from another case,[95] that 'the rule, that in inferior Courts and proceedings by magistrates the maxim *omnia praesumuntur rite esse acta* does not apply to give jurisdiction, never has been questioned'. Accordingly if a weekly rent is reduced by order of a rent tribunal from £5 to £3, the landlord can still sue for £5 and, when met with the defence that the tribunal has ordered a reduction, he may show if he can that the tribunal had no jurisdiction.[96] This is a corollary of the rule, discussed earlier,[97] that a tribunal cannot give itself additional jurisdiction by its own mistaken decision.

Personal liberty

In cases of habeas corpus there is a principle which 'is one of the pillars of liberty',

> that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act.[98]

Accordingly the detaining authority must be able to give positive evidence that it has fulfilled every legal condition expressly required by statute, even in the absence of contrary evidence from the prisoner. This was held in a case where clandestine immigrants had been arrested but where there was power to detain them only if they had landed within the previous twenty-four hours. The immigrants failed to show that they had landed before that time and the authorities failed to show that they had landed within it. In this situation it was held that they must be released.[99] Accordingly it is not enough for the custodian to make a return which is valid on its face, unless there is no challenge to the conditions which must be satisfied.[1] If there is such a challenge, the custodian must accept the burden of proof of their existence. This rule is indeed an example of the principle stated at the outset, since

[94] *City of London* v. *Cox* (1866) LR 2 HL 230 at 262.

[95] *R.* v. *All Saints, Southampton* (1828) 7 B & C 785 (Holroyd J). See likewise *Briscoe* v. *Stephens* (1824) 2 Bing. 213.

[96] *R.* v. *Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1 at 10. And see *R.* v. *Judge Pugh ex p. Graham* [1951] 2 KB 623.

[97] Above, p. 263.

[98] *Liversidge* v. *Anderson* [1942] AC 206 at 245 (Lord Atkin), confirmed in the *Khawaja* case (below) at 110 (Lord Scarman). And see *R.* v. *Home Secretary ex p. Ram* [1979] 1 WLR 148.

[99] *Ahsan's* case (above). See also *R.* v. *Home Secretary ex p. Badaike*, The Times, 3 May 1977 (habeas corpus granted).

[1] See Lord Parker CJ in *Ahsan's* case (above) at 231.

unjustified detention is trespass to the person. It is particularly important that the principle should be preserved where personal liberty is at stake. It has been corroborated in a decision of the House of Lords which, though not primarily concerned with habeas corpus, explains the burden of proof which lies upon those who have power to detain and remove immigrants, and for this purpose equates habeas corpus with the other remedies of judicial review.[2]

In the past, unfortunately, the protection of liberty has been weakened by judges who have held that a return from the custodian which is valid on its face puts the burden of disproving it upon the prisoner.[3] For the return is merely a statement of the facts which are alleged to justify the detention, and does not in itself provide any evidence of their existence. Administrative detention is a different matter from detention by order of a court of competent jurisdiction, where the return is conclusive.[4] To throw the burden of proof onto administrative prisoners contradicts the principle stated by Lord Atkin[5] and puts the individual in danger of being detained upon allegations which he may have no means of disproving. It was in order to require proper proof of the facts stated in returns by gaolers that the Habeas Corpus Act 1816 empowered the court 'to examine into the truth of the facts set forth in such return' in non-criminal cases.[6] But this protection becomes nugatory if the initial burden of proof is put upon the prisoner. Despite the obvious confusion between allegation and evidence, judges have too readily committed themselves to this dangerous proposition, instead of requiring the custodian to produce at least enough evidence of legality to call for rebuttal. The burden should revert to the prisoner only where his case is based on an allegation of bad faith or breach of natural justice or some such vitiating element, in accordance with the normal rules.[7] If, on the other hand, an allegation of fraud is made, the burden of proof is of course upon the party making it.[8]

[2] *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74, especially at 105 (Lord Wilberforce) and 110 (Lord Scarman). Lord Scarman's later statement that a prisoner carries the initial burden of proof is difficult to understand, since the fact of imprisonment makes a prima facie case, as Lord Scarman acknowledges.

[3] *R.* v. *Home Secretary ex p. Greene* [1942] 1 KB 87 at 116; *Greene* v. *Home Secretary* [1942] AC 284 at 295; *R.* v. *Risley Remand Centre Governor ex p. Hassan* [1976] 1 WLR 971 (rejecting *Ahsan's* case, above, p. 294, on an unjustifiable distinction between British subjects and aliens and adopting the opinion of the dissenting judge). In *R.* v. *Home Secretary ex p. Zamir* [1980] 3 WLR at 253 Lord Wilberforce is reported as saying that it was for the detainee to show that his detention was unlawful; but in [1980] AC at 947 these words are omitted. See also Sharpe, *Habeas Corpus*, 2nd edn., 85.

[4] See *Liversidge* v. *Anderson* [1942] AC 206 at 245 (Lord Atkin); *Greene* v. *Home Secretary* (above) at 294 (Lord Maugham, erroneously extending the rule to administrative detention also).

[5] Quoted above, p. 292. In *Liversidge* v. *Anderson* (above) at 247 Lord Atkin said: 'A minister given only a limited authority cannot make for himself a valid return by merely saying "I acted as though I had authority". His ipse dixit avails nothing.'

[6] See the *Khawaja* case (above) at 110 (Lord Scarman).

[7] As in *R.* v. *Brixton Prison Governor ex p. Soblen* [1963] 2 QB 243 at 281 (deportation order alleged to be a sham).

[8] *R.* v. *Home Secretary ex p. Momin Ali* [1984] 1 WLR 663.

INTERIM EFFECT OF DISPUTED ORDERS

Effectiveness pending determination

Some of the most difficult problems of invalidity arise in the period before the decision of the court can be given. The House of Lords has held that there is a presumption of validity in favour of a disputed order during the time that must elapse before the court can decide the question; and even where temporary obedience to the disputed order caused the irreparable loss of a large sum of money, the House refused to impose terms which would protect the person affected.[9] This was in a case where a supplier of drugs (used in large quantities in the national health service) claimed that a price-fixing order was invalid because of improper procedure by the Monopolies Commission. The cost to the supplier of obeying the order pending final determination of its validity in about two years' time was estimated at £8 m. When the Crown sought to enforce the disputed order immediately by interim injunction, the supplier asked for the usual undertaking in damages to protect him in case the order should prove to have been invalid. The House of Lords refused this protection, holding that a sufficiently strong prima facie case had not been shown. They held, further, that the order must meanwhile be presumed to be valid and must be obeyed. In later decisions the House explained the limited effect of this case, which dealt only with the interim situation while the question of validity was in suspense, awaiting determination by the court. The presumption was 'an evidential matter at the interlocutory stage' and involved no 'sweeping proposition that subordinate legislation must be treated for all purposes as valid until set aside'.[10] 'There is no *rule* that lends validity to invalid acts'.[11] In his dissenting speech in the original case Lord Wilberforce had pointed to the right solution, which was to compensate whichever party proved to be right—a solution which is not available while the law gives no compensation for innocent but invalid governmental acts.[12] The presumption of validity, therefore, is of temporary and procedural importance only, unjust and costly as it may prove to the party against whom the court exercises its discretion.

An unrealistic argument, to which judges sometimes resort, is that if the order is void no one need obey it or suffer loss, all persons being presumed to know the

[9] *Hoffmann–La Roche & Co.* v. *Secretary of State for Trade and Industry* [1975] AC 295. The logic is criticised by Lord Wilberforce in his dissenting speech. The European Court has decided similarly: *Granaria BV* v. *Hoofproduktschap voor Akkerbouwprodukten* (case 101/78) [1979] 3 CMLR 124. Compare *A.-G.* v. *Wright* [1988] 1 WLR 164; *Quietlynn Ltd.* v. *Plymouth CC* [1988] QB 114; *R.* v. *Commissioners of Inland Revenue ex p. T. C. Coombs & Co.* [1991] 2 AC 283.

[10] *R.* v. *Wicks* [1998] AC 92 at 116 (Lord Hoffmann).

[11] *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 174 (Lord Steyn).

[12] For this see below, p. 785.

law.[13] In a case where an Australian local authority had imposed building restrictions which were ultra vires and void the Privy Council rejected the landowner's claim for loss of development value during the period before the invalidity of the restrictions was established in litigation.[14] The local authority had failed to comply with certain requirements, including a requirement of notice and hearing, and the Privy Council said:

> The effect of the failure is to render the exercise of the power void and the person complaining of the failure is in as good a position as the public authority to know that that is so. He can ignore the purported exercise of the power. It is incapable of affecting his legal rights.

The Court of Appeal has similarly held that maintenance payments made by a husband under a justices' order could not be recovered in an action against the justices when the order was later found to have been made without jurisdiction, since there was no obligation to obey the void order.[15]

But the argument that void orders need not be obeyed 'bears no relation to the facts', as Denning LJ once aptly said in a case where a member of a trade union had been wrongfully expelled.[16] He continued:

> The exclusion may have been a nullity in law but it was far from being a nullity in fact. . . . It deprived him of his livelihood and caused him great damage.

Similarly in a notable Canadian case, where damages were recovered for the wrongful (and void) revocation of a liquor licence, Rand J said:[17]

> The revocation was de facto, it was intended to end the privilege and to bring about the consequences that followed. As against the respondent, the appellant was entitled to treat the breach of duty as effecting a revocation and to elect for damages.

Comments on this factual effect were recently made in the House of Lords, though by way of reservation rather than decision. Lord Browne-Wilkinson said:[18]

[13] As in *Wood* v. *Woad* (1874) LR 9 Ex. 190 (no damages for wrongful expulsion from business association since expulsion was void and plaintiff therefore remained a member); and see *Stott* v. *Gamble* [1916] 2 KB 504 at 508; *Thompson* v. *British Medical Association* [1924] AC 764 at 775. The option of disobedience may often not be available, e.g. where a licence is wrongfully refused.

[14] *Dunlop* v. *Woollahra Municipal Council* [1982] AC 158. For the possibility of an action for negligence in such a case see below, p. 762.

[15] *O'Connor* v. *Isaacs* [1956] 2 QB 288.

[16] *Bonsor* v. *Musicians' Union* [1954] 1 Ch. 479 at 513 (dissenting). Since trade union membership is a matter of contract, the exclusion would have been a breach of contract rather than a nullity.

[17] *Roncarelli* v. *Duplessis* (1959) 16 DLR (2d) 689 at 708; below, p. 361. Similarly in *Ridge* v. *Baldwin* [1964] AC 40 the chief constable was dismissed de facto in the period before it was established that his dismissal was void; see below, p. 489.

[18] *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 164. See similarly the remarks of Schiemann LJ in *Percy* v. *Hall* [1997] QB 924 at 951, pointing out that in the interim 'many people will have regulated their lives on the assumption that the enactment was lawful. Society cannot function if all legislation has first to be tested in court for legality. In practice, money will have been spent, taxes collected, businesses and property bought and sold and people arrested and perhaps imprisoned on the basis that what appears to be the law is the law'.

I adhere to my view that the juristic basis of judicial review is the doctrine of ultra vires. But I am far from satisfied that an ultra vires act is incapable of having any legal consequence during the period between the doing of that act and the recognition of its invalidity by the court. During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity . . . I prefer to express no view at this stage on these difficult points.

Lord Slynn[19] and Lord Steyn[20] made reservations of a similar kind. The trend of these dicta is clear. They suggest that strict logic may have to yield to practical realities in case of need. Since the law successfully achieved that result in the doctrine of officers and judges de facto, as explained earlier, there is no evident reason why it should not do the same with the problems of interim validity. The Court of Appeal has held, for example, that the presumption of validity provides a common law defence of lawful justification to a constable who arrests a man for infringing a byelaw later held to be invalid,[21] whereas under the strict logic of ultra vires he would be liable in tort since the byelaw would be 'incapable of ever having had any legal effect'.

Yet that proposition was reinforced by the House of Lords where a woman's imprisonment was later found to have been unlawful due to a change in the law.[22] She had been held on remand on several charges on which she was later given concurrent sentences, and the question was how her date of release should be calculated, allowing for the time spent on remand. The prison governor calculated in accordance with the ruling High Court decisions (interpreting obscure legislation) but on appeal those decisions were reversed, with the result that she was found to have been held for 59 days too long—had the correct law been known at the time. Her claim for false imprisonment against the prison governor was upheld in the House of Lords on the principle of the retrospectivity of judgments, taken to its logical extreme.

This is a thorny issue. On the one hand, legal instincts rebel against holding the governor personally liable for acting as the law then compelled. On the other hand, the applicant had been kept in prison unlawfully for 59 days and should be compensated.[23] In this clash of principles, the House of Lords was influenced not only

[19] Ibid. at 165.

[20] Ibid. at 172.

[21] *Percy* v. *Hall* (as above). In that case the plaintiffs, who were prosecuted for trespassing on a military zone protected by byelaws, established that the byelaws were invalid and sued the constables for wrongful arrest and false imprisonment. The Court of Appeal held that the byelaws were valid and that even if they were not the constables would have a good defence of reasonable cause. See similarly *R.* v. *Central London County Court ex p. Ax London* [1999] QB 1260.

[22] *R.* v. *Governor of Brockhill Prison ex p. Evans* (No. 2) [2001] 2 AC 19.

[23] See the discussion below on whether the Attorney-General rather than the governor should be liable to compensate the prisoner.

by the doctrinal considerations in favour of retrospectivity.[24] The tort of false imprisonment was one of strict liability and that weighed in the balance in favour of the applicant. Moreover, the Solicitor-General (for the governor) conceded that the detention was unlawful. But Article 5 of the European Convention gave a right to compensation to those held otherwise than 'in lawful detention . . . after conviction by a competent court', showing that, if the applicant was not compensated, the law would not be human rights compliant.[25]

The logical extreme was favoured also in the House of Lords when the question was whether banks who had lent money to local authorities under contracts later held to be invalid had acted under mistake of law.[26] Two dissenting lords held that there could have been no mistake since the banks acted in accordance with the law as then understood. But the majority held that the mistake was revealed retrospectively by the judgment, so that the money could be recovered. Although a judgment cannot 'rewrite history' as to factual events, it can rewrite legal history by making unlawful what seemed to be lawful and by making mistaken what seemed to be right.

To resolve this dilemma there may be need for a doctrine of relativity such as that discussed in the following section on nullity. It is hard not to feel that the minority judges were right in absolving the prison governor in the earlier case, but justice could still be done by allowing a claim for redress, perhaps against the Attorney-General as representing the Crown, which ought to answer for a malfunction of the judicial system. The erroneous High Court judgments would then be valid in favour of the governor but invalid against the Crown. Schiemann LJ had made a similar suggestion in the case concerning arrest under (hypothetically) invalid byelaws, saying that 'a sensible answer might be that no remedy should be given against the policeman who acted in good faith but that a remedy should be given against a secretary of state who enacted invalid byelaws'.[27] He also criticised the rigid application of the retrospectivity doctrine, despite the 'strong stream of authority in our law to that effect', as needlessly restricting the answers that policy might require. The wisdom of his approach may be illustrated from other systems. The EU Treaty provides that 'the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive'.[28] The Supreme Court of the United States treats the retrospectivity of its decisions, for example when holding State laws to be unconstitutional, as purely a matter of policy, to be decided in each case as justice may require. Some equally flexible principle seems to be needed if the paradoxes of

[24] See particularly the speech of Lord Hope.
[25] The Human Rights Act 1998 was not yet in force.
[26] *Kleinwort Benson Ltd.* v. *Lincoln CC* [1999] AC 153.
[27] *Percy* v. *Hall* (as above) at 952.
[28] Art. 231 (ex 174), also applied to directives by analogy. See, e.g., *Defrenne* v. *Sabena* [1976] 2 CMLR 98 and *Barber* v. *Guardian Royal Exchange Assurance* [1990] 2 CMLR 513, balancing the principles of legality and legal certainty.

retrospectivity are to be resolved justly.[29] This is partially acknowledged in the devolution legislation. The Scotland Act 1998 provides that where an Act of the Scottish Parliament is held to be ultra vires the court or tribunal may make an order removing or limiting any retrospective effect of the decision, or suspending it pending correction;[30] and there are similar provisions for Wales and Northern Ireland.[31]

In the false imprisonment case Lord Woolf MR in the Court of Appeal suggested that the doctrine of retrospectivity needed examination; that invalid byelaws and other administrative actions, unlike judicial decisions, might be valid for some purposes until set aside; that the American doctrine of prospective overruling,[32] under which the law is changed for the future only, had much to commend it.[33] The House of Lords, as we have seen, held firmly to the doctrine of retrospectivity. But it did not shut the door to the introduction of a form of prospective overruling in future.[34] Lord Hope's speech, citing copious weighty authority, and concluding that 'no such power is currently recognised by the common law', shows that this will not be straightforward.[35]

NULLITY AND RELATIVITY

Nullity and voidness

An act or order which is ultra vires is a nullity, utterly without existence or effect in law.[36] That is the meaning of 'void', the term most commonly used. In several decisions the House of Lords has made it clear that 'there are no degrees of nullity'

[29] See the discussion of retrospectivity in [1988] *PL* 78, esp. at 92–93 (C. Lewis).

[30] s. 102.

[31] Government of Wales Act 1998, s. 110; Northern Ireland Act 1998, s. 81.

[32] See Tribe, *American Constitutional Law*, 3rd edn. (2000), 218. The foundation case is *Great Northern Ry Co.* v. *Sunburst Oil and Refining* 287 US 358 (1932). A further leading case is *Linkletter* v. *Walker* 381 US 618 (1965) and a striking example is *Myers* v. *Drozda* 141 NW(2d) 852 (1966), showing how free a hand American courts may take in regulating retrospectivity. See also references in [1999] QB at 1048. See Lewis, above, for an insightful discussion.

[33] Lord Woolf cities the *Datafin* case (below, p. 640) as a British example. The doctrine 'has no place in our legal system': *Kleinwort Benson Ltd.* v. *Lincoln CC* [1999] 2 AC at 379. (Lord Goff), but in fact it can be found in a disguised form: see below, p. 703.

[34] Lord Steyn (at 849).

[35] At 856.

[36] For discussion of this group of problems see M. Taggart in Taggart (ed.), *Judicial Review of Administrative Action in the 1980s*, 70, preferring a 'relative theory of invalidity' to the principle of legal relativity mentioned below; Forsyth in Forsyth and Hare (eds.), *The Golden Metwand*, 141.

and that errors such as bad faith, wrong grounds, and breach of natural justice all necessarily involve excess of jurisdiction and therefore nullity.[37] This was merely to restate what has always been a fundamental rule. Lord Diplock made it clear that 'void' is the correct term in any such context, saying:[38]

> It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any less consequence in law than to render the instrument incapable of ever having had any legal effect ...

Quoting this passage with approval, Lord Irvine LC has said that when an act or regulation has been pronounced by the court to be unlawful, it 'is then recognised as having had no legal effect at all'.[39] This consequence flows from the ultra vires principle or 'equally acceptably' from the rule of law.

Such an absolute result depends, however, upon the willingness of the court to grant the necessary legal remedies. The court may hold that the act or order is invalid, but may refuse relief to the applicant because of his lack of standing,[40] because he does not deserve a discretionary remedy,[41] because he has waived his rights,[42] or for some other legal reason. In any such case the 'void' order remains effective and, must be accepted as if it was valid. It seems also that an order may be void for one purpose and valid for another;[43] and that it may be void against one person but valid against another.[44] A common case where an order, however void, becomes valid for practical purposes is where a statutory time limit expires after which its validity cannot be questioned.[45] The statute does not say that the void order shall be valid; but by cutting off legal remedies it produces that result.[46] As Lord Diplock said of a compulsory purchase order alleged to be made in bad faith but challenged after the expiry of the limitation period, the order 'had legal effect notwithstanding its potential invalidity'.[47]

[37] *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 at 170 (Lord Reid). See likewise *Ridge* v. *Baldwin* [1964] AC 40 at 80; *Crédit Suisse* v. *Allerdale BC* [1997] QB 306.

[38] In the *Hoffmann–La Roche* case (as below) at 365.

[39] *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 158.

[40] As in *Gregory* v. *Camden LBC* [1966] 1 WLR 899; below, p. 683.

[41] As in *Lovelock* v. *Minister of Transport* (1980) 40 P&CR 336 (remedy sought too late).

[42] As to waiver see above, p. 239, and below, p. 464.

[43] Approved in *R.* v. *Wicks* [1998] AC 92 at 109 (Lord Nicholls). Thus it may be valid for the purpose of being appealed against but not otherwise, as explained in *Calvin* v. *Carr* [1980] AC 574 at 590 and *Crédit Suisse* v. *Allerdale BC* (above); and see below, p. 950.

[44] As in *Agricultural etc. Training Board* v. *Aylesbury Mushrooms Ltd.* [1972] 1 WLR 190 (industrial training order valid against organisations duly consulted but void against those not consulted) approved in the *Crédit Suisse* case (as above).

[45] As in *Smith* v. *East Elloe RDC* [1956] AC 736; *R.* v. *Secretary of State for the Environment ex p. Ostler* (as below).

[46] See *O'Reilly* v. *Mackman* [1983] 2 AC 237 at 283F (Lord Diplock); the *Crédit Suisse* case, above, at 355 (Hobhouse LJ). See also *R.* v. *Secretary of State for the Environment ex p. Ostler* [1977] QB 122 and similar cases cited below, p. 731 (challenge barred by statutory time limit).

[47] See the *Hoffmann–La Roche* case (as below) at 769–70.

Another example of a void act becoming effective was the case where the customs commissioners, who were required by statute to collect betting duty from bookmakers in half-yearly instalments, allowed payment to be made by post-dated cheques on a monthly basis. When rival bookmakers sought to enforce the Act against their competitors, they were refused relief for lack of standing, plain though the illegality was to the court.[48] Challenge thus being impossible, the illegal concession stood.

Similarly with remedies withheld in discretion: the court may hold that an attack on the validity of some act or order succeeds, but that no remedy should be granted.[49] The court then says, in effect, that the act is void but must be accepted as valid. An example was where in making social security regulations the Secretary of State neglected his mandatory duty to consult organisations concerned: the court granted a declaration to this effect, but declined in its discretion to quash the regulations.[50] The net result of this contradictory course was that the regulations stood, and were in effect valid.

The truth is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be 'a nullity' and 'void' but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of legal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results. This does not mean, as Lord Hailsham LC suggested in an oft-quoted judgment, that categories of analysis (such as nullity, void, voidable, mandatory, directory) should be regarded not as logically distinct but as 'a spectrum of possibilities in which one compartment or description fades gradually into another', and where the choice is to be made at the court's discretion.[51] The fact that it is often difficult to choose between categories does not mean that they do not exist and are not to be sharply distinguished. That is a familiar problem throughout the law. The problems of nullity should be soluble by the formulation of principles and by their logical application, not by abandoning the field to free discretion.

[48] *R.* v. *Commissioners of Customs and Excise ex p. Cook* [1970] 1 WLR 450; below, p. 683. See similarly *Gregory* v. *Camden LBC* [1966] 1 WLR 899; below, p. 683.

[49] This passage was approved by Glidewell LJ in *R.* v. *Governors of Small Heath School ex p. Birmingham CC* (1989) 2 Admin. LR 154.

[50] *R.* v. *Secretary of State for Social Services ex p. Association of Metropolitan Authorities* [1986] 1 WLR 1.

[51] *London & Clydeside* case (as below), at 189. See the contrasting views of this controversial statement in Forsyth and Hare (eds.), *The Golden Metwand* at 145 (Forsyth) and 219 (Lord Cooke). Lord Irvine LC has explained how the statement must be given a restricted meaning, excluding judicial discretion: *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 158.

The theory of the second actor

This theory,[52] which has attracted significant judicial support,[53] seeks to explain how an unlawful and void administrative act may none the less have legal effect. It is built on the perception that while unlawful administrative acts (the first acts) do not exist in law, they clearly exist in fact. Those unaware of their invalidity (the second actors) may take decisions and act on the assumption that these (first) acts are valid. When this happens the crucial question is whether these latter, or second acts, are valid.

The theory of the second actor holds that the validity of these second acts does not depend upon any presumption of validity or judicial exercise of a discretion to refuse a remedy to an applicant in particular proceedings. It depends upon the legal powers of the second actor. Did that second actor have power to act even though the first act was invalid? Thus in the case discussed above of the man prosecuted for carnal knowledge of a detained mental defective,[54] the decision of the House of Lords meant that the court before which he was charged (the second actor) lacked the power to convict unless the detention order (the first act) was valid. On the other hand, in the case of the landowner prosecuted for failure to comply with an enforcement notice served by the local planning authority,[55] the House of Lords held that notwithstanding the alleged invalidity of the first act (the enforcement notice) the magistrates' court (the second actor) had power to convict.

The strength of the theory is that it shows that a void act is not 'incapable of ever having had any legal effect'. This resolves at a theoretical level many of the difficulties identified in this chapter. The weakness of the theory is that it provides no guidance as to how the powers of the second actor are to be determined when not expressly laid down in statute. But some principles are beginning to emerge. One such is the way in which the existence of a separate avenue of appeal against the first act will show that the relevant legislation gives the second actor the power to act not withstanding the invalidity of the first act.[56]

Effect on third parties

If an act or order is held to be ultra vires and void it is natural to assume that, being a nullity, it is to be treated as non-existent by all who would otherwise be concerned. But the judgment of a court binds only the parties to it, so that here also

[52] First put forward in Forsyth and Hare (eds.), *The Golden Metwand*, 141 (Forsyth).
[53] *Boddington* at 172 (Lord Steyn). See also *Oudekraal* v. *City of Cape Town* discussed in Appendix 2.
[54] Above, p. 281.
[55] Above, p. 284.
[56] Above, p. 284.

there are problems of relativity. Once again Lord Diplock has supplied the answer:[57]

> Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare.

In effect, therefore, the court's judgment of nullity operates *erga omnes*, i.e. for and against everyone concerned.

Patent and latent invalidity

In a well-known passage Lord Radcliffe said:[58]

> An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

This must be equally true even where the 'brand of invalidity' is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects.[59] Lord Diplock spoke still more clearly,[60] saying that

> it leads to confusion to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction.

To the same effect is this statement by Lord Irvine LC:[61]

> No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever.

[57] *Hoffmann–La Roche & Co* v. *Secretary of State for Trade and Industry* [1975] AC 295 at 365.

[58] *Smith* v. *East Elloe Rural District Council* [1956] AC 736 at 769.

[59] As by Lord Morris in *Ridge* v. *Baldwin* [1964] AC 40 at 125; by the Privy Council (Lord Wilberforce) in *Calvin* v. *Carr* [1980] AC 574 at 589–90; by Lord Hailsham LC in *London & Clydeside Estates Ltd.* v. *Aberdeen DC* [1980] 1 WLR 182 at 189. Lord Morris's remarks were misunderstood by the Privy Council in *Durayappah* v. *Fernando* [1967] 2 AC 337, for which see below, p. 495.

[60] In the *Hoffmann–La Roche* case (as above) at 366.

[61] *Boddington* v. *British Transport Police* [1999] 2 AC 143 at 158, rejecting the distinction made in *Bugg* v. *Director of Public Prosecutions* [1993] QB 473.

Lord Diplock had added that there might be no one entitled to sue, for example if a statutory time limit had expired. In that case the order would have to stand. Cooke J expressed the same idea in a New Zealand case:[62] 'Except perhaps in comparatively rare cases of flagrant invalidity, the decision in question is recognised as operative unless set aside.'

Yet even in the case of flagrant invalidity it remains necessary for the court to pronounce. It cannot be right to say, as Lord Denning MR once did of a defective rating list, that 'there is no need for an order to quash it. It is automatically null and void without more ado'. The only difference is, as Lord Irvine LC has pointed out,[63] that the citizen may feel sure enough of his ground to take no action and rely on the invalidity if he should be sued or prosecuted. But that is his decision, and he must accept the risk of uncertainty. Only the court's judgment can eliminate that risk.

Void or voidable

The question whether unlawful administrative acts were void or merely voidable became a source of confusion in the period when landmark decisions were revitalising administrative law. Historically there was a sound basis for this distinction. But it is now obsolete, the House of Lords having written its obituary notice decisively. An abbreviated account will now suffice.

'Void or voidable' was a distinction which could formerly be applied without difficulty to the basic distinction between action which was ultra vires and action which was liable to be quashed for error of law on the face of the record. That distinction no longer survives since the House of Lords declared all error of law to be ultra vires.[64] But formerly an order vitiated merely by error of law on its face was intra vires and within jurisdiction, but liable to be quashed because of the exceptional powers of control which the courts established three centuries ago.[65] Such an order was voidable, being intra vires and valid and effective, unless and until the court quashed it. Although judges have suggested that these terms were borrowed from the law of contract and unsuited to administrative law, in fact, in their proper application, they are natural and apt.

The last important example of the doctrine in its classical form was in the dissent of Lord Denning in the House of Lords in a case where a man prosecuted for the offence of carnal knowledge of a detained mental defective was acquitted on the ground that the detention order was void. Lord Denning held that the defect in the detention order was mere error on its face, so that it was voidable only and

[62] *A. J. Burr Ltd.* v. *Blenheim Borough* [1980] 2 NZLR 1 at 4.

[63] [1999] 2 AC at 158. See likewise *London & Clydeside Estates Ltd.* v. *Aberdeen* DC (as above) at 189 (Lord Hailsham LC).

[64] Above, p. 270.

[65] Above, p. 274.

supported the conviction. But the majority held that the detention order was ultra vires and void.[66]

Lord Irvine LC has since explained how the *Anisminic* case and its sequels, 'by extending the doctrine of ultra vires' so as to embrace any error of law and render the decision a nullity, 'made obsolete the historic distinction between errors of law on the face of the record and other errors of law . . . Thus, today, the old distinction between void and voidable acts on which Lord Denning relied . . . no longer applies'.[67]

Before the law was clearly settled in the above sense confusion had been caused by judicial suggestions that even ultra vires action might be merely voidable.[68] This paradoxical opinion was first advanced by the dissenting judges in *Ridge* v. *Baldwin*,[69] a case of denial of natural justice which in no way appeared on the record and which the court therefore could only condemn on the footing that the action was ultra vires and void—as the majority judges duly held. This and other cases on natural justice are discussed in that context separately.[70] Yet for some time after *Ridge* v. *Baldwin* Lord Denning MR expressed opinions to the effect that irregular administrative acts might be voidable only. But in the end he retracted them. In a case where a court registrar's order was made under a fundamental mistake and contrary to natural justice Lord Denning said that 'on being set aside, it is shown to have been a nullity from the beginning and void', and that he would adopt the meanings of 'void' and 'voidable' given in this book.[71] The ultimate incongruity, perhaps, was the statement by Donaldson LJ that an immigrant's leave to enter was 'voidable *ab initio*'[72]—a category justly described in the House of Lords as 'impossibly difficult to comprehend'.[73]

The superior courts

The order of a superior court, such as the High Court, must always be obeyed, no matter what flaws it may be thought to contain. Thus a party who disobeys a High

[66] *Director of Public Prosecutions* v. *Head* [1959] AC 83.

[67] *Boddington* v. *British Transport Police* (as above) at 154.

[68] The high-water mark of this heresy was perhaps *Durayappah* v. *Fernando* [1967] 2 AC 337, for which see below, p. 495. For discussion see (1967) 83 *LQR* 499, (1968) 84 *LQR* 95 (Wade); 31 *MLR* 2 at 138 (M. B. Akehurst); [1981] CLP 43 (D. Oliver); Taggart (ed.), *Judicial Review of Administrative Action in the 1980s*, 70.

[69] [1964] AC 40.

[70] Below, p. 489.

[71] *Firman* v. *Ellis* [1978] QB 886, generously confirmed in *The Discipline of Law*, 77 ('I confess that at one time I used to say that such a decision was not void but only voidable. But I have seen the error of my ways'). See also *The Discipline of Law*, 108. In *Lovelock* v. *Minister of Transport* (1980) 40 PLCR 336 Lord Denning said 'I have got tired of all the discussion about "void" and "voidable". It seems to me to be a matter of words—of semantics—and that is all.'

[72] *R.* v. *Home Secretary ex p. Khawaja* [1982] 1 WLR 625 at 630.

[73] Ibid., [1984] AC 74 at 118 (Lord Bridge).

Court injunction is punishable for contempt of court even though it was granted in proceedings deemed to have been irrevocably abandoned owing to the expiry of a time limit.[74] As Lord Diplock explained:

> The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies.

Lord Diplock also said that where there was a defect such as breach of the rules of natural justice a party might have the order set aside *ex debito justitiae* (meaning as of right) without recourse to the rules about irregularity which give the judge discretion.

An example of a superior court's order being held to be void was where the Court of Appeal allowed an appeal in a case where appeal was expressly prohibited by statute and on further appeal its decision was held by the House of Lords to be without jurisdiction and a nullity.[75] But such an order must always be obeyed, whatever its legal defects, unless and until it is set aside.

[74] *Isaacs* v. *Robertson* [1985] AC 97 at 103. See similarly *M* v. *Home Office* [1994] 1 AC 377, below, p. 835 (disobedience by minister).

[75] *Re Racal Communications Ltd.*, reported as *Re a Company* [1981] AC 374; above, p. 265.

PART V
DISCRETIONARY POWER

10

RETENTION OF DISCRETION

DISCRETIONARY POWER

In this and the next following chapter the rules which govern discretionary power must be examined in detail. All legal power, as opposed to duty, is inevitably discretionary to a greater or lesser extent, but now the emphasis falls upon the nature of discretion itself and the standards upon which the courts insist in order that it may be exercised in a proper and lawful way in accordance with the presumed intentions of the legislature that conferred it. First, in this chapter, come the rules which ensure that discretionary power should be wielded only by those to whom it is given and that they should retain it unhampered by improper constraints or restrictions. Next, in Chapter 12, comes the sovereign principle that powers must be exercised reasonably and in good faith and on proper grounds—in other words, that they must not be abused. This is one of the twin pillars that uphold the structure of administrative law. The other is natural justice, the subject of Part V. The law can thus control, to a limited but important extent, both the substance of discretionary decisions and the procedure under which they are made.

DELEGATION

Inalienable discretionary power

An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it causes administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. Normally the courts are rigorous in requiring the power to be exercised by the precise person or body stated in the statute, and in condemning as ultra vires action taken by agents, sub-committees or delegates, however expressly authorised by the authority endowed with the power.

One aspect of this principle is the rule that the participation of non-members in

the deliberations or decisions of a collective body may invalidate its acts. The decision of a disciplinary committee, for example, is likely to be invalid if any non-member of the committee has taken part in its proceedings.[1] It is not clear that the mere presence of a non-member will be fatal,[2] although in one case Lord Wright MR said:

> It would be most improper on general principles of law that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision.[3]

A recognised exception is the right of magistrates to have the assistance of their clerk on questions of law.[4]

The maxim *delegatus non potest delegare* is sometimes invoked as if it embodied some general principle that made it legally impossible for statutory authority to be delegated. In reality there is no such principle; and the maxim plays no real part in the decision of cases, though it is sometimes used as a convenient label. Its proper home is in the law of agency, where it expresses the point that a principal who must accept liability for the acts of his agent need not accept it for the acts of his agent's agent; but even here there are wide exceptions. In the case of statutory powers the important question is whether, on a true construction of the Act, it is intended that a power conferred upon A may be exercised on A's authority by B. The maxim merely indicates that this is not normally allowable.[5] For this purpose no distinction need be drawn between delegation and agency. Whichever term is employed, the question of the true intent of the Act remains. It is true that the court will more readily approve the employment of another person to act as a mere agent than the wholesale delegation of the power itself. But this is due not to any technical difference between agency and delegation but to the different degrees of devolution which either term can cover. The vital question in most cases is whether the statutory discretion remains in the hands of the proper authority, or whether some other person purports to exercise it. Thus where the Act said that an inspector of nuisances 'may procure any sample' of goods for analysis, it was held that the inspector might validly send his assistant to buy a sample of coffee.[6] This might be described as mere agency as opposed to delegation. But that would obscure the true ground, which was that the inspector had in no way authorised his assistant to exercise the discretion legally reposed in himself. For similar reasons there can be

[1] *Lane* v. *Norman* (1891) 66 LT 83; *Leary* v. *National Union of Vehicle Builders* [1971] Ch. 34; *Ward* v. *Bradford Corporation* (1971) 70 LGR 27. But see *Wislang* v. *Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29.

[2] See *Leary's* case (above) at 53.

[3] *Middlesex County Valuation Committee* v. *West Middlesex Assessment Area Committee* [1937] Ch. 361.

[4] See *Ward's* case (above) at 33.

[5] For discussion see *Re S. (A Barrister)* [1970] 1 QB 160; (1943) 21 Can. BR 257 (J. Willis); (1972) 2 Auck. ULJ 85 (P. H. Thorp).

[6] *Horder* v. *Scott* (1880) 5 QBD 552.

no objection to the Commission for Racial Equality using its officers to collect information in its investigations.[7]

Examples of delegation

The following are characteristic cases where action was held ultra vires because the effective decision was taken by a person or body to whom the power did not properly belong.

(a) Under wartime legislation local committees were empowered to direct farmers to grow specified crops on specified fields. A committee decided to order eight acres of sugar beet to be grown by a farmer, but left it to their executive officer to decide on which field it should be grown. The farmer, prosecuted for disobedience, successfully pleaded that the direction was void, since the executive officer had no power to decide as to the field.[8] The right procedure would have been for the committee to have obtained the officer's recommendation and to have decided the whole matter itself.

(b) Registered dock workers were suspended from their employment after a strike. The power to suspend dockers under the statutory dock labour scheme was vested in the local Dock Labour Board. The suspensions were made by the port manager, to whom the Board had purported to delegate its disciplinary powers. The dockers obtained declarations that their suspension was invalid since the Board had no power to delegate its functions and should have made the decision itself.[9]

(c) In a similar case where a registered dock worker was dismissed the House of Lords granted a declaration that the dismissal was invalid because the Board, instead of deciding itself, had entrusted the whole matter to a disciplinary committee.[10]

(d) A local board had power to give permission for the laying of drains. They empowered their surveyor to approve straightforward applications, merely reporting the number of such cases to the Board. It was held that the Board itself must decide each application, and that delegation to the surveyor was unlawful.[11] The result was the same where a local education committee left it to its chairman to fix the date of closure of a school[12] and where the Monopolies Commission allowed its chairman to decide that a company's takeover proposal had been abandoned.[13]

(e) A local authority, having a statutory duty to provide housing for homeless persons,

[7] *R.* v. *Commission for Racial Equality ex p. Cottrell & Rothon* [1980] 1 WLR 1580.

[8] *Allingham* v. *Minister of Agriculture and Fisheries* [1948] 1 All ER 780.

[9] *Barnard* v. *National Dock Labour Board* [1953] 2 QB 18.

[10] *Vine* v. *National Dock Labour Board* [1957] AC 488; see similarly *Young* v. *Fife Regional Council* 1986 SLT 331 (committee wrongly delegated to sub-committee).

[11] *High* v. *Billings* (1903) 89 LT 550. Similarly *Vic Restaurant Inc.* v. *City of Montreal* (1958) DLR (2d) 81 (licensing power delegated to police); *City Cabs (Edinburgh) Ltd.* v. *Edinburgh DC* 1988 SLT 184 (officials acted instead of council).

[12] *R.* v. *Secretary of State for Education and Science ex p. Birmingham CC* (1984) 83 LGR 79 (Secretary of State's approval quashed).

[13] *R.* v. *Monopolies and Mergers Commission ex p. Argyll Group Plc* [1986] 1 WLR 763 (Secretary of State's consent not quashed: see below, p. 702).

set up a company which purchased houses, financed by a loan from a bank which the council guaranteed. This was held to be impermissible delegation since it transferred the council's functions to the company, over which the council had only limited control.[14]

(f) A chief constable was entitled to delegate to the assistant chief constable his power to extend a police probationer's probation period, but not, it seems, his power to dismiss a probationer.[15]

From these typical cases it might be supposed that the question was primarily one of form. Convenience and necessity often demand that a public authority should work through committees, executive officers and other such agencies.[16] The law makes little difficulty over this provided that the subordinate agencies merely recommend, leaving the legal act of decision to the body specifically empowered.[17] It is obvious that in many such situations the real discretion appears to be exercised by the agency that recommends, and so it seems that the law allows this function to be delegated. Nevertheless it is more than a matter of observing legal forms. The valid exercise of a discretion requires a genuine application of the mind and a conscious choice by the correct authority.

A public body which blindly rubber-stamps its officers' recommendations will therefore be acting unlawfully, as already seen in the case of the local board which had power to approve drains but allowed its surveyor to approve straightforward applications, merely reporting the numbers of such cases to the board.[18] Similarly a labour relations board, which had power to determine whether a trade union was supported by a majority of employees, could not validly commission one of its officers to determine this question and then merely adopt his decision.[19] In both these cases the decision would have been valid had it been taken on a report and recommendation from the officer which the board genuinely considered before determining the question itself. The same distinction was applied in Ceylon to a board which had power to appoint trustees of a mosque. They consulted a Member of Parliament who supplied a list of names including his own, all of whom the board appointed. It was held that the board had merely adopted a ready-made decision by an outsider and that such appointments were void.[20] There can be no legal objection to a public body obtaining advice and consulting suitable persons, but it is vital that it should genuinely keep the decision in its own hands.

[14] *Crédit Suisse* v. *Waltham Forest LBC* [1997] QB 362.

[15] *R.* v. *Chief Constable of Greater Manchester Police*, The Times, 13 July 1999. See also *Rooney* v. *Chief Constable, Strathclyde Police* 1997 SLT 1261 (chief constable empowered by circular to delegate power to accept resignations, despite statutory regulation to the contrary).

[16] See below, p. 318.

[17] *Hall* v. *Manchester Cpn.* (1915) 79 JP 385 (HL); distinguished in *Cohen* v. *West Ham Cpn.* [1933] Ch. 814.

[18] *High* v. *Billings* (1903) 89 LT 550.

[19] *Labour Relations Board of Saskatoon* v. *Spears* [1948] 1 DLR 340.

[20] *Cader* v. *Commissioners for Mosques* (1963) 66 NLR 16.

Unauthorised discretion or consent

Sometimes the judicial aversion to delegation is carried to lengths which make administration difficult, a tendency which is particularly marked in the Canadian cases. In one of these the Governor in Council was empowered to make regulations for the control of immigration with reference to specified criteria such as the immigrant's unsuitability. The court condemned a regulation which denied admission to persons who were unsuitable in the opinion of a special inquiry officer[21]—though it is hard to see how the criterion could have been applied without some such delegation. A clearer case was where an immigration adjudicator, hearing an appeal, found facts which gave a discretion to the Secretary of State but wrongly exercised it himself.[22] In a case from Ceylon the Governor-General had power to appoint a commission of inquiry into any matter in which in his opinion it would be in the interests of the public safety or welfare. He appointed a commissioner to inquire into all such government contracts as the commissioner in his absolute discretion might think of sufficient importance to the public welfare to warrant inquiry. The Privy Council held this to be unlawful delegation, since the subject of inquiry should have been chosen according to the Governor-General's opinion, not the Commissioner's.[23] But the House of Lords upheld notices issued by a rating authority's subordinate officer where the Act said: 'Where the rating authority are of opinion . . .', and the only opinion formed was that of the subordinate.[24] It was said that the Act plainly contemplated rate-collection by subordinates and this construction was assisted by the very wide powers conferred upon local authorities.[25]

Another legal pitfall is the requirement of some extraneous person's consent, which may be held to put the decision effectively into that person's hands. A county council erred in this respect when it licensed a cinema on condition that no film should be shown which had not been certified by the British Board of Film Censors, an unofficial body established by the film industry.[26] The council were empowered to impose such conditions as they might determine, but this condition was held unreasonable and ultra vires as 'putting the matter into the hands of a third person or body not possessed of statutory or constitutional authority'. But this case was only just on the wrong side of the line. A similar condition imposed by another council survived challenge since it contained the words 'without the consent of the council' and so preserved the council's own power to decide in the last resort.[27] Thus the court was able to validate an eminently reasonable

[21] *A.-G. of Canada* v. *Brent* [1956] SCR 318.
[22] *R.* v. *Home Secretary ex p. Malik*, The Times, 18 November 1981.
[23] *Ratnagopal* v. *A.-G.* [1970] AC 974.
[24] *Provident Mutual Life Assurance Association* v. *Derby CC* [1981] 1 WLR 173 (Lord Bridge dissenting).
[25] See below, p. 318.
[26] *Ellis* v. *Dubowski* [1921] 3 KB 621.
[27] *Mills* v. *London County Council* [1925] 1 KB 213. See *R.* v. *Greater London Council ex p. Blackburn* [1976] 1 WLR 550.

administrative policy. Similarly in New Zealand, where the Governor-General had power to make regulations for the control of civil aviation, the court upheld a regulation prohibiting the towing of aircraft except with the permission of the Director of Civil Aviation.[28] If the courts make it impossible for conditions of this kind to be imposed, good administration may be hampered for doctrinaire reasons.[29] It is obvious that some dispensing or licensing power will often need to be given to subordinate officials, and that general powers of regulation should be construed so as to permit this in suitable cases.

Agency and administration

Unlawful delegation must be distinguished from lawful agency. A public authority is naturally at liberty to employ agents in the execution of its powers, as for example by employing solicitors in litigation, surveyors in land transactions, and contractors in road-building. The essential thing is that it should take its decisions of policy itself, and observe any statutory requirements scrupulously.[30] It may be allowed to ratify the acts of its agents retrospectively, both under the ordinary rules of agency and under liberal interpretation of statute.[31] Occasionally the court may even invoke the rules of agency to justify a questionable delegation. This happened where the Westminster City Council's public health committee had authorised their chairman to deal with urgent matters in the vacation, and the chairman instituted proceedings for nuisance which the committee ratified at their next meeting.[32] This was an indulgent decision and it was not unanimous. Normally a stricter rule prevails, so that where the Act allows proceedings to be instituted by an officer authorised by resolution, a later resolution cannot validly ratify action already taken.[33] It must be emphasised that all these cases turn on the implications of various statutory provisions: there is no rigid rule. But in general the court is likely to be more strict where the issue is one of substance as opposed to formality. The Court of Appeal summarily dismissed the National Dock Labour Board's

[28] *Hookings* v. *Director of Civil Aviation* [1957] NZLR 929, reviewing earlier cases. See likewise *R.* v. *Newbury DC ex p. Chieveley Parish Council* (1998) 10 Admin. LR 676 (planning officer authorised to decide 'subject to there being no objection' from highway authority: valid).

[29] An extreme case is *Re Davies & Village of Forest Hills* (1964) 47 DLR (2d) 392.

[30] Thus local authorities taking legal proceedings through their officers must expressly authorise them under the Local Government Act 1972, s. 223; a mere resolution to take proceedings is inadequate: *Bob Keats Ltd.* v. *Farrant* [1951] 1 All ER 899. Cf *Becker* v. *Crosby Cpn.* [1952] 2 All ER 1350 (notice to quit signed by wrong officer).

[31] As in *Warwick RDC* v. *Miller-Mead* [1962] Ch. 441 (council empowered to sue for nuisance resolved to sue three days after writ issued by their solicitors; held, valid).

[32] *R.* v. *Chapman ex p. Arlidge* [1918] 2 QB 298. In *Firth* v. *Staines* [1897] 2 QB 70, there relied upon, the Act expressly authorised subsequent approval.

[33] *Bowyer Philpott & Payne Ltd.* v. *Mather* [1919] 1 KB 419 (legal proceedings).

claim to have ratified the suspension of dock workers who had been invalidly suspended by the port manager, since this was a serious disciplinary action which only the Board itself was competent to take.[34] It dismissed no less firmly a minister's claim to have ratified the irregular requisitioning of a house by a local authority under powers validly delegated by the minister.[35] It refused, likewise, to allow a planning authority to ratify a planning permission issued by its clerk without any authority.[36]

In one doubtful decision it was held in effect that delegation of its powers by a local planning authority was justified by a general practice, though the practice had no legal basis.[37] In another case Denning LJ said: 'While an administrative function can often be delegated, a judicial function rarely can be. No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication'.[38] The decisions in fact show that the courts do not normally allow the delegation even of administrative functions if they involve the exercise of discretion. There is no general principle that administrative functions are delegable. The principle is rather that, where any sort of decision has to be made, it must be made by the authority designated by Parliament and by no one else. On this ground the Director of Public Prosecutions acted unlawfully in delegating legal work to non-legal staff.[39]

Occasionally the court will allow some degree of delegation on the ground that the matter is merely administrative,[40] particularly in the case of a body which has to make investigations, such as the Race Relations Board.[41] It is doubtless correct that the general objections to delegation apply with special force to judicial functions, particularly if they affect personal liberty or are disciplinary.[42] The extent to which the courts will allow the delegation of fair hearings required by the principles of natural justice is explained elsewhere.[43]

[34] *Barnard* v. *National Dock Labour Board* [1953] 2 QB 18. See similarly *Vine* v. *National Dock Labour Board* [1957] AC 488. In both cases the judicial or quasi-judicial nature of the function was emphasised.

[35] *Blackpool Cpn.* v. *Locker* [1948] 1 KB 349.

[36] *A.-G. ex rel. Co-operative Retail Services Ltd.* v. *Taff-Ely BC* (1979) 39 P & CR 233, affirmed (1981) 42 P & CR 1.

[37] *Lever Finance Ltd.* v. *Westminster London Borough Council* [1971] 1 QB 222, now distinguished in *R. (Reprotech (Pebsham) Ltd)* v. *East Sussex County Council* [2003] 1 WLR 348 (HL), discussed below, p. 339.

[38] *Barnard* v. *National Dock Labour Board* (above) at 40.

[39] *R.* v. *Director of Public Prosecutions ex p. Association of First Division Civil Servants*, (1988) 138 NLJ Rep. 158.

[40] e.g. *Bridge* v. *R.* [1953] 1 DLR 305; *Hookings* v. *Director of Civil Aviation* [1957] NZLR 929. See also the *Provident Mutual Life Assurance* case (above, p. 315).

[41] *R.* v. *Race Relations Board ex p. Selvarajan* [1957] 1 WLR 1686.

[42] See *R.* v. *Chiswick Police Station Superintendent ex p. Sacksteder* [1918] 1 KB 578 at 591; *General Medical Council* v. *UK Dental Board* (below).

[43] Below, p. 530.

Statutory power to delegate

Since in practice government demands a great deal of delegation, this has to be authorised by statute, either expressly or impliedly. The whole of the committee system, as operated by local authorities, is dependent upon the powers of delegation conferred by statute, currently by the Local Government Act 1972. This empowers local authorities, including local planning authorities, to arrange for the discharge of any of their functions by committees, sub-committees or officers of the authority or by any other local authority, or by acting jointly with other local authorities through joint committees, etc.[44] Certain functions are excepted, notably the levying of rates and the borrowing of money.[45] Statutory powers of delegation are necessarily very numerous. Ministers' wide powers to provide by Order that certain of their functions should be exercised by another person (typically a commercial company) as part of the contracting out of their functions may also be specifically noted.[46]

Powers to delegate will be construed in the same way as other powers, and will not therefore extend to sub-delegation in the absence of some express or implied provision to that effect. The delegate must also keep within the bounds of the power actually delegated, which may be narrower than that possessed by the delegating authority; it will be no defence that that authority could, had it wished, have delegated wider power.[47]

A statutory power to delegate functions, even if expressed in wide general terms, will not necessarily extend to everything. Thus it has been held that the General Medical Council must itself exercise its disciplinary powers over dentists and cannot delegate them to its executive committee, even though it has express statutory powers to act through such a committee for the purpose of its functions under the Dentists Acts.[48] In the case of important judicial and disciplinary functions the court may be disposed to construe general powers of delegation restrictively.

A statutory power to delegate will normally include a power to revoke the delegation when desired.[49] While the delegation subsists it may be arguable whether the delegating authority is denuded of its power or is able to exercise it

[44] ss. 101, 102. The Local Government Act 1933, s. 85, gave power to 'delegate' functions to committees, but not to sub-committees. The Act of 1972 avoids using that word.

[45] s. 101(6).

[46] Under the Deregulation and Contracting Out Act 1994 (discussed above, p. 52), s. 69. The power is subject to certain limitations (no delegation of judicial or legislative functions, or powers of search or seizure or restrictions on personal liberty (s. 71)). See below, p. 795 on 'contracting out'.

[47] *Cook* v. *Ward* (1877) 2 CPD 255; *Blackpool Cpn.* v. *Locker* [1948] 1 KB 349.

[48] *General Medical Council* v. *UK Dental Board* [1936] Ch. 41.

[49] But not retrospectively: *Battelley* v. *Finsbury Borough Council* (1958) 56 LGR 165 (council unable to repudiate appointment of employee made by committee under delegated power). For revocability see above, p. 229, and *Manton* v. *Brighton Cpn.* [1951] 2 KB 393.

concurrently with the delegate. This question arose where under statutory authority the executive committee of a county council delegated to a sub-committee its powers to make regulations for the control of rabies; but before the sub-committee had done anything the executive committee, without revoking the delegation, itself issued regulations for the muzzling of dogs. These regulations were upheld, but on inconsistent grounds, one judge holding that the executive committee had resumed its powers and the other that it had never parted with them, and that 'the word "delegate" means little more than an agent'.[50] In a later case the latter view prevailed, on the ground that 'one cannot divest oneself of one's statutory duties'.[51] But the contrary was held by the Court of Appeal where a minister had formally delegated to local authorities his power to requisition houses. By doing this he had for the time being divested himself of his powers, so that an invalid requisition by the local authority could not be cured by their acting in his name; and the court rejected the contention that delegation was a form of agency.[52] The Local Government Act 1972 expressly preserves the powers of a local authority concurrently with those delegated to its committees, etc.[53]

Implied power to delegate is not commonly found in peacetime legislation. Under wartime powers, which are necessarily very wide and which necessarily demand much delegation and sub-delegation, the implication is almost irresistible. The Defence of the Realm legislation in the First World War contained no express power to delegate, but there was no litigation attempting to challenge any of the government's acts on this ground. Under similar legislation in Canada in the Second World War the Supreme Court held that the power to make regulations must necessarily be delegable, so that it could be delegated by the Governor-General to the Controller of Chemicals.[54] The corresponding legislation in the United Kingdom permitted delegation and sub-delegation expressly.[55] Under an Act obliging the owners of cars to identify their drivers if so required 'by or on behalf of' a chief constable, it was held that police officers who normally handled traffic cases had implied delegated authority to sign notices on behalf of the chief constable by reason of their position, without any express authorisation.[56] But the court emphasised that express authority was highly desirable, and the case must be regarded as on the borderline. It was made clear that the police cannot claim the benefit of the doctrine which applies to ministers and officials in government departments.

[50] *Huth* v. *Clark* (1890) 25 QBD 391 (Lord Coleridge CJ and Wills J).
[51] *Manton* v. *Brighton Cpn.* (above). See similarly *Gordon, Dadds & Co.* v. *Morris* [1945] 2 All ER 618.
[52] *Blackpool Cpn.* v. *Locker* [1948] 1 KB 349.
[53] s. 101(4).
[54] *Re Chemicals Regulations* [1943] SCR 1.
[55] Emergency Powers (Defence) Act 1939, s. 1(3); below, p. 887.
[56] *Nelms* v. *Roe* [1970] 1 WLR 4.

Government departments

Departments of the central government have the benefit of a special rule whereby officials may act in their ministers' names without any formal delegation of authority. When powers are conferred upon ministers who have charge of large departments, it is obvious that they will often not be exercised by the minister in person. Parliament is well aware of this, and ministerial powers are therefore taken to be exercisable by officials of the minister's department acting in his name in the customary way. In the leading case the owner of a factory challenged a wartime requisitioning order made on behalf of the Commissioners of Works (as the ministry was then called). The Commissioners had power to requisition land 'if it appears to that authority to be necessary or expedient to do so'. But they themselves never met or transacted business as a body: their powers were exercised entirely by their officials. The requisitioning order was signed by an assistant secretary, who was solely in charge of the case, and it was never considered by any of the Commissioners. The Court of Appeal held that this procedure was open to no legal objection.[57] Lord Greene MR said:[58]

> It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority. . . .

Consequently many ministerial powers are exercised by officials who recite 'I am directed by the Minister', 'the Minister is of the opinion', and so forth, when in reality they are acting on their own initiative. If the proper official is acting in his capacity as such, his assumption of ministerial authority is lawful.[59] This doctrine is assumed to extend equally to legislative powers, since it is common practice for officials to issue statutory regulations under powers vested in their ministers.[60]

Strictly speaking there is not even delegation in these cases. Delegation requires a distinct act by which the power is conferred upon some person not previously competent to exercise it. But the authority of officials to act in their ministers' names derives from a general rule of law and not from any particular act of

[57] *Carltona Ltd.* v. *Commissioners of Works* [1943] 2 All ER 560. See similarly *Point of Ayr Collieries Ltd.* v. *Lloyd-George* [1943] 2 All ER 546; *Re Golden Chemical Products Ltd.* [1976] Ch. 300.

[58] In the *Carltona* case at 563.

[59] See also *Lewisham BC* v. *Roberts* [1949] 2 KB 608; *Woollett* v. *Minister of Agriculture and Fisheries* [1955] 1 QB 103; *R.* v. *Skinner* [1968] 2 QB 700. For the position when the official is not authorised see below, p. 337.

[60] This is the practice, for certain classes of orders, in the Department of the Environment, the Department of Trade, and the Ministry of Agriculture, Fisheries and Food.

delegation.[61] Legally and constitutionally the act of the official is the act of the minister, without any need for specific authorisation in advance or ratification afterwards. See *R.* v. *Home Secretary, ex p. Oladehinde* [1991] 1 AC 254 at 284 'The civil servant acts not as the delegate, but as the *alter ego*, of the Secretary of State' (Sir John Donaldson). Cf. Freedland [1996] *PL* 16 at 22 deprecating the *alter ego* fiction and preferring a rule of construction that a power granted to a minister is granted to his department. Even where there are express statutory powers of delegation they are not in fact employed as between the minister and his own officials.[62] Such legal formalities would be out of place within the walls of a government department, as is recognised by Parliament's practice of conferring powers upon ministers in their own names. The case is of course different where the official is to be empowered to act in his own name rather than the minister's. Thus the power for inspectors to decide certain kinds of planning appeals must be delegated by the minister by statutory instrument, as required by the Act.[63]

The limits of this doctrine must be noticed. It applies only to the departments of the central government, and not therefore to local government authorities and other statutory bodies, as is plain from the examples already given.[64] It does not apply to the police.[65] Even within the central government the powers conferred upon a specified minister could not be exercised in his name by another minister or the latter's officials,[66] until delegation to 'any other servant of the Crown' was authorised by statute in 1992.[67] There may be cases where the power is of such a special kind that the minister must exercise it personally and not through officials. A wartime detention order has been assumed to be one such matter;[68] an order for the deportation of an alien was held to be another in 1918.[69] But in 1990, without reference to the case of 1918, the House of Lords held that the power to make decisions to deport aliens could be exercised on the authority of the Home Secretary by immigration officers, who were Home Office civil servants and not

[61] *Lewisham BC* v. *Roberts* (above); *R.* v. *Skinner* (above).

[62] See *Carltona Ltd.* v. *Commissioners of Works* (above); *Lewisham BC* v. *Roberts* (above).

[63] Town and Country Planning Act 1990, 6th sched.

[64] Above, p. 313.

[65] *Nelms* v. *Roe* (above). But this was disapproved in *R. (Chief Constable of the West Midlands Police)* v. *Birmingham Justices* [2002] EWHC 1087 (Admin.), for the reasons given below, p. 322.

[66] But powers conferred upon 'the Secretary of State' are exercisable by any Secretary of State: above, p. 46.

[67] Civil Service (Management Functions) Act 1992. See *Jackson Stansfield & Sons* v. *Butterworth* [1948] 2 All ER 558, a case which revealed much legal and administrative confusion. Clearer guidance is given by *Lavender & Sons Ltd.* v. *Minister of Housing and Local Government* [1970] 1 WLR 1231, holding that one minister may not share his powers with another: see below, p. 322.

[68] *Liversidge* v. *Anderson* [1942] AC 206 (see Lord Maugham at 224). But see *Re Golden Chemical Products Ltd.* [1976] Ch. 300 at 310 (personal exercise of discretion by responsible minister not a 'legal necessity' but in some cases 'a political necessity' (Brightman J)).

[69] *R.* v. *Chiswick Police Station Superintendent ex p. Sacksteder* [1918] 1 KB 578 at 585, 591.

holders of statutory offices.[70] This decision must throw doubt on the indication in an earlier case that a departmental official could not be authorised to make an order for the return of a fugitive offender.[71]

But the most recent decision, however, rejects much of the above. Instead it draws a distinction between 'those offices which are the apex of an organisation itself composed of office-holders or otherwise hierarchically structured, and those offices designated by Parliament because of the personal qualifications of the individual holder.'[72] In the former case the subordinate officers could act on behalf of their superior to whom Parliament had granted the power and who would take legal responsibility for its exercise. In the latter only the officer actually empowered could act. On this doubtful approach legal responsibility, not accountability to Parliament, determines the reach of the *Carltona* principle; and it thus extends beyond central government.[73] But the application of that principle to executive agencies has been persuasively criticised on the ground that ministerial responsibility for such agencies is too weak to justify its application.[74] Administrative convenience should not justify a substitution of legal responsibility for accountability to Parliament.

SURRENDER, ABDICATION, DICTATION

Power in the wrong hands

Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must

[70] *R.* v. *Home Secretary ex p. Oladehinde* [1991] 1 AC 254. See also *R.* v. *Home Secretary ex p. Doody* [1994] 1 AC 531 (fixing of prisoner's 'tariff period' for parole may be delegated to junior minister).

[71] See *R.* v. *Brixton Prison Governor ex p. Enahoro* [1963] 2 QB 455 (point assumed but not decided). See also *Minister for Aboriginal Affairs* v. *Peko-Wallsend Ltd.* (1986) 60 ALJR 560.

[72] Sedley LJ in *R. (Chief Constable of West Midlands Police)* v. *Birmingham Justices* (above).

[73] Thus in the *Birmingham Justices*'s case it was held that the Chief Constable's power to make application for an anti-social behaviour order under the Crime and Disorder Act 1998 could be exercised by his subordinate officers.

[74] Freedland [1996] *PL* 19 at 25–30.

seem quite natural and proper to those who make them. In this class might be included the case of the cinema licensing authority which, by requiring films to be approved by the British Board of Film Censors, was held to have surrendered its power of control[75] and also the case of the Police Complaints Board, which acted as if it were bound by a decision of the Director of Public Prosecutions when only required to 'have regard' to it.[76] This doctrine has even been applied to voting by local councillors.[77]

Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise. The Minister of Housing and Local Government made it a rule to refuse planning permission for gravel-working on top-class agricultural land whenever the application was opposed by the Minister of Agriculture. The court held that this was to put the decisive power into the hands of the wrong minister and that a decision so taken must be quashed.[78] A decision of the Home Secretary that a prisoner should serve a term of at least 20 years was quashed because he acted 'as a rubber stamp' on the advice of the judge or of the parole board without making his own decision.[79] Even where there is a right of appeal to a minister, and it may seem sensible to take account of this practice, it has been held that this must not be adopted uncritically; but this was in a case where the Act specifically required a local authority to follow certain rules, which did not extend to the departmental practice which they followed wrongly.[80]

Clear-cut cases of unlawful dictation have occurred in other jurisdictions where ministers have attempted to interfere for political reasons. In one, the Prime Minister of Quebec gave instructions for the cancellation of a liquor licence where the licensee was supporting an unpopular section of the community;[81] in another, an Indian minister was alleged to have procured the taking-over by the state of businesses belonging to his political opponents.[82] If the minister's intervention is in fact the effective cause, and if the power to act belongs to a body which ought to act independently, the action taken is invalid on the ground of external dictation as well as on the obvious grounds of bad faith or abuse of power.[83]

[75] *Ellis* v. *Dubowski*, above, p. 315.

[76] *R.* v. *Police Complaints Board ex p. Madden* [1983] 1 WLR 447.

[77] *R.* v. *Waltham Forest L.B.C. ex p. Baxter* [1988] QB 419 (CA), upholding votes based on party policy.

[78] *Lavender & Sons Ltd.* v. *Minister of Housing and Local Government* [1970] 1 WLR 1231. For an example of an official abdicating his discretion to a minister see, *Simms Motor Units Ltd.* v. *Minister of Housing and Local Government* [1946] 2 All ER 201.

[79] *R.* v. *Home Secretary ex p. Walsh* [1992] COD 240.

[80] *R.* v. *Stepney Cpn.* [1902] 1 KB 317.

[81] *Roncarelli* v. *Duplessis* (1959) 16 DLR (2d) 689 (licensee repeatedly provided bail for Jehovah's Witnesses).

[82] *Rowjee* v. *Andhra Pradesh* AIR 1964 SC 962.

[83] See below, p. 361.

Permissible guidance

Clearly these rules ought not to be carried to the length of preventing one government department from consulting another, or of preventing government agencies from acting in accordance with government policy. There must always be a difference between seeking advice and then genuinely exercising one's own discretion, on the one hand, and, on the other hand, acting obediently or automatically under someone else's advice or directions. A licensing authority, for instance, may quite properly take account of government policy in its decisions, provided that it genuinely decides each case itself. A borderline case divided opinions in the High Court of Australia where the majority held that the Director-General of Civil Aviation might refuse import licences for aircraft following the Government's policy of not allowing new operators to enter the interstate air freight business.[84]

OVER-RIGID POLICIES

Policy and precedent

An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance.[85] It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time. The Greater London Council was criticised for disregard of this principle when it proceeded to make a large subsidy to the London bus and underground services as a matter of course because the ruling party had promised to do so in their election campaign.[86] They regarded themselves as irrevocably committed in advance, whereas their duty was to use their discretion. Nor may a local authority lawfully refuse all applications for housing for children of families considered to be 'intentionally homeless',[87] since the power to provide housing implies a duty to consider the different circumstances of each child.[88] Nor, for the same reason, may they automatically proceed to recondition sub-standard houses as soon as the owner has failed to comply with an improve-

[84] *R.* v. *Anderson ex p. Ipec-Air Pty Ltd.* (1965) 113 CLR 177.

[85] For discussion see (1972) 18 McGill LJ 310 (H. L. Molot); [1976] *PL* 332 (D. J. Galligan); [2002] *PL* 111 (C. Hilson).

[86] *Bromley LBC* v. *Greater London Council* [1983] 1 AC 768 (Lords Diplock and Brandon).

[87] See above, pp. 73–74.

[88] *A.-G. ex rel. Tilley* v. *Wandsworth LBC* [1981] 1 WLR 854 (declaration that resolution was unlawful); cf. *R.* v. *Accrington Youth Court ex p. Flood* (1997) 10 Admin. LR 17 (over-rigid policy of sending young offenders to remand centres); *R.* v. *North West Lancashire Health Authority ex p. A* [2000] 1 WLR 977 (over-rigid policy of refusing medical treatment for transsexuals).

ment notice.[89] Nor may they refuse to repay rates overpaid if their policy is based upon advice which interprets their statutory discretionary power too narrowly.[90] Where the Secretary of State's policy was to disallow all merely local objections to the allocation of land for gipsies, the court held it unlawful for undue rigidity.[91] Where he made a rule that he would refuse grants to all projects already started before the grant application he fettered his discretion unlawfully.[92] The Court of Appeal has held that a local council's resolution might be quashed if councillors voted for it in obedience to the orders of their political party, but not if they conscientiously decided to prefer the party's policy to their own opinions.[93]

In enforcing this rule the courts are underlining the difference between judicial and administrative processes. The legal rights of litigants are decided according to legal rules and precedents so that like cases are treated alike. But if an administrative authority acts in this way its decision is ultra vires and void. It is not allowed to 'pursue consistency at the expense of the merits of individual cases'.[94] This doctrine is applied even to statutory tribunals, despite their resemblance to courts of law.[95] Indeed, the quotation comes from a case in which it was held that the Transport Tribunal ought not to hold itself bound by its own precedents. But that tribunal, as explained elsewhere,[96] is in effect a licensing authority which takes decisions based on administrative policy, and it is the nature of the decision that counts rather than the outward appearance of the deciding body.

Just how far they may enforce a fixed policy is often a difficult question for authorities granting licences or permits. A clear instance was where an applicant for permission to sell pamphlets in public parks for the benefit of the blind was told that the Council had decided to grant no such permits, and could make no exception even in the most deserving case. The court regarded that 'not as the adoption of a policy in the exercise of a discretion but as a refusal to exercise any discretion',[97] and granted mandamus to compel the Council to consider the

[89] *Elliott* v. *Brighton BC* (1980) 79 LGR 506.

[90] *R.* v. *Rochdale MBC ex p. Cromer Ring Mill Ltd.* [1982] 3 All ER 761. See also the *Tower Hamlets* case, below, p. 798.

[91] *R.* v. *Secretary of State for the Environment ex p. Hatton BC* (1983) 82 LGR 662; and see *R.* v. *Home Secretary ex p. Bennett*, The Times, 18 August 1986 (Home Office circular set unduly rigid criteria for approval of police rent allowance applications).

[92] *R.* v. *Secretary of State for Transport ex p. Sherriff & Sons Ltd.*, The Times, 18 December 1986.

[93] *R.* v. *Waltham Forest LBC ex p. Baxter* [1988] QB 419 (no unlawful fettering of discretion found).

[94] *Merchandise Transport Ltd.* v. *British Transport Commission* [1962] 2 QB 173 at 193.

[95] See *R.* v. *Greater Birmingham Appeal Tribunal ex p. Simper* [1974] QB 543 (tribunal applied rule of thumb instead of exercising discretion: decision quashed); *R.* v. *Criminal Injuries Compensation Board ex p. RJC*, The Times, 21 January 1978 (discretion fettered by policy statement).

[96] Below, p. 910.

[97] Quoted from Bankes LJ in *R.* v. *Port of London Authority ex p. Kynoch Ltd.* [1919] 1 KB 176 at 185.

application.[98] It did not follow that they must give permission, or that they might not follow a policy: their duty was merely to exercise their discretion in each case, and not to shut the door indiscriminately either on all applicants or on applicants who did not conform to some particular requirement.

Consequently a local education authority may follow its own rules in allotting pupils to schools, provided that its motives are not unreasonable, capricious or irrelevant, and provided that it is ready to consider exceptional cases.[99] Where it is at liberty to make a choice between conflicting policies, it may decide to make no exceptions, as where it adopts a policy of making all schools in its area into comprehensive schools and abolishing all grammar schools.[1] But even then it is in a stronger position if it has listened fairly to the objections of parents and others concerned.

Licensing authorities

The rule has often been canvassed in liquor licensing cases where the licensing justices have adopted some restrictive policy, for example for reducing the number of licences in their area.[2] If the justices refuse renewal of a licence under some new policy without considering the application on its merits, their decision will be quashed.[3] But there can be no objection to a declared policy provided that the application is properly heard and considered in each case. Thus where the justices announced publicly that they would renew restricted licences only subject to the same restrictions, save in very exceptional cases, and subsequently decided a case saying: 'The bench carefully considered the application but is not prepared to alter the policy', the court upheld its decision.[4] The court is careful not to inhibit public authorities from laying down policies, since consistent administrative policies are not only permissible but highly desirable. And it is no less desirable that policies should be made public, so that applicants may know what to expect. But the policies must naturally be based on proper and relevant grounds. The justices erred, therefore, in refusing an occasional licence under a policy of never allowing

[98] *R.* v. *London County Council ex p. Corrie* [1918] 1 KB 68. Cf. *Sagnata Investments Ltd.* v. *Norwich Cpn.* [1971] 1 QB 614 (rigid policy against amusement arcades: no exercise of discretion. This was decided on appeal, not on judicial review). For a case of statutory permission to adopt a rigid policy of refusal see *R.* v. *Herrod ex p. Leeds City District Council* [1976] QB 540.

[99] *Cumings* v. *Birkenhead Cpn.* [1972] Ch. 12, where Lord Denning MR expounds the rules as to policy.

[1] *Smith* v. *Inner London Education Authority* [1978] 1 All ER 411.

[2] *Boyle* v. *Wilson* [1907] AC 45.

[3] *R.* v. *Windsor Licensing Justices ex p. Hodes* [1983] 1 WLR 685.

[4] *R.* v. *Torquay Licensing Justices ex p. Brockman* [1951] 2 KB 784, distinguishing *R.* v. *Walsall Justices* (1854) 18 JP 757 (refusal to hear any application for new licences) and following *R.* v. *Holborn Licensing Justices* (1926) 42 TLR 778 (fixed policy but case duly considered).

more than two such licences a year to any one applicant.[5] Even though they considered the case and were prepared to make exceptions, they acted on a policy different from that which the Act imposed upon them, which was public convenience. Similarly where the justices had refused a licence to sell liquor to one theatre, and for the sake of consistency felt obliged to refuse one to another theatre which had enjoyed it for fifty years previously, the decision was set aside since the statutory purpose was 'for ensuring order and decency' and the justices' motive was primarily to enforce consistency.[6] These decisions are merely examples of the abuse of discretionary power, discussed elsewhere.[7] None of them is in any way hostile to the adoption of a policy as such.

Bankes LJ stated the basic distinction in a *frequently* cited judgment. He contrasted two classes of cases: 'cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case'; and 'cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made'.[8] Accordingly the Port of London Authority, which was empowered to grant or withhold permission for the construction of docks, was allowed to enforce its policy of refusing permission, after due consideration, in cases where the new dock would come into competition with its own docks.

Ministers and national policy

Ministerial policies are subject to the same principles as the policies of other authorities. Accordingly it was unobjectionable for the Minister of Housing and Local Government, in deciding planning appeals, to follow a policy of discouraging development likely to interfere with the Jodrell Bank radio telescope provided that he judged each individual case fairly.[9] The Home Secretary was likewise entitled to pursue a policy of discrimination against foreign students of 'scientology' by refusing to renew their residence permits, subject to the same qualification;[10] and he might change his policy so as to refuse release on licence ('parole') to certain classes of prisoners in all but the most exceptional cases, so long as each case was

[5] *R.* v. *Rotherham Licensing Justices ex p. Chapman* (1939) 55 TLR 718 (explained in the *Torquay* case, above). See also *Perilly* v. *Tower Hamlets London Borough Council* [1973] QB 9 (mistaken rule of 'first come first served').

[6] *R.* v. *Flintshire CC Licensing Committee ex p. Barrett* [1957] 1 QB 350.

[7] See particularly *R.* v. *Birmingham Licensing Planning Committee ex p. Kennedy* [1972] 2 QB 140 (unlawful requirement that licences be purchased), below, p. 396.

[8] *R.* v. *Port of London Authority ex p. Kynoch Ltd.* [1919] 1 KB 176 at 182.

[9] *Stringer* v. *Ministry of Housing and Local Government* [1970] 1 WLR 1281.

[10] *Schmidt* v. *Home Secretary* [1969] 2 Ch. 149.

examined individually.[11] The Home Secretary fettered his powers unduly when he announced a policy of considering the release of life sentence prisoners on certain grounds only, but he remedied the fault by a later announcement that he would take account of exceptional circumstances.[12] He committed the same fault when he fixed a rigid tariff-period of fifteen years for the minimum term of imprisonment of two boy murderers instead of fixing a term which would be provisional and always reviewable.[13] The law was reviewed by the House of Lords in another case where the Board of Trade had made it a rule to refuse all applications for investment grants for items costing less than £25.[14] The claimants had invested over £4 m. in oxygen cylinders, but since each cylinder cost only about £20 the Board refused a grant, after giving full consideration to the case. The Act said merely that the Board 'may make' a grant. The House of Lords upheld the Board's action. Lord Reid said: '. . . if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him'. He added the familiar proviso: 'provided that the authority is always willing to listen to anyone with something new to say—of course I do not mean to say that there need be an oral hearing'. But he sounded a caveat against taking Bankes LJ's formula literally in every case; and Lord Dilhorne carried this further, saying: 'it seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail'. There may thus be room for some relaxation of the requirement of consideration of every application on its merits, at any rate in cases involving a national policy where applications are multitudinous. And there is no real difference in this context between a 'policy' and a 'rule'.

In a strongly contrasting case a minister resolved to turn a deaf ear to all pleas for a change of policy and his decision was quashed.[15] He had consulted local authorities generally before obtaining statutory power to reduce the central government's rate support grant to those whose expenditure was in his view excessive. After the Act was passed he refused to receive further representations and decided on reductions in the case of several authorities. He was held to have fettered his discretion unlawfully by settling and announcing his policy before he obtained his powers and then refusing to consider any appeals for exceptions. He had disregarded his duty 'to listen to any objector who shows that he may have something new to say'. He had also disregarded the principles of natural justice.[16]

[11] *Re Findlay* [1985] AC 318. Opinions in the Divisional Court and the Court of Appeal were divided.

[12] *R.* v. *Home Secretary ex p. Hindley* [2000] 2 WLR 730.

[13] *R.* v. *Home Secretary ex p. Venables* [1998] AC 407. Compare *R.* v. *Accrington Youth Court ex p. Flood* (1997) 10 Admin. LR 17 (rigid policy of sending female young offenders to remand centres instead of to young offender institutions held unlawful).

[14] *British Oxygen Co. Ltd.* v. *Board of Trade* [1971] AC 610; cf. *Kilmarnock Magistrates* v. *Secretary of State for Scotland* (below).

[15] *R.* v. *Secretary of State for the Environment ex p. Brent LBC* [1982] QB 593 (Divisional Court).

[16] See below, p. 533.

Sometimes a minister will have power to make regulations covering the same ground as some policy which he has adopted, and it may then be argued that he should enforce his policy openly by making regulations, which may be subject to Parliamentary scrutiny, rather than covertly by exercising discretion in each case. This argument was rejected by the Court of Session in a case where the Secretary of State had refused to approve the appointment of a chief constable on the ground that he came from within the local force.[17] The Secretary of State had both a discretionary power to withhold consent and also power to prescribe the qualifications of chief constables by regulation but he had made no regulation embodying his policy for rejecting internal appointments. There might perhaps be cases where a regulation-making power could be held to exclude administrative discretion; but where both powers are conferred by the same statute it is reasonable to allow the minister to choose between them; and it is, indeed, his duty to decide every case as he believes the public interest requires at the time.

Indiscriminate action

It undoubtedly remains true that the court will not accept the indiscriminate use of a power where cases ought to be considered on their own merits. If a local authority has power to refer furnished lettings to a rent tribunal, in order to obtain adjudication of the rent, it may not adopt a rule of referring all tenancies in any block of flats where two or more reductions of rent have previously been ordered, whether or not the tenants have complained.[18] For it is inherent in the power to refer that there should be some reasonable and specified ground for doing so in each particular case. If the authority has power to require owners of unfit houses to repair them, or else to repair them itself at the owner's expense, it may not give standing orders that the latter course shall always be taken without regard to individual circumstances.[19] There can be no substitute for the genuine exercise of discretion on every occasion.

Context, rigidity and the Human Rights Act

We have already seen that the context in which a policy is applied may affect its rigidity. Where, for instance, the applications are numerous and very similar the

[17] *Kilmarnock Magistrates* v. *Secretary of State for Scotland* 1961 SC 350 (Secretary of State's decision upheld). This question has been much litigated in the United States: see Schwartz and Wade, *Legal Control of Government*, 93.

[18] *R.* v. *Paddington and St Marylebone Rent Tribunal ex p. Bell London & Provincial Properties Ltd.* [1941] 1 KB 666 (below, p. 397). Cf. *Wood* v. *Widnes Cpn.* [1898] 1 QB 463 (over-rigid policy of requiring installation of water-closets).

[19] *Elliott* v. *Brighton BC* (1980) 79 LGR 506.

policy may almost harden into a rule.[20] On the other hand, where the applications are few in number and the circumstances are very different, greater flexibility will be required. Where the fundamental rights of individuals are involved, the Human Rights Act 1998 may now require a greater degree of flexibility. The decision not to follow the policy will need to be properly made; and in doing this the decision-maker will need to show, as explained elsewhere,[21] that any interference with human rights was proportionate to legitimate aims justifying their restriction.

This was exemplified in a case about the prison service's policy of separating imprisoned mothers from their babies at the age of 18 months.[22] In a narrow range of exceptional circumstances—primarily where the mother would shortly be released—the policy would not be applied. But, because of the human rights context,[23] the Court of Appeal held that the policy should be more flexibly applied. In each case the interference in the child's family life would have to be justified and shown to be proportionate to the legitimate aims of the policy.

RESTRICTION BY CONTRACT OR GRANT

Contractual fetters on discretion

Just as public authorities must have policies, so they must make contracts. Like policies, contracts may be inconsistent with the authorities' proper exercise of their powers. But, unlike policies, contracts are legally binding commitments, and therefore they present more difficult problems. The general principle is the same: an authority may not by contract fetter itself so as to disable itself from exercising its discretion as required by law. Its paramount duty is to preserve its own freedom to decide in every case as the public interest requires at the time.[24] But at the same time its powers may include the making of binding contracts, and it may be most important that it should make them. Since most contracts fetter freedom of action in some way, there may be difficult questions of degree in determining how far the authority may legally commit itself for the future.[25]

Two leading decisions of the House of Lords may be contrasted. In the *Ayr Harbour* case the harbour trustees had been incorporated by a local Act of Parliament with power to acquire compulsorily certain specified land for the purpose of carrying out certain specified works. On the acquisition of one part of the land

[20] See above, p. 328 (*British Oxygen* case).
[21] Above, p. 366.
[22] *R. (P & Q)* v. *Home Secretary* [2001] 1 WLR 2002 (CA). See further below, p. 368.
[23] Article 8—right to respect for family life—was the right involved.
[24] See *Denman Ltd.* v. *Westminster Cpn.* [1906] 1 Ch. 464 at 476.
[25] See [1971] *PL* 288 (P. Rogerson).

they wished to give an undertaking to the former owner that he should have unobstructed access from his adjoining land to the harbour, thus reducing the compensation payable for injurious affection of that land. The House of Lords held that any such undertaking would be incompetent.[26] The trustees had specific statutory power to build etc., on the land in question, and they could not strip themselves of this power by making a bargain. Lord Blackburn emphasised that the powers were entrusted to them by the legislature for the public good, and that a contract purporting to bind them and their successors not to exercise the powers was therefore void.

In the *Birkdale Electricity* case the House of Lords refused to apply this doctrine to an agreement by a statutory electricity company not to raise its charges above those of the adjoining electricity authority, the Corporation of Southport.[27] The company had statutory power to charge what it wished, subject to certain limits, and it was contended that any contract which fettered its exercise of this power could not be binding. But the House of Lords refused to accept an argument which would invalidate many ordinary trading contracts made by statutory authorities in the due management of their businesses. The *Ayr Harbour* case was distinguished as one where the trustees 'renounced a part of their statutory birthright' by offering 'to sterilize part of their acquisition, so far as the statutory purpose of their undertaking was concerned'.[28] In other words, there was a clear incompatability between their specific statutory purposes and the contract which they wished to make. The electricity company, on the other hand, should have commercial liberty as part of its statutory birthright of selling electricity, and that liberty should include power to make binding contracts. It would be absurd if the existence of statutory powers invalidated 'mere contracts restricting the undertakers' future freedom of action in respect of the business management of their undertaking'.[29]

Compatibility of powers

The important question is whether there is incompatibility between the purposes of the statutory powers and the purposes for which the contract is made. In cases where there is no commercial element the court is normally ready to condemn any restriction on a public authority's freedom to act in the public interest. Thus a planning authority cannot bind itself by contract either to grant[30] or to

[26] *Ayr Harbour Trustees* v. *Oswald* (1883) 8 App. Cas. 623.

[27] *Birkdale District Electric Supply Company* v. *Southport Cpn.* [1926] AC 355, criticising *York Cpn.* v. *Henry Leetham & Sons Ltd.* [1924] 1 Ch. 557 (contract assuring fixed river tolls for twenty years held inconsistent with power to increase tolls as required).

[28] *Birkdale* (as above) at 371–2 (Lord Sumner).

[29] As above, p. 372.

[30] *Ransom & Luck Ltd.* v. *Surbiton Borough Council* [1949] Ch. 180 (contract not to revoke permission). But see *Windsor and Maidenhead RBC* v. *Brandrose Investments Ltd.* [1983] 1 WLR 509 (relief refused in discretion).

refuse[31] planning permission in the future. In one case a local authority designated a sports ground as a proposed public open space, but made a formal agreement with the owner that this designation should cease to operate if the authority had not purchased the land by a certain time, that it would not purchase the land either voluntarily or compulsorily during a certain period, and that it would not make any claim for betterment. All these undertakings were void as clearly incompatible with the authority's duty to preserve its powers intact.[32] On the other hand it has been held to be compatible with the powers of a city council to give a public assurance that it would not increase the number of licensed taxicabs until a local Act of Parliament had been obtained.[33] This was not, apparently, a contractually binding undertaking,[34] but it influenced the Court of Appeal to hold that the council failed to act fairly and could not lawfully proceed without hearing those affected and paying due regard to its own assurance.

It follows *a fortiori* that a contract can contain no implied term which conflicts with the freedom to exercise a governmental power. This consideration determined a case where the London Corporation had contracted with a firm of barge-owners for the removal by water of large quantities of refuse, on terms fixed in 1936 which later proved unprofitable to the firm. The Corporation was also the port health authority and responsible for making byelaws. During the period of the contract they made new byelaws imposing more stringent requirements on barges, which would have added to the firm's losses. The firm claimed that the contract for refuse-collecting necessarily implied an undertaking by the Corporation to refrain from altering its byelaws to the firm's disadvantage, and that for breach of this undertaking they were entitled to rescind. The Court of Appeal held that there could be no question of implying a term which, even if express, could not be legally binding, since the Corporation could not contract out of its statutory duties as port health authority.[35] There would seem to be no objection to a term, express or implied, under which the Corporation would undertake, if it should change the byelaws, to compensate the contractor. This is the result achieved in French law by the doctrine of *fait du prince*, under which a government contractor can claim an

[31] *Stringer* v. *Minister of Housing and Local Government* [1970] 1 WLR 1281 (formal agreement with Manchester University to discourage development in the area of the Jodrell Bank radio telescope).

[32] *Triggs* v. *Staines Urban District Council* [1969] 1 Ch. 10.

[33] *R.* v. *Liverpool Corporation ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299. For its 'acting fairly' context see below, p. 534.

[34] Lord Denning MR said: 'So long as the performance of the undertaking is compatible with their public duty, they must honour it.' He also said that 'it certainly was binding unless overridden by some imperative public interest'. No such obligation was mentioned by the other members of the court, but unilateral undertakings have since been held binding in other cases: see below, p. 373.

[35] *Cory (William) & Son Ltd.* v. *London Corporation* [1951] 2 KB 476. It was conceded that the new byelaws would frustrate the contract, but the firm was claiming immediate rescission as for breach.

equitable adjustment if the government, by use of its paramount powers, upsets the calculations on which the contract was made.[36]

The principles which forbid the fettering of public authorities' powers by contract apply equally to covenants and grants in property transactions. If the Crown grants a lease, this cannot prevent the Crown from requisitioning the property under wartime statutory powers.[37] In this case the Crown cannot be said to have 'evicted' the tenant, and thus released him from liability for the rent, since the taking of the premises by requisition was a lawful act. Nor can the usual implied covenant for quiet enjoyment include any implication that the power of requisition will not be exercised, since clearly that power must in the public interest be paramount.[38] Similarly if the government acquires land for national defence, they have overriding power to use the land as an airfield even though it is subject to a restrictive covenant limiting its use to agriculture[39]—and it can make no difference whether the covenant was made by the government itself or by some predecessor in title.

Valid commitments

It would be quite wrong to conclude that a public authority can 'escape from any contract which it finds disadvantageous by saying that it never promised to act otherwise than for the public good'.[40] There will often be situations where a public authority must be at liberty to bind itself for the very purpose of exercising its powers effectively. The Bournemouth Corporation, on acquiring land for a public park, entered into a restrictive covenant with the vendor that the land should be used as a pleasure ground free from building or erections. The Corporation wished to erect public lavatories, having specific statutory power to do so in any public park. The Court of Appeal held that they were bound by their covenant, and refused to accept that there was any analogy with the *Ayr* case.[41] The land had been acquired for an express purpose and there was nothing contrary to that purpose in the observance of the covenant. Similarly a local authority, on acquiring land for

[36] See Mitchell, *The Contracts of Public Authorities*, 193. For criticism see P. Rogerson, [1971] *PL* at p. 300, suggesting that an automatic right to compensation unduly favours those who contract with public authorities as compared with other contractors who may suffer equal loss from acts of government. In principle all contractors should cover themselves against this risk, but there are special reasons for implying an indemnity when it is within the power of one contracting party to alter the situation to the disadvantage of the other.

[37] *Commissioners of Crown Lands* v. *Page* [1960] 2 QB 274 (CA).

[38] There is no implied term that the powers shall be exercisable; no covenant can prevent them from being exercisable.

[39] *Marten* v. *Flight Refuelling Ltd.* [1962] Ch. 115 (covenant by predecessor in title).

[40] *Commissioners of Crown Lands* v. *Page* (above) at 293 (Devlin LJ).

[41] *Stourcliffe Estates Co. Ltd.* v. *Bournemouth Cpn.* [1910] 2 Ch. 12. See similarly *R.* v. *Hammersmith and Fulham LBC ex p. Beddowes* [1987] QB 1050.

allotments, could validly covenant that it would be used only for that purpose.[42] If it were otherwise, local authorities would often find it very difficult to acquire land by agreement. This is another case where the 'statutory birthright' must include power to make binding promises. And, of course, such a power may be conferred by statute.[43]

The truth is that multi-purpose authorities, such as local councils, are equipped with a great many different powers for different purposes, and that some of these may necessarily be inconsistent with others. It cannot be right to restrict the exercise of power which the authority wishes to use in some particular situation, because some other power, which the authority does not then wish to use, would then become unusable. A local authority which has power to maintain public parks may thus quite properly dedicate a park to public use, even though this makes it impossible for the future for it to exercise its general powers of letting the land in question.[44]

The Court of Appeal has indicated that in the case of overlapping and conflicting powers the first thing to ascertain is the object for which the land is held. All other powers are subordinate to the main power to carry out the statutory object and can be used only to the extent that their exercise is compatible with that object.[45] This principle was applied, though without being cited, in a case where the Wolverhampton Corporation had granted to a company the right to use the municipal airport for ninety-nine years. After thirty-five years the Corporation decided to discontinue the airport and use the land as a housing estate. But the Vice-Chancellor held that it had no right to do so in breach of its commitment to the company, which had been validly made.[46] He said:

> Obviously, where a power is exercised in such a manner as to create a right extending over a term of years, the existence of that right pro tanto excludes the exercise of other statutory powers in respect of the same subject matter, but there is no authority and I can see no principle upon which that sort of exercise could be held to be invalid as a fetter upon the future exercise of powers.

In this case as in many others the court was pressed with the *Ayr* case. But it is quite evident that the doctrine of that case will not be extended to the point where it can be invoked by a public authority as a pretext for escaping from obligations which it has deliberately and properly contracted.

[42] *Leicester (Earl)* v. *Wells-next-the-Sea Urban District Council* [1973] Ch. 110.

[43] *Windsor BC* v. *Brandcote Investments Ltd.* [1981] 1 WLR 1083 (statutory agreement with planning authority).

[44] *Blake* v. *Hendon Cpn.* [1962] 1 QB 283.

[45] *Blake* v. *Hendon Cpn.* (above) at 301–2, following *British Transport Commission* v. *Westmorland County Council* (below).

[46] *Dowty Boulton Paul Ltd.* v. *Wolverhampton Cpn.* [1971] 1 WLR 204.

Non-contractual cases

It has several times been held that a non-contractual undertaking may bind a public body. One case was where a taxicab licensing authority gave a public undertaking not to increase the number of licences for a certain time. Although this was a mere statement of future policy, which in general cannot be restricted by agreement, it was said that the undertaking 'certainly was binding unless overridden by some imperative public interest'.[47] That such an undertaking could create a legal obligation was a novel proposition. But it has since fallen into place as part of the doctrine that breach of an undertaking may lead to inconsistent and unfair action amounting either to an abuse of power[48] or else to a breach of the principles of natural justice.[49]

The grant of an easement, such as a right of way, may or may not be compatible with a public body's statutory powers and duties. This question has often arisen,[50] but many of the cases concern railway companies and other non-governmental bodies, outside the field of administrative law. They were considered by the House of Lords in a case where a railway company had allowed the public to use a bridge over their railway for so long that dedication as a public highway was to be presumed. The question was whether the dedication of a highway was inconsistent with the company's statutory objects and powers, including their power to demolish the bridge in certain circumstances. This was answered in the negative,[51] and it was laid down that the test of consistency was not to be applied with undue rigour, as had occurred in some earlier cases.[52] It was to be based on 'consideration of reasonable probabilities'[53] and it was to be a 'pragmatic test', bearing in mind that it would be a grave impediment to public amenity if railways were legally incompetent to create public rights of way across their lines.[54]

[47] *R.* v. *Liverpool Cpn. ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 (Lord Denning MR).

[48] See below, p. 372.

[49] See below, p. 492.

[50] See *R.* v. *Leake (Inhabitants)* (1833) 5 B & Ad. 469 and later cases cited in *British Transport Commission* v. *Westmorland County Council* (below).

[51] *British Transport Commission* v. *Westmorland County Council* [1958] AC 126.

[52] *Mulliner* v. *Midland Railway* (1879) 11 Ch. D. 611; *Paterson* v. *Provost etc. of St. Andrews* (1881) 6 App. Cas. 833. Both these decisions are hostile to the creation of public rights of way by authorities with limited powers. The second concerned a road on the St Andrews golf links.

[53] *British Transport Commission* v. *Westmorland County Council* (above) at 144 (Lord Simonds).

[54] *British Transport Commission* (as above) at 153, 156 (Lord Radcliffe).

ESTOPPEL—MISLEADING ADVICE

Estoppel and discretion

The doctrine of estoppel must be prevented not only from enlarging the powers of public authorities illegitimately, as already explained:[55] it must also be prevented from cramping the proper exercise of their discretion. The principle here is the same as in the case of contracts, already discussed, and it is equally capable of causing hardship.[56] The leading cases concern misleading official rulings.

The employees of public authorities may often be asked to advise or rule upon some question which only their employing authority can decide. Expense may reasonably be incurred in reliance on the advice given, but if it turns out to be wrong there is usually no legal remedy. The authority's freedom to decide as it thinks the public interest requires must on no account be compromised, hard though the result may be. A notable illustration was a case where a company had bought land for use as a builder's yard, on the understanding that it had an existing use right for that purpose, so that no planning permission would be required.[57] In order to make sure of this before committing themselves to the purchase, the company consulted the borough surveyor, an employee of the planning authority, who confirmed that the right existed and that no planning permission was necessary. But this advice was wrong, and eventually the planning authority served an enforcement notice to stop the company from using the land as a builder's yard. It was held, though reluctantly, that this notice was enforceable, and that no advice or assurance from the borough engineer could hamper the planning authority's free and unhindered discretion, which they had a duty to exercise in the public interest. In the same way a local education authority's decision to pay the school transport costs of a pupil could not estop them from revoking it when it was found to have been taken under a mistake as to the facts.[58]

In endeavouring to protect the citizen against such hardships the courts have strained the law and given doubtful decisions. An irregular departmental decision was held binding on the Crown in a case where an army officer claimed a disablement pension on account of war injury. The War Office wrote to him that 'Your

[55] Above, p. 236. For discussion see [2003] JR 71 (M. C. Elliott); [1981] CLP 1 (A. W. Bradley); (1977) 93 *LQR* 398 (P. P. Craig); [1972] *PL* 43 (M. A. Fazal); [1965] *PL* 237 (G. Ganz); (1953) 53 Col. LR 374 (F. C. Newman).

[56] See the *Laker Airways* case, above, p. 238.

[57] *Southend-on-Sea Corporation* v. *Hodgson (Wickford) Ltd.* [1962] 1 QB 416. See also *Brooks and Burton Ltd.* v. *Secretary of State for the Environment* (1977) 75 LGR 285, reversed on other grounds [1977] 1 WLR 1294 but approved on this point in *Western Fish Products Ltd.* v. *Penwith DC* [1981] 2 All ER 204.

[58] *Rootkin* v. *Kent CC* [1981] 1 WLR 1186.

disability has been accepted as attributable to military service.' But for this injury the responsible department was the Ministry of Pensions, which the War Office had not consulted. The Ministry later decided that the disability was not attributable and the pension appeal tribunal upheld that decision. In reliance on the War Office letter the claimant had refrained from getting a medical opinion and assembling other evidence which might have strengthened his case against the Ministry. On appeal to the court, Denning J reversed the decisions of the Ministry and the tribunal, holding that the Crown was bound by the War Office letter.[59] He invoked two doctrines of his own creation: that assurances intended to be acted upon and in fact acted upon were binding; and that where a government department wrongfully assumes authority to perform some legal act, the citizen is entitled to assume that it has the authority. He also dismissed the contentions that estoppels do not bind the Crown ('that doctrine has long been exploded') and that the Crown cannot fetter its future executive action.[60]

The proposition about wrongfully assumed authority was emphatically repudiated by the House of Lords in a later case in which Denning LJ had again put it forward. The question was whether ship repairs, which could be lawfully executed only under written licence, could in effect be validly authorised merely by oral permission from the licensing officer. Could the licensee rely on the licensing officer's purported authority to grant an oral licence? The House of Lords answered this firmly in the negative.[61] Although this was a somewhat stronger case, in that there would otherwise have been a violation of an express statutory prohibition, it would seem necessary to reject the whole notion of estoppel of a public authority by wrongful assumption of statutory authority.[62] For it clearly conflicts with the basic rule that no estoppel can give the authority power which it does not possess. Just as there was no power to license ship repairs orally, so there was no power for the War Office to award pensions which in law were available only from the Ministry of Pensions.

Nevertheless the Court of Appeal has held a local planning authority bound by wrong statements made by its own officers, in apparent defiance of the rules against both delegation and estoppel. After planning permission had duly been given for the building of a group of houses in London, the builder submitted a revised plan and asked for approval of the variations. The planning officer had lost the file with the original plan and, thinking that the variations were not material, told the builder that no further permission would be needed. In fact the variations brought the new houses much closer to existing houses, and when one of them was

[59] *Robertson* v. *Minister of Pensions* [1949] 1 KB 227. See also *Re L (AC) (an infant)* [1971] 3 All ER 743.

[60] See below, p. 841.

[61] *Howell* v. *Falmouth Boat Construction Co. Ltd.* [1951] AC 837. See also *A.-G. for Ceylon* v. *A. D. Silva* [1953] AC 461, quoted below, p. 340.

[62] In this context estoppel has a wider sense than estoppel by representations of fact, and includes representations of law. For ostensible agency in contract see below, p. 829.

already nearly finished the planning authority refused permission and threatened enforcement. The Court of Appeal granted a declaration that there was already a valid planning permission for the house on the altered site.[63] But in fact the planning officer had no power to grant planning permission at all, and the planning authority itself had not done so in respect of the new site. Lord Denning MR held that the practice of allowing the planning officer to rule that variations were not material gave him 'ostensible authority', since the planning authority might have delegated its powers to him and the builder was entitled to assume that the necessary resolution had been passed.[64] He also stated that a public authority may be bound by representations made by their officer within this ostensible authority if some other person acts on them.[65] These two propositions were virtually the same as those that had been rejected by the House of Lords in the ship-licensing case,[66] but this was not cited.

The unfortunate features of the Court of Appeal's decision were first that it sacrificed the interests of the neighbouring house-owners, who were forced to accept houses overlooking them much more closely than the planning authority would have permitted. Secondly, it sacrificed the public interest, since the court deprived the responsible public authority of the powers of control which the Act assigned to them and to them only. As has been amply illustrated, the court is normally careful to prevent any legal doctrines from impeding the free exercise of statutory discretion in the public interest by the proper body.

Wrestling with the problems so created,[67] another Court of Appeal supplied a partial corrective in a case where a firm purchased a disused factory for the purpose of manufacturing fish products and incurred expenditure after being told orally on behalf of the local authority's chief planning officer that application for an 'established use' certificate would be 'purely a formality'.[68] The local authority eventually refused the certificate and refused planning permission. Dismissing the firm's claim, the court held that there were only two kinds of exception to the principle that a public authority could not be estopped from exercising its duties

[63] *Lever Finance Ltd.* v. *Westminster London Borough Council* [1971] 1 QB 222 (judgments not reserved) and now distinguished in *R. (Reprotech (Pebsham) Ltd)* v. *East Sussex County Council* [2003] 1 WLR 348 (HL), discussed below, p. 339–40. Sachs LJ held that on the facts the planning authority had delegated its power to the planning officer under Town and Country Planning Act 1968, s. 64; statutory formalities had not been observed, but perhaps they could have been treated as merely directory.

[64] The Town and Country Planning Act 1968, s. 64, was already in force. It was on this ground that the *Southend* case (above, p. 336) was distinguished.

[65] This must mean 'acts on them to his detriment': *Norfolk County Council* v. *Secretary of State for the Environment* [1973] 1 WLR 1400, where Lord Widgery CJ accepted Lord Denning's proposition with this addition. For this case see above, p. 237. See also *Rootkin* v. *Kent CC* [1981] 1 WLR 1186; *A.-G.* v. *Taff-Ely BC* [1981] 42 P & CR 1.

[66] *Howell* v. *Falmouth Boat Construction Co. Ltd.* (above).

[67] And being unable to overule the earlier Court of Appeal decision.

[68] *Western Fish Products Ltd.* v. *Penwith DC* (1978) 38 P & CR 7 (later reported in [1981] 2 All ER 204) (unanimous judgment).

and powers. One exception was where it had statutory power to delegate functions to its officers and there were special circumstances to justify the applicant in thinking that the officer thus had power to bind the authority by an irrevocable decision. The earlier Court of Appeal case was brought within this exception because of the evidence of a widespread practice of allowing planning officers to authorise immaterial modifications of approved plans. But the mere holding of such an office was not enough, and the court rejected Lord Denning's proposition that anyone dealing with a planning officer is entitled to assume that he is authorised to make binding decisions. The court also stressed the injustice to third parties and to the public where a planning authority is held bound by an estoppel to allow development which flouts its planning policy.

The other exception is where the authority waives a procedural requirement relating to some application made to it, whereupon it may be estopped from relying on the lack of formality.[69] As already explained,[70] this is an established exception in cases where it does not hamper the authority in the discharge of its statutory functions.

Despite these restrictive rules, the Court of Appeal has since held the Crown estopped by a colonial governor's letter wrongly stating that an applicant's children already had British citizenship, so that he discontinued an application for their registration. Registration was discretionary, but it was conceded that it would have been granted. The House of Lords, however, found other reasons for rejecting the Crown's argument that it was now too late to rectify the mistake, while noting that the element of discretionary power might have made it difficult to establish an estoppel.[71]

On the most recent occasion on which the House of Lords has considered the issue it recognised the strength of the criticisms set out above of the role of estoppel in public law.[72] Their Lordships concluded that 'it is unhelpful to introduce private law concepts of estoppel into planning law' and 'public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand on its own two feet'. As the court foresaw, if estoppel ceased to operate here,[73] the innocent

[69] The court cites *Wells* v. *Minister of Housing and Local Government* [1967] 1 WLR 1000, where the waiver was by the authority itself now distinguished in *R. (Reprotech (Pebsham) Ltd)* v. *East Sussex County Council* [2003] 1 WLR 348 (HL), discussed below. It seems that officers of the authority may also raise estoppels of this kind: *Re L (AC) (an infant)* [1971] 3 All ER 743 (above, p. 238).

[70] Above, p. 240.

[71] *Gowa* v. *Attorney-General* [1985] 1 WLR 1003.

[72] *R. (Reprotech (Pebsham) Ltd)* v. *East Sussex County Council* [2003] 1 WLR 348 (HL) (applicant sought unsuccessfully to rely upon planning officer's apparent statement that planning permission was not required for change of use). See [2003] JR 71 (M. C. Elliott), [2003] CLJ 3 (S. Atrill).

[73] Their Lordships in fact distinguished rather than overruled *Lever Finance Ltd* v. *Westminster (City) LBC* [1971] 1 QB 222 and *Wells* v. *Minister of Housing and Local Government* [1967] 1 WLR 732.

representee would yet be able to rely upon a substantive legitimate expectation.[74] And there are several cases which have relied upon legitimate expectation when earlier they might have rested upon estoppel.[75] Although there is significant overlap between the two doctrines,[76] the substantive protection of legitimate expectations envisages an express judicial weighing of the conflicting interests. So, in principle, the individual interest in upholding the representation might outweigh the public interest in maintaining the planning system on which the public is entitled to rely. But in most cases, since the public interest will generally prove more weighty, there will be little difference.[77]

The solution: compensation

The dilemma which misleading rulings can create is certainly painful. But it does not follow that the right solution is to disregard the public interest, together with the interest of those whom the law is intended to protect. If the force of law is given to a ruling from an official merely because it is wrong, the official who has no legal power is in effect substituted for the proper authority, which is forced to accept what it considers a bad decision.[78] To legitimate ultra vires acts in this way cannot be a sound policy, being a negation of the fundamental canons of administrative law. As the Privy Council said in an analogous case of a Crown officer who made an unauthorised contract:[79]

> It may be said that it causes hardship to a purchaser . . . if the burden of ascertaining whether or not the Principal Collector has authority to enter into the sale is placed upon him. This undoubtedly is true. But . . . to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorised acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one.

Nor should it make any difference that the decision forced upon the public authority is one which would have been within its powers, as opposed to one which would have been outside them. For decisions which are against the public interest, in the view of the proper authority, are scarcely less objectionable if intra vires than if ultra vires. The Court of Appeal has now very properly recognised the dangers of

[74] See above, p. 372.

[75] See, for instance, *R.* v. *Leicester City Council, ex p. Powergen UK Ltd* [2000] JPL 629.

[76] And both wrestle with the difficulty of a representation made by an ostensibly authorised officer: *South Buckinghamshire DC* v. *Flanagan* [2002] 1 WLR 2601 and *R. (Bloggs 61)* v. *Home Secretary* [2003] 1 WLR 2724 (representation by police did not bind prison service).

[77] See Elliott, above, 77–80.

[78] In *Wells* v. *Minister of Housing and Local Government* (above) Russell LJ, dissenting, attributed that policy to the natural indignation that the practice should operate as a trap for the unwary, adding that 'the question is, I think one of law not to be decided by a thoroughly bad administrative practice'.

[79] *A.-G. for Ceylon* v. *A. D. Silva* [1953] AC 461 at 480.

giving rein to the doctrine of estoppel in public law and has said that its extension cannot be justified beyond the two exceptions explained above.[80]

The only acceptable solution, therefore, is to enforce the law but to compensate the person who suffered the loss by acting on a ruling from the ostensibly proper official. If the ruling leads to the erection of a house without planning permission, and the planning authority thinks it wrong to give permission, the house should be demolished and the builder should be compensated, in the same way as when a valid planning permission is revoked and compensation is paid for abortive expenditure.

The Parliamentary Commissioner for Administration has given a lead in the right direction by obtaining compensation in a number of such cases, for example for an importer who had to pay purchase tax on a car imported on the faith of a prior official assurance that it would be duty-free.[81] The giving of wrong rulings by officials is maladministration and this is the correct basis for redress. French law has found no difficulty in reaching this solution[82] and English law should equally well be able to reach it. It is on all accounts better than manipulating the law so as to uphold acts which are ultra vires or contrary to the public interest, in an attempt to make two wrongs into a right. It is true that many people have to rely on legal or other advice which may prove to be wrong, but there is a special claim to redress where loss is caused by a wrong ruling from a governmental authority on whose guidance the citizen is entitled to rely.

In a growing number of cases a solution has been found in the tort of negligent misstatement, now being developed by the courts.[83] Although negligence is not always easy to prove, it is sometimes self-evident in cases of wrong official rulings. A local authority has been held liable for the failure by one of its clerks to search the local register of land charges with due care, thus causing pecuniary loss.[84] A government department has been held liable similarly for negligently advising an exporter that he would be insured against loss when in fact he was not.[85] And other examples are accumulating. Wrong advice or assurances given by officials of planning authorities might make them liable similarly, so as to compensate the misguided developer and avoid the legitimation of wrongful assumption of

[80] In the *Western Fish Products* case (above); and see *Rootkin* v. *Kent CC* (above).

[81] See above, p. 75.

[82] The Conseil d'État treats misleading official advice as *faute de service*: see CE 10 July 1964, *Duffaut*, Rec. 399; CE 17 Dec. 1965, *Jaquet*, Rec. 699. In both cases planning authorities misled purchasers of land by informing them that there were no restrictions on building, whereas the lands were reserved for an airfield and a university respectively; and when permission to build was later refused, the purchasers recovered compensation from the state. See similarly CE 20 Jan. 1988 *Aubin*, noted in [1988] *PL* 469 (misinformation about unemployment benefit).

[83] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] AC 465 is the root case.

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

[85] *Culford Metal Industries Ltd.* v. *Export Credits Guarantee Department*, The Times, 25 March 1981.

authority. This head of liability is further discussed below in the wider context of negligent government acts and decisions.[86]

Compensation as a solution has been criticised on the ground that it is a wasteful use of scarce resources.[87] However, the same reproach could be levelled at every use of public funds to remedy maladministration or to pay damages for torts committed by public officials. Justice for the innocent representee has its price.

Misleading official advice may, in addition, be a contributory factor to action by a public authority which is so unfair and inconsistent that it amounts to an abuse of power.[88] Where local authorities wrongly advised students that they were ineligible for grants, thus deterring them from making their applications in time, and then refused grants on the ground that the applications were late, the refusals were quashed as unfair and irrational and an abuse of discretion[89]—a form of maladministration amply illustrated in the following chapter.

Wrong official advice may also sometimes be a good defence to a criminal charge, but only where there would be no offence if the advice given were correct.[90]

[86] Below, p. 762.

[87] (1977) 93 *LQR* 398 (P. P. Craig), proposing instead a search by the judge for the balance of public and individual interest; and where the individual interest is more weighty to protect it.

[88] See below, p. 372.

[89] *R.* v. *West Glamorgan CC ex p. Gheissary*, The Times, 18 December 1985.

[90] *Cambridgeshire County Council* v. *Rust* [1972] 2 QB 426.

11

ABUSE OF DISCRETION

RESTRICTION OF DISCRETION

Discretion limited by law

It used to be thought to be classical constitutional doctrine that wide discretionary power was incompatible with the rule of law.[1] But this dogma cannot be taken seriously today, and indeed it never contained much truth. What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should be able to control its exercise. Modern government demands discretionary powers which are as wide as they are numerous. Parliamentary draftsmen strive to find new forms of words which will make discretion even wider, and Parliament all too readily enacts them. It is the attitude of the courts to such seemingly unbounded powers which is perhaps the most revealing feature of a system of administrative law.[2]

The first requirement is the recognition that all power has legal limits. The next requirement, no less vital, is that the courts should draw those limits in a way which strikes the most suitable balance between executive efficiency and legal protection of the citizen. Parliament constantly confers upon public authorities powers which on their face might seem absolute and arbitrary. But arbitrary power and unfettered discretion are what the courts refuse to countenance. They have woven a network of restrictive principles which require statutory powers to be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering Act. They have also, as explained elsewhere, imposed stringent procedural requirements.[3] Here we are concerned with the substance of administrative discretion.

[1] Dicey, *Law of the Constitution*, 9th edn., 202.

[2] For discussion see Galligan, *Discretionary Power*. For the corresponding law in France see [1986] *PL* 99 (J. Bell); [1987] *PL* 287 (R. Errera). For the USA see Schwartz, *Administrative Law*, 3rd edn., 654; (1986) 54 *Geo. Wash L. Rev.* 469 (C. H. Koch); Schwartz and Wade, *Legal Control of Government*, 260, 262; Davis, *Discretionary Justice*, discusses problems of discretionary power in the United States but says little about the role of the courts. See also Davis, *Discretionary Justice in Europe and America*. For criticism see [1984] *PL* 570 (R. Baldwin and K. Hawkins). Note also Recommendation R(80)2 of the Committee of Ministers, Council of Europe (11 March 1980).

[3] Below, p. 439.

Discretion is an element in all power, as opposed to duty, so that 'abuse of discretion' could be made to include most of administrative law. But it is more convenient to confine this rubric to a central group of rules which are difficult to separate from one another, leaving aside what can readily be classified under other headings. This has the advantage of emphasising the policy of the courts in the area where they have to come closest to sitting in judgment on the merits, as such, of governmental acts and decisions. It is an area where wide choices are open to them. If they choose to shelter behind literal interpretation, and take the words of each Act at face value, they could absolve themselves from many difficult problems. By insisting, as they do, that the implications of an enactment are as significant as its express provisions, and that powers given for public purposes are as it were held upon trust, they embroil themselves with the policy, motives and merits of administrative action. At the same time they must confine themselves to applying recognisable principles of law, since at all costs they must not expose themselves to the charge of usurping executive power.

Having pushed their doctrines to remarkable lengths in some cases, the courts have staked their claim to a kind of constitutional restraining power. While their paramount duty is loyal obedience to Parliament, it is for them to say what Parliament really means. Parliament—or, more realistically, the government which controls Parliament—is impatient of any restraint, and constantly confers what appear to be unfettered powers, or attempts to take away judicial remedies. The courts as constantly react by devising some means of preserving the legal principles of control. In so doing they preserve the rule of law, of which Parliament appears surprisingly heedless. If legislation were more restrained, the courts would not be called upon to perform such striking feats of interpretation. They are a kind of legal antidote to the unqualified sovereignty of Parliament, redressing the balance of forces in the constitution.

Although it has been laid down in the House of Lords, and repeated by other judges, that judicial review means 'review of the manner in which the decision was made',[4] the context of this statement shows that it was not intended to affect the established grounds of review which, as the whole of this chapter illustrates, extend to the substance as well as the manner of administrative decisions and acts.

Basis of judicial review

In requiring statutory powers to be exercised reasonably, in good faith, and on correct grounds, the courts are still working within the bounds of the familiar principle of ultra vires. The analysis involves no difficulty or mystique. Offending acts are condemned simply for the reason that they are unauthorised. The court

[4] *Chief Constable of North Wales Police* v. *Evans* [1982] 1 WLR 1155 at 1174 (Lord Brightman). Review for unreasonableness in the *Wednesbury* sense is expressly recognised.

assumes that Parliament cannot have intended to authorise unreasonable action, which is therefore ultra vires and void.[5] This is the express basis of the reasoning in many of the cases cited below.[6] Two particularly well-known statements may be instanced. One is from Lord Russell of Killowen CJ, who said that if a local authority's byelaws were manifestly unjust or oppressive

> the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.'[7]

The other is from Lord Greene MR, who in a judgment discussed later said that where an act was challenged as being unreasonable, the court's only task was

> to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.[8]

It is, indeed, self-evident that the decisions rest on this elementary principle, since if the action in question is found to be intra vires the court has no power to interfere. The same result is attained in some cases by saying that, where a decision is bad for unreasonableness, the authority has failed to exercise its discretion at all.[9]

A necessary corollary is that, as usual throughout administrative law, we are concerned with acts of legal power, i.e. acts which, if valid, themselves produce legal consequences. Courts of law have nothing directly to do with mere decisions of policy, such as decisions by the government that Britain shall join the European Communities (even though a treaty is concluded)[10] or that grammar schools shall be replaced by comprehensive schools.[11] Such decisions have no legal impact until statutory powers are conferred or invoked. But as soon as Parliament confers some legal power it becomes the business of the courts to see that the power is not exceeded or abused; and statements of policy relating to the use of such legal powers are within the scope of judicial review.[12]

[5] Above, p. 35.

[6] e.g. *Short* v. *Poole Corporation* [1926] Ch. 66; *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240; *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] AC 735 at 753 (Lord Radcliffe); *Hartnell* v. *Minister of Housing and Local Government* [1965] AC 1134 at 1173 (Lord Wilberforce); *Roncarelli* v. *Duplessis* (1959) 16 DLR (2d) 689, quoted below, p. 361.

[7] *Kruse* v. *Johnson* [1898] 2 QB 91 at 100.

[8] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Cpn.* [1948] 1 KB 223 at 234.

[9] e.g. in *R.* v. *St Pancras Vestry* (1890) 24 QBD 371 at 375; *R.* v. *Board of Education* [1910] 2 KB 165 at 175; *Williams* v. *Giddy* [1911] AC 381 at 386; *R.* v. *Port of London Authority ex p. Kynoch* [1919] 1 KB 176 at 183. In licensing cases this analysis may be due to the preference for mandamus as a remedy, based on the mistaken idea that certiorari will not lie: see below, p. 664.

[10] *Blackburn* v. *A.-G.* [1971] 1 WLR 1037.

[11] *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] AC 1014; below, p. 424.

[12] See below, p. 376.

This logic, fundamental though it should be, is not invariably respected.[13] A number of non-statutory bodies, such as the Criminal Injuries Compensation Board (in its original form)[14] and the Panel on Take-overs and Mergers (an agency of the London Stock Exchange) have been brought within the scope of judicial review on the same general basis as if they were statutory. These remarkable decisions, discussed later,[15] were prompted by the courts' determination to act 'in defence of the citizenry'[16] against abuse of power by important bodies of a governmental or quasi-governmental nature, or by bodies wielding monopolistic power over some profession or activity, and not to let them escape merely because of their non-statutory character. Bold judicial forays have opened up an important new field for administrative law.

The royal prerogative

The prerogative powers of the Crown[17] have traditionally been said to confer discretion which no court can question;[18] and there was long a dearth of authority to the contrary. But it may be that this was because the decided cases involved discretions which are, as has been laid down in the House of Lords, inherently unsuitable for judicial review, 'such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others'.[19] But at the same time the House of Lords held that the court could review a minister's action (forbidding trade union membership by certain civil servants) under authority delegated to him by prerogative Order in Council, so that the principles of natural justice would apply. Administrative action was held to be reviewable in proceedings against the responsible minister without distinction as to the origin of the power, whether statute or common law.[20] In later cases it was held that the dismissal of a civil servant involved 'a sufficient public law element' to be subject to

[13] Note also the anomaly as to 'decisions', below, p. 611.
[14] It is now a statutory commission under the Criminal Injuries Compensation Act 1995.
[15] Below, p. 638.
[16] Sir John Donaldson MR in *R.* v. *Panel on Take-overs and Mergers ex p. Datafin Plc* [1987] QB 815 at 839.
[17] See above, p. 215.
[18] Bl. Comm. 250, 252.
[19] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 at 418 (Lord Roskill). For this case see below, p. 553. Despite its title it was an application for judicial review.
[20] So confirming a remark of Lord Devlin in *Chandler* v. *Director of Public Prosecutions* [1964] AC 763 at 809–10. Note the similar attitude of the Court of Appeal in *R.* v. *Panel on Take-overs and Mergers ex p. Datafin Plc* (as above). See also [1973] *CLJ* 287 at 293 (B. S. Markesinis).

judicial review,[21] and that an unfair compensation award by the civil service appeal board should be quashed.[22] So now it may be said that the royal prerogative does not *per se* confer unreviewable discretion, but that many of the powers contained in it will be of a kind with which the courts will not concern themselves. It may be that prerogative acts of the Crown itself, though taken on the advice of ministers, are immune from review, whereas the action of ministers, though authorised by delegation of prerogative power, is reviewable.[23] But this is an artificial distinction, and if the case were strong enough even an Order in Council might prove to be reviewable in a declaratory judgment.[24]

These propositions are founded on the wide definition of prerogative which has been criticised earlier.[25] The making of treaties, for example, has no effect on the law of this country,[26] so that there is no exercise of power which can concern the courts. It might be called prerogative without power, while the employment of civil servants might be called power without prerogative. A case where there may be neither prerogative nor power is the grant and refusal of passports, which has been claimed to be wholly within the prerogative and discretion of the Crown.[27] A passport is merely an administrative device, the grant or cancellation of which probably involves no direct legal consequences,[28] since there appears to be no justification for supposing that, in law as opposed to administrative practice, a citizen's right to leave or enter the country is dependent upon the possession of a passport.[29] The arbitrary power claimed by the Crown has now been made subject to judicial review along with various other non-legal powers discussed later.[30] Other countries were ahead of Britain in protecting this necessary civil right.[31]

[21] *R.* v. *Civil Service Appeal Board ex p. Bruce* [1989] 2 All ER 907 (relief refused since applicant was taking proceedings in an industrial tribunal). A naval officer's disqualification for promotion was held potentially reviewable in *Bradley* v. *Attorney-General* [1986] 1 NZLR 176.

[22] *R.* v. *Civil Service Appeal Board ex p. Cunningham* [1991] 4 All ER 310.

[23] Lord Fraser makes this distinction in the *Council of Civil Service Unions* case (as above).

[24] See below, p. 572.

[25] Above, p. 215. See (1992) 108 *LQR* 626 (B. V. Harris).

[26] *The Parlement Belge* (1879) 4 PD 129; *Walker* v. *Baird* [1892] AC 491; *Blackburn* v. *A.-G.* [1971] 1 WLR 1037. But it is often called 'prerogative', as in the *Laker Airways* case, below.

[27] See 209 HL Deb. col. 860 (16 June 1958); 764 HC Deb. cols. 1041 ff. (14 May 1969). The government has refused to agree to a statutory right as advocated in *Going Abroad* (a JUSTICE booklet): 416 HL Deb. col. 558 (22 Jan. 1981).

[28] Under the Immigration Act 1971, 2nd sched., para. 4(2)(a) an immigration officer may now require production of either a passport or some other document satisfactorily establishing identity and nationality.

[29] See Bl. Comm. (14th edn.,), i. 265; Halsbury (4th edn.), viii. 636; revised edn., Wade, *Constitutional Fundamentals*, 62. For the more favourable law in France see [1986] *PL* 637, [1987] *PL* 464 (R. Errera).

[30] *R.* v. *Secretary of State for Foreign and Commonwealth Affairs ex p. Everett* [1989] QB 811 (refusal of passport held reviewable but relief refused). See below, p. 639.

[31] The United States: *Kent* v. *Dulles* 375 US (1958); *US* v. *Lamb* 385 US 475 (1967); *Lund* v. *Rusk* 398 F 2d 940 (1967); the Irish Republic: *State (M.)* v. *A.-G.* [1978] IR 73; and India: *Satwant Singh* v. *Ramarathnam* AIR 1967 SC 1836; *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.

At least it is now judicially recognised that prerogative power is as capable of abuse as is any other power, and that the law can sometimes find means of controlling it. The prerogative has many times been restricted both by judicial decision and by statute.[32] It is for the court to determine the legal limits of the prerogative, and they may include the same requirement of reasonable and proper exercise as applies to statutory powers—though with this difference, that it cannot be based upon the presumed intention of Parliament. In one unusual case, where a Parliamentary basis could be found because action taken by a minister under a treaty was held to be impliedly prohibited by a statute,[33] Lord Denning MR discussed the nature of the prerogative and said:[34]

> Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive.

Then after citing cases of abuse of statutory power he concluded:

> Likewise it seems to me that when discretionary powers are entrusted to the executive by the prerogative—in pursuance of the treaty-making power—the courts can examine the exercise of them so as to see that they are not used improperly or mistakenly.

Although this last remark was said in the House of Lords to be 'far too wide',[35] in today's atmosphere it seems clear that the court would entertain a complaint that, for example, a royal pardon had been obtained by fraud or granted by mistake or for improper reasons.[36] The High Court has gone so far as to review a decision of the Home Secretary not to recommend a posthumous free pardon for a youth hanged for murder forty years previously, on the ground that he considered only an unconditional pardon and failed to take account of other possibilities.[37] Although the court made no order or declaration and merely invited the Home Secretary to look at the matter again, it clearly took a long step towards judicial review of the prerogative of mercy.

[32] As in *Entick* v. *Carrington* (1765) 19 St. Tr. 1030; *A.-G.* v. *De Keyser's Royal Hotel* [1920] AC 508; *Burmah Oil Co.* v. *Lord Advocate* [1965] AC 75.

[33] *Laker Airways Ltd.* v. *Department of Trade* [1977] QB 643; below, p. 390.

[34] Lord Denning claimed support from Blackstone but did not mention that he insists that the prerogative, within its limits, is uncontrollable by the courts.

[35] By Lord Roskill in the *Civil Service Unions* case (above) [1985] AC at 416.

[36] According to *Hanratty* v. *Butler*, The Times, 12 May 1971, the discretion is absolute. See likewise *de Freitas* v. *Benny* [1976] AC 239; *Reckley* v. *Minister of Public Safety and Immigration* (No. 2) [1966] AC 527 (PC). For criticism see [1996] *PL* 557 (D. Pannick). In 1948, when after the vote in the House of Commons the death penalty for murder was suspended administratively by granting commutation, Lord Goddard CJ suggested that this was contrary to the prohibition of the suspending power in the Bill of Rights 1688: 156 HL Deb. 117 (2 June 1948); compare *Professional Promotions and Services Ltd.* v. *Attorney-General* [1990] 1 NZLR 501 (minister's policy on radio licensing violated Bill of Rights 1688).

[37] *R.* v. *Home Secretary ex p. Bentley* [1994] QB 349. The Home Secretary later procured a qualified pardon.

Watkins LJ said:

> If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so.

In New Zealand the Court of Appeal has held that the prerogative power of pardon is not reviewable 'at any rate at present', but that the position might change if justice so required; that the prerogative character of the power did not exempt it from review; but that the existing legal and administrative safeguards were adequate, so that an extension of judicial review was unnecessary.[38]

A further question is whether the law should concern itself with the Crown's exercise of the ordinary powers and liberties which all persons possess, as in the making of contracts and the conveyance of land. It has hitherto been assumed that in this area the Crown has the same free discretion as has any other person. But where such powers are exercised for governmental purposes it is arguable that the courts should be prepared to intervene, as a matter of public ethics, as a safeguard against abuse. They do not allow local authorities to act arbitrarily or vindictively in evicting tenants, letting sports grounds or placing advertisements, for example.[39] Those are technically statutory powers (since all local authorities are statutory),[40] but they correspond to ordinary powers and liberties.[41] If, as the House of Lords holds, the source of power is irrelevant,[42] it would not seem impossible for judicial review to be extended to this 'third source' of public power[43] which is neither statutory nor prerogative but is a remnant from the days of personal government. But 'the grotesquely undemocratic idea that public authorities have a private capacity is deeply embedded in our legal culture',[44] and such judicial authority as there is is not encouraging.[45]

Intentions imputed to Parliament

For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a

[38] *Burt* v. *Governor-General* [1992] 3 NZLR 672. See also [1991] *PL* 386 (B. V. Harris); [1983] *PL* 398 (A. T. H. Smith).

[39] See below, p. 356.

[40] *Jones* v. *Swansea CC* [1990] 1 WLR 54 at 70, 85.

[41] Note also the use of contracts to enforce policies (below, p. 793).

[42] Above, p. 111.

[43] See B. V. Harris *The 'Third Source' of Government Action*, (1992) 108 *LQR* 626; (1990) 106 *LQR* 277 (S. Arrowsmith); (1992) 15 NZLR 117 (D. L. Mathieson), discussing comments of Thomas J in *King and New Zealand Medical Association* v. *Clark* (unreported).

[44] (1993) 13 *Legal Studies* at 189 (J. Alder).

[45] See *R.* v. *The Lord Chancellor ex p. Hibbit and Saunders* [1993] COD 326 (below, p. 642); the *Hang Wah Chong* case, below, p. 397.

variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious. They can all be comprised by saying that discretion must be exercised in the manner intended by the empowering Act. As Griffiths LJ has said:[46]

> Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament. Of course it is often a difficult matter to determine the precise extent of the power given by the statute particularly where it is a discretionary power and it is with this consideration that the courts have been much occupied in the many decisions that have developed our administrative law since the last war.

In attempting to discover the intention to be imputed to Parliament, the court must pick its way between conflicting presumptions. On the one hand, where Parliament confers power upon some minister or other authority to be used in discretion, it is obvious that the discretion ought to be that of the designated authority and not that of the court. Whether the discretion is exercised prudently or imprudently, the authority's word is to be law and the remedy is to be political only. On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion. The apparent contradiction of the propositions between which the courts have to steer is well brought out in two contrasting statements by Lord Halsbury. In one case he said:[47]

> Where the legislature has confided the power to a particular body, with a discretion how it is to be used, it is beyond the power of any court to contest that discretion.

But in an earlier case he had already made the necessary qualification:[48]

> . . . 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case*; according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

[46] *R.* v. *Commission for Racial Equality ex p. Hillingdon LBC* [1982] QB 276.
[47] *Westminster Cpn.* v. *London & North Western Railway Co.* [1905] AC 426.
[48] *Sharp* v. *Wakefield* [1891] AC 173.

This passage describes the administrative discretion of justices of the peace in deciding applications for liquor licences. The middle sentence is borrowed from Lord Mansfield, who used the same words in describing the discretion of a court of law in allowing bail to prisoners.[49]

THE PRINCIPLE OF REASONABLENESS

Early decisions

The characteristically legal conception of discretion just explained is firmly established and dates at least from the sixteenth century. *Rooke's Case*,[50] referred to by Lord Halsbury, contains a well-known statement made in 1598 which has lost nothing of its accuracy in over 400 years. The Commissioners of Sewers had levied charges for repairing a river bank, but they had thrown the whole charge on one adjacent owner instead of apportioning it among all the owners benefited. In law they had power to levy charges in their discretion. But this charge was disallowed as inequitable and the report proceeds, in Coke's words:

> . . . and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit.*

In a very similar case of 1609 the same doctrine is repeated;[51] and it recurs elsewhere in Coke's works.[52] In 1647 it is laid down that

> wheresoever a commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this court hath power to redress things otherwise done by them.[53]

To the same effect is a reporter's note of 1666, where the court had granted certiorari against the Commissioners of Fens merely on an allegation 'that they had proceeded unreasonably' for 'this court may judge whither they have pursued their powers'.[54]

[49] *R.* v. *Wilkes* (1770) 4 Burr. 2527 at 2539.
[50] (1598) 5 Co. Rep. 99b.
[51] *Keighley's Case* (1609) 10 Co. Rep. 139a.
[52] See also Co. Litt. 227b: 'for as by the authority of Littleton, *discretio est discernere per legem, quid sit justum*, that is to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion.' See also *Hetley* v. *Boyer* (1614) Cro. Jac. 336 (Coke CJ). Cf. 4 Co. Inst. 41.
[53] *Estwick* v. *City of London* (1647) Style 42.
[54] *R.* v. *Commissioners of Fens* (1666) 2 Keb. 43.

An eighteenth-century illustration is the case of the paving commissioners for Wapping, who had power to make alterations in streets 'in such a manner as the commissioners shall think fit'. In order to give a regular incline to a certain street they raised part of it by six feet, thus obstructing the plaintiff's doors and windows. The court held that 'the commissioners had grossly exceeded their powers, which must have a reasonable construction. Their discretion is not arbitrary, but must be limited by reason and law.'[55] These words clearly echo the decisions of the previous century.

Some later authorities

That the general principle remains unchanged is shown by an abundance of later statements of high authority, such as Lord Halsbury's already cited. In a case about a local authority's power to erect public conveniences Lord Macnaghten said:

> It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first.[56]

Lord Macnaghten likewise said, in a case where the Public Service Board of New South Wales had awarded a retiring civil servant a derisory gratuity of one penny per year of service:

> Nobody, of course, can dispute that the Government or the Board had a discretion in the matter. But it was not an arbitrary discretion, as Pring J. seems to think. It was a discretion to be exercised reasonably, fairly, and justly.

Consequently the Privy Council held that the award was a mere sham and pretence, and tantamount to a refusal to exercise the statutory discretion.[57]

An extensive repertory of similar statements is to be found in the speeches of the Law Lords in *Roberts* v. *Hopwood*, a celebrated case where the whole issue revolved round reasonableness. The district auditor had disallowed as 'contrary to law' the over-generous wages paid by the Borough Council of Poplar to their employees under an Act empowering them to pay such wages as they 'may think fit'. What limit should the law set to this apparently unbounded discretion? In upholding the auditor the House of Lords decided unanimously that the Council were not at liberty to pay more than what was reasonable in the light of rates of wages generally.[58] Lord Sumner said that the words 'as they think fit' contained a necessary implication both of honesty and of reasonableness, and that the admitted

[55] *Leader* v. *Moxon* (1773) 2 W. Bl. 924 (successful action for damages).
[56] *Westminster Corporation* v. *L & NW Railway* [1905] AC 426 at 430.
[57] *Williams* v. *Giddy* [1911] AC 381.
[58] *Roberts* v. *Hopwood* [1925] AC 578; below, p. 398.

implication as to bad faith was wide enough to include both.[59] This is precisely what Lord Macnaghten had said. Lord Sumner added:

> There are many matters which the courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another. This, however, is not a recognition of the absolute character of the local authority's discretion, but of the limits within which it is practicable to question it.[60]

Lord Wrenbury, dealing with the argument that that Act did not say 'such reasonable wages' or 'as they reasonably think fit', said that to his mind there was no difference in the meaning, whether those words were in or out.[61] He laid down the law as follows:

> A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.[62]

Vitality of the principle—'Wednesbury *review'*

The principle of reasonableness has become one of the most active and conspicuous among the doctrines which have vitalised administrative law in recent years. Although the principle itself is ancient, the cases in which it was invoked were few and far between until in 1968 the *Padfield* case[63] opened a new era. Today, on the other hand, it appears in reported cases almost every week, and in a substantial number of them it is invoked successfully. Its contribution to administrative law on the substantive side is equal to that of the principles of natural justice on the procedural side.

This doctrine is now so often in the mouths of judges and counsel that it has acquired a nickname, taken from a case decided twenty years before *Padfield*, the *Wednesbury* case.[64] The reports now are freely sprinkled with expressions like 'the *Wednesbury* principle', '*Wednesbury* unreasonableness', or 'on *Wednesbury* grounds'. As Lord Scarman explained,[65]

[59] At 604.
[60] At 606.
[61] At 613.
[62] At 613.
[63] Below, p. 356.
[64] Below, p. 363.
[65] *R.* v. *Secretary of State for the Environment ex p. Nottinghamshire CC* [1986] AC 240 at 249.

'*Wednesbury* principles' is a convenient legal 'shorthand' used by lawyers to refer to the classical review by Lord Greene MR in the *Wednesbury* case of the circumstances in which the courts will intervene to quash as being illegal the exercise of administrative discretion.

One of the grounds of review, he added, is 'unreasonableness in the *Wednesbury* sense'. In the same case Lord Bridge referred to the exercise of power 'unreasonably in what, in current legal jargon, is called the "*Wednesbury*" sense'. '*Wednesbury*' is now a common and convenient label indicating the special standard of unreasonableness which has become the criterion for judicial review of administrative discretion. It is explained in that context below, where the key passage from the judgment of Lord Greene MR is set out in full.[66]

In an important ex cathedra statement of the grounds for judicial review Lord Diplock preferred the term 'irrationality', explaining it as 'what can by now be succinctly referred to as *Wednesbury* unreasonableness'.[67] But it is questionable whether 'irrationality' is a better word.[68] Virtually all administrative decisions are rational in the sense that they are made for intelligible reasons, but the question then is whether they measure up to the legal standard of reasonableness. 'Irrational' most naturally means 'devoid of reasons' whereas 'unreasonable' means 'devoid of satisfactory reasons'.[69]

The expression 'arbitrary and capricious' is sometimes used as a synonym for 'unreasonable';[70] and in one case this has been transmuted into 'frivolous or vexatious' and 'capricious and vexatious'.[71] But the meaning of all such expressions is necessarily the same, since the true question must always be whether the statutory power has been abused.

No unfettered discretion in public law

The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely—that is to say, it can

[66] Below, p. 363. Among much literature see [1987] *PL* 368 (J. Jowell and A. Lester); [1996] *PL* 59 (Lord Irvine of Lairg); Supperstone and Goudie, *Judicial Review*, 2nd edn., ch. 6 (P. Walker); Sir John Laws in Forsyth and Hare (eds.), *The Golden Metwand*, 185, exploring constitutional and ethical connotations.

[67] *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374 at 410. See Appendix 1 for context.

[68] For Lord Donaldson MR's dislike of it see *R.* v. *Devon CC ex p. G* [1989] AC 573 at 577 ('it is widely misunderstood by politicians, both local and national, and even more by their constituents, as casting doubt on the mental capacity of the decision-maker'); and see the criticism by Carnwath J in [1996] *PL* 244 at 253.

[69] e.g. in the *Nottinghamshire* case, above, and in *R.* v. *Home Secretary ex p. Brind* [1991] 1 AC 696.

[70] e.g. in *Weinberger* v. *Inglis* [1919] AC 606; *Roncarelli* v. *Duplessis* (above). This is the established formula in the United States: see below, n. 78.

[71] *R.* v. *Barnet and Camden Rent Tribunal ex p. Frey Investments Ltd.* [1972] 2 QB 342.

validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.[72] The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish.[73] He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives.[74] This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. So a city council acted unlawfully when it refused unreasonably to let a local rugby football club use the city's sports ground,[75] though a private owner could of course have refused with impunity. Nor may a local authority arbitrarily release debtors,[76] and if it evicts tenants, even though in accordance with a contract, it must act reasonably and 'within the limits of fair dealing'.[77] The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law:[78] it is equally prominent in French law.[79] Nor is it a special

[72] A particularly clear decision to this effect is that of Sachs J in *Commissioners of Customs and Excise* v. *Cure and Deeley Ltd.* [1962] 1 QB 340, especially at 366–7.

[73] See *Re Brocklehurst* [1978] Ch. 14.

[74] As in *Chapman* v. *Honig* [1963] 2 QB 502 (tenant gave evidence against landlord, who then evicted him. Lord Denning MR dissented).

[75] *Wheeler* v. *Leicester CC* [1985] AC 1054, explained below, p. 395.

[76] *A.-G.* v. *Tynemouth Union* [1930] 1 Ch. 616.

[77] *Bristol District Council* v. *Clark* [1975] 1 WLR 1443; *Cannock Chase DC* v. *Kelly* [1978] 1 WLR 1, holding that a local authority is under a stricter obligation than a private landlord but need not explain its reasons: *Sevenoaks DC* v. *Emmett* (1979) 39 P & CR 404 (from which the quotation comes). See also *Webster* v. *Auckland Harbour Board* [1983] NZLR 646; *West Glamorgan CC* v. *Rafferty* [1987] 1 WLR 457 (unlawful eviction of gipsies).

[78] In the United States s. 10(3) of the federal Administrative Procedure Act of 1946, in this respect restating the previous law, requires the court to set aside decisions which are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Schwartz and Wade, *Legal Control of Government*, 262, 337.

[79] It is well stated in Vedel and Delvolvé, *Droit administratif*, 12th edn., ii. 328: 'En droit privé . . . un particulier peut agir par raison, par intérêt, par générosité, par caprice; le contrôle du juge ne s'exercera qu'à l'encontre d'un but illicite ou immoral. Au contraire, il n'existe pas en droit administratif de principe d'autonomie de la volonté. La volonté de l'Administration n'est pas autonome; l'Administration ne doit se décider que pour des raisons de fait ou de droit ayant existence objective réelle et adéquates à l'acte fait.'

restriction which fetters only local authorities: it applies no less to ministers of the Crown.[80] Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial.[81] It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal.[82] It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere.[83]

Before analysing this principle, which has many facets, it will be well to look now at a group of classic decisions which will show its general character, and which come from the period when the courts were breaking through the earlier boundaries and vigorously extending judicial review. These examples concern ministerial approval, the powers of the police and the revocation of licences. They are all illustrations of the rebellion by the judges against the idea of unfettered discretion.

Judicial rejection of unfettered discretion

In two strong and almost simultaneous decisions of 1968 the House of Lords and the Court of Appeal boldly applied the law as so often laid down. In one, the House of Lords asserted legal control over the allegedly absolute discretion of the Minister of Agriculture and held that he had acted unlawfully. In the other, related in the next section, the Court of Appeal decided that they had power to condemn discriminatory action by the police in enforcing the criminal law, a species of discretion which is particularly difficult to challenge.

In *Padfield* v. *Minister of Agriculture, Fisheries and Food*[84] the House of Lords had to consider a dispute under the milk marketing scheme established under the

[80] e.g. *Commissioners of Customs and Excise* v. *Cure and Deeley Ltd.* [1962] 1 QB 340; *Padfield* v. *Minister of Agriculture, Fisheries and Food* (below); *Congreve* v. *Home Office*, below, p. 362; and see the *Tameside* case, below, p. 424.

[81] *Ward* v. *James* [1966] 1 QB 273. For rejection of 'absolute discretion' see at 292 (Lord Denning MR). Similar law governs the discretionary powers of professional bodies and trustees: see, e.g., *R.* v. *Askew* (1768) 4 Burr. 2186 at 2189 (admission to College of Physicians); *Re Baden's Deed Trusts* [1971] AC 424 at 456.

[82] As in the case of some prerogative powers (above, p. 348).

[83] Most of the above section, as it stood in the 6th edition, was approved by the House of Lords in *R.* v. *Tower Hamlets LBC ex p. Chetnik Developments Ltd.* [1988] AC 858 at 872.

[84] [1968] AC 997.

Agricultural Marketing Act 1958. The Act provided for a committee of investigation which was to consider and report on certain kinds of complaint 'if the Minister in any case so directs'. The milk producers of the region close to London complained that the differential element in the price fixed for their milk by the Milk Marketing Board was too low, since it ought to reflect the increased cost of transport from other regions but had not been revised since the Second World War. But since that region was in a minority on the Board, and any increase would be at the expense of the other regions, the Board could not be persuaded to act. The minister had power, if the committee of investigation so recommended, to make an order overriding the Board. But he refused to direct the committee to act, saying that since the producers were represented on the board they should be content with 'the normal democratic machinery' of the marketing scheme. His officials also added, incautiously, that if the committee made a favourable report the minister might be expected to take action on it. The whole object of the minister's overriding power, however, was that he might correct the 'normal democratic machinery' where necessary; and the suggestion that he might be embarrassed by a favourable report was, as Lord Reid said, 'plainly a bad reason'. It was held that where there was a relevant and substantial complaint the minister had a duty as well as a power and that he could not use his discretion to frustrate the policy of the Act. Otherwise he would be rendering nugatory a safeguard provided by the Act and depriving the producers of a remedy which Parliament intended them to have. Mandamus was therefore granted to compel the minister to act as the law required.

Lord Reid expressly rejected 'the unreasonable proposition that it must be all or nothing—either no discretion at all or an unfettered discretion'. He said:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.

Lord Upjohn said that the minister's stated reasons showed a complete misapprehension of his duties, and were all bad in law. The scarcely veiled allusion to fear of parliamentary trouble was, in particular, a political reason which was quite extraneous and inadmissible. One of the fundamental matters confounding the minister's attitude was his claim to 'unfettered' discretion:

> First, the adjective nowhere appears in section 19 and is an unauthorised gloss by the Minister. Secondly, even if the section did contain that adjective I doubt if it would make any difference in law to his powers, save to emphasise what he has already, namely that acting lawfully he has a power of decision which cannot be controlled by the courts; it is unfettered. But the use of that adjective, even in an Act of Parliament, can do nothing to

unfetter the control which the judiciary have over the executive, namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives.

Having thus decisively rejected the notion of unfettered discretion, at the initial stage, the House of Lords went on to indicate that the minister might in the end decline to implement the committee's report, and that the assessment of the balance of public interest would be for him alone. Lord Reid said:

> He may disagree with the view of the committee as to public interest, and, if he thinks that there are other public interests which outweigh the public interest that justice should be done to the complainers, he would be not only entitled but bound to refuse to take action. Whether he takes action or not, he may be criticised and held accountable to Parliament but the court cannot interfere.

In the end, perhaps predictably, the committee reported in favour of the complainants, but the minister refused to take action. No doubt even his ultimate discretion could be abused unlawfully if he could be shown to have acted on inadmissible grounds, e.g. from personal spite. But the distinction drawn by the House of Lords well shows how a statute which confers a variety of discretionary powers may confer wider or narrower discretion according to the context and the general scheme of the Act. Translated into terms of the traditional rule that powers must be exercised reasonably, this means that the standard of reasonableness varies with the situation. The pitfalls which must always be avoided are those of literal verbal interpretation and of rigid standards.

The importance of the House of Lords' decision was underlined by Lord Denning MR:[85]

> The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by *Padfield* v. *Minister of Agriculture, Fisheries and Food* which is a landmark in modern administrative law.

Another potentially significant aspect of the case was that the House of Lords refused to accept that the court's control could be evaded by omitting to specify the grounds of decision.[86]

Two particularly striking examples of a minister's discretionary power being

[85] *Breen* v. *Amalgamated Engineering Union* [1971] 2 QB 175 at 190; see similarly *Secretary of State for Employment* v. *ASLEF* (No. 2) [1972] 2 QB 455 at 493; *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] AC 1014.

[86] See below, p. 390.

fettered by the policy of an Act of Parliament are the *Laker Airways* case and the *Criminal Injuries Compensation Board* case. These are explained below.[87]

The Privy Council has held that the discretion of the Malaysian head of state to revoke a proclamation of emergency is not entirely unfettered, and that failure to revoke it after he no longer considers it to be necessary would be an abuse of his discretion.[88]

Discretionary police powers

The discretion possessed by the police in enforcing the criminal law was considered by the Court of Appeal in a case in which the applicant complained, merely as a citizen, that the police had adopted a policy of not prosecuting London gaming clubs for illegal forms of gaming.[89] The Commissioner's confidential instructions, when revealed to the court, substantially bore out the complaint, being based on the uncertainty of the law and the expense and manpower required to keep the clubs under observation. But while the case was pending the law was clarified, fresh instructions were issued, and the Commissioner undertook to withdraw the former instructions. The court therefore found no occasion to intervene. But they made it clear that the Commissioner was not an entirely free agent as his counsel contended. He had a legal duty to the public to enforce the law and the court could intervene by mandamus if, for example, he made it a rule not to prosecute housebreakers. On the other hand the court would not question his discretion when reasonably exercised, e.g. in not prosecuting offenders who for some special reason were not blameworthy in the way contemplated by the Act creating the offence. The court criticised the police policy of suspending observation of gaming clubs, as being clearly contrary to Parliament's intentions; and had it not been changed, they would have been disposed to intervene. But the police have a wide discretion in their operational decisions and their choice of methods, for instance if they call off the pursuit of robbers in a disturbed area because of concern for the safety of their officers,[90] or if their resources of manpower and finance are inadequate for providing continuous protection to exporters of live animals from attacks and obstruction by mobs of protesters.[91]

In 1972 the same public-spirited citizen brought similar proceedings, asking the court to order the police to take more effective action to enforce the law against the publication and sale of pornography. The Metropolitan Police were given

[87] p. 391.

[88] *Teh Cheng Poh* v. *Public Prosecutor, Malaysia* [1980] AC 458, holding that the duty would be enforceable by mandamus to the responsible ministers.

[89] *R.* v. *Metropolitan Police Commissioner ex p. Blackburn* [1968] 2 QB 118. See also *Adams* v. *Metropolitan Police Cmr.* [1980] RTR 289.

[90] *R.* v. *Oxford ex p. Levey*, The Times, 1 November 1986; (1987) 151 LG Rev 371.

[91] *R.* v. *Chief Constable of Sussex ex p. International Trader's Ferry Ltd.* [1999] 2 AC 418. For this case see below, p. 387.

instructions not to institute prosecutions or apply for destruction orders without the approval of the Director of Public Prosecutions; and it was shown that much pornographic literature was flagrantly offered for sale without interference by the police. The Court of Appeal found that the efforts of the police had been largely ineffective, but that the real cause of the trouble was the feebleness of the Obscene Publications Act 1959. Accordingly it could not be said that the police were failing in their duty, and an order of mandamus was refused.[92] It was again made clear that if the police were carrying out their duty to enforce the law, the court would not interfere with their discretion; but that the court would do so in the extreme case where it was shown that they were neglecting their duty. And the applicant was commended for having performed a public service by his proceedings.

That the police may be subject to an especially strict judicial regime is shown by a later decision of a divisional court concerning paedophiles.[93] The applicants, released from prison after serving sentences for acts of gross indecency against children, and regarded as still dangerous, challenged the action of the police in disclosing their criminal record to their neighbours, with the result that they were driven away by harassment. The dilemma for the police lay in their duty to protect the neighbours' children by giving warning, as against the need to enable the applicants to live a normal life in privacy. The police had formulated a policy for these difficult cases, considering each individually. The court upheld their decision, holding that it was taken under a policy that could not be faulted; and that the police had a duty not to disclose damaging information, even though convictions are public knowledge, unless there was a specific public justification. This principle, said Lord Bingham CJ, 'rests on a rule of good public administration, which the law must recognise and if necessary enforce'. The reasonableness doctrine, on the other hand, should allow latitude where reasonable people might decide either way. The court's willingness to enforce its own rules of 'good public administration' suggests a tightening of the reins. On appeal the conduct of the police was upheld on orthodox grounds of reasonableness, avoiding any conflict of principles.

These cases are examples of the court's power to control the exercise of a non-statutory discretionary power, for the police possess important powers at common law. They show that statutory implication is not the indispensable basis of the principle that the discretion of public authorities is never unfettered. Its real basis is that nothing else is compatible with a proper system of administrative law.

[92] *R.* v. *Metropolitan Police Commissioner ex p. Blackburn* (No. 3) [1973] 1 QB 241. The applicant made another attempt in 1980 but with no better success: The Times, 7 March 1980 (reporting that the applicant referred to Lord Denning MR as 'the greatest living Englishman' and received the retort 'tell that to the House of Lords').

[93] *R.* v. *Chief Constable of the North Wales Police ex p. AB* [1999] 3 WLR 724. In the Court of Appeal [1999] QB 396 the duty of the police as to disclosure was affirmed, but the challenge to the police policy was abandoned and the complaint was changed to one of procedural error.

Police powers of arrest on suspicion are now statutory and are, as the House of Lords has held, reviewable on '*Wednesbury* principles'.[94]

Abuse of licensing powers

The law was admirably stated by a Canadian judge in a celebrated case where a liquor licence had been unlawfully cancelled for extraneous political reasons, purportedly under an Act which said that the liquor commission 'may cancel any permit at its discretion'. Rand J. said:[95]

> In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another Province or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted.

In this case a restaurant proprietor's liquor licence had been cancelled by the Quebec Liquor Commission at the instigation of the Prime Minister of Québec, for the reason that the proprietor habitually stood bail for members of the sect of Jehovah's Witnesses, who were a nuisance to the police. The Supreme Court of Canada awarded damages against the Prime Minister and stigmatised the cancellation as

> a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the Province.

And in addition it was said:

> To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.

As well as affording an outstandingly clear example of the abuse of executive power, this case illustrates the personal liability of ministers[96] and the possibility of a remedy in damages for maladministration.[97]

[94] *Mohammed-Holgate* v. *Duke* [1984] AC 437 (complaint of irrelevant considerations failed).

[95] *Roncarelli* v. *Duplessis* (1959) 16 DLR (2d) 689 at 705. The other quotations below are from the same judgment.

[96] Below, p. 817.

[97] Below, p. 782.

In a comparable English case the revocation of television licences by the Home Office was condemned by the Court of Appeal.[98] The Home Secretary had a statutory power to revoke or vary any licence under the Wireless Telegraphy Act 1949, and he elected to use this power to cancel the licences of persons who took them out during the currency of their previous licences in order to avoid a sharp increase in the licence fee. The increase took effect on a fixed date and it was in no way unlawful for a licence-holder to obtain a new licence before that date at the lower fee. The Home Office had no power to prevent this, but they tried to enforce a policy of exacting the higher fee by resorting to their power to revoke licences. This was held to be a clear abuse of the power and also an illegal attempt to levy money for the use of the Crown contrary to the Bill of Rights 1688. Lord Denning MR said:

> But when the licensee has done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence. It would be a misuse of the power conferred on him by Parliament: and these courts have the authority—and, I would add, the duty—to correct a misuse of power by a minister of his department, no matter how much he may resent it or warn us of the consequences if we do.

In effect, the Home Office had tried to use their licensing powers to obtain taxing powers which had not been conferred on them. Their handling of the affair was also strongly criticised by the Parliamentary Commissioner for Administration.[99]

Other examples of the legal limits to the discretion of licensing authorities are given below.[1]

The standard of reasonableness

The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. When a Divisional Court yielded to that temptation by invalidating a Secretary of State's decision to postpone publication of a report by company inspectors, the House of Lords held that the judgments 'illustrate the

[98] *Congreve* v. *Home Office* [1976] QB 629. See (1976) 92 *LQR* 331. The Home Office had issued many thousands of demands and had to undertake a big operation to repay money unlawfully received.

[99] HC 680 (1974–5).

[1] Below, p. 401.

danger of judges wrongly though unconsciously substituting their own views for the views of the decision-maker who alone is charged and authorised by Parliament to exercise a discretion'.[2] The court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.[3] Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. 'With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority.'[4] As Lord Hailsham LC has said, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.[5]

This is not therefore the standard of 'the man on the Clapham omnibus'.[6] It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called '*Wednesbury* unreasonableness', after the now famous case in which Lord Greene MR expounded it as follows.[7]

> It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short* v. *Poole Corporation*[8] gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

[2] *R.* v. *Secretary of State for Trade and Industry ex p. Lonrho Plc* [1989] 1 WLR 525 (Lord Keith).

[3] This passage in its former version was approved by the Court of Appeal in *R.* v. *Boundary Commission ex p. Foot* [1983] QB 600 (unsuccessful challenge to Commission's decisions fixing boundaries of parliamentary constituencies).

[4] *Short* v. *Poole Cpn.* [1926] Ch. 66 and 91 (Warrington LJ).

[5] *Re W. (An Infant)* [1971] AC 682 at 700.

[6] [1933] 1 KB 205 at 224.

[7] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 KB 223 at 229, for which see below, p. 403.

[8] [1926] Ch. 66.

This has become the most frequently cited passage (though most commonly cited only by its nickname) in administrative law. It explains how 'unreasonableness', in its classic formulation, covers a multitude of sins. These various errors commonly result from paying too much attention to the mere words of the Act and too little to its general scheme and purpose, and from the fallacy that unrestricted language naturally confers unfettered discretion.

Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classed as self-misdirection,[9] or addressing oneself to the wrong question.[10] But the language used in the cases shows that, while the abuse of discretion has this variety of differing legal facets, in practice the courts often treat them as distinct. When several of them will fit the case, the court is often inclined to invoke them all. The one principle that unites them is that powers must be confined within the true scope and policy of the Act.

Taken by itself, the standard of unreasonableness is nominally pitched very high: 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (Lord Greene MR); 'so wrong that no reasonable person could sensibly take that view' (Lord Denning MR);[11] 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (Lord Diplock).[12] It might seem from such language that the deliberate decisions of ministers and other responsible public authorities could almost never be found wanting. But, as may be seen in the following pages, there are abundant instances of legally unreasonable decisions and actions at all levels. This is not because ministers and public authorities take leave of their senses,[13] but because the courts in deciding cases tend to lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behaviour.[14]

There is ample room, within the legal boundaries, for radical differences of opinion in which neither side is unreasonable. A number of statements to this effect were made in the Court of Appeal and the House of Lords in the case of the

[9] An example of self-misdirection was where the minister was given misleading advice, misunderstood his default powers, and gave invalid directions to a local health authority: *Lambeth LBC* v. *Secretary of State for Social Services* (1980) 79 LGR 61. The mistake was rectified by National Health Service (Invalid Direction) Act 1980.

[10] Examples are *Niarchos* v. *Secretary of State for the Environment* (1977) 76 LGR 480; *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 (above, p. 264).

[11] In the *Tameside* case [1977] AC at 1026.

[12] In *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC at 410. For context see Appendix 1.

[13] Lord Scarman used this phrase in *R.* v. *Secretary of State for the Environment ex p. Nottinghamshire CC* [1986] AC 240 at 247.

[14] See the discussion by Lord Lowry, approving the treatment in this book, in *R.* v. *Home Secretary ex p. Brind* [1991] 1 AC 696 at 765. Cf. [1987] *PL* 368 at 372 (J. Jowell and A. Lester).

Tameside schools, discussed below.[15] Lord Denning MR pointed out the error of confusing differences of opinion, however strong, with unreasonableness on the part of one side or the other. One party may call the other 'quite unreasonable' when he is well within the legal limits of reasonableness. This was the distinction which the Secretary of State failed to make, as the House of Lords emphatically confirmed. Lord Diplock said:[16]

> The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.

In the same vein Lord Hailsham LC has said that 'not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable'.[17]

Judges have sometimes given examples of what might be called pure unreasonableness. In a controversy which upheld a local authority's power to erect a urinal near Buckingham Palace, Turner LJ said that it would not be lawful to do so 'in front of any gentleman's house'.[18] Similarly the power to erect rails and fences in streets for the protection of pedestrians would not justify a high closeboarded fence which would interfere with light.[19] The authority 'is bound to have some regard to the interest of those who may suffer for the good of the community'.[20] As concrete instances of pure unreasonableness may be cited the case of the penny-a-year gratuity;[21] a case where a minister allowed only four days for objections to be made to a scheme for a comprehensive school;[22] and a case where a local authority, having lodged homeless persons temporarily in a hotel, then served notices requiring the hotel to conform to the Housing Act standards applicable to private houses.[23] More numerous are the cases which can be classified under particular sub-heads such as improper motives or irrelevant considerations, which are grouped separately below.

Reasonableness does not require reasons to be stated. The only significance of withholding reasons is that if the facts point overwhelmingly to one conclusion, the decision-maker cannot complain if he is held to have had no rational reason for deciding differently,[24] and that in the absence of reasons he is in danger of being held to have acted arbitrarily.[25]

[15] Below, p. 424.
[16] [1977] AC at 1064.
[17] *Re W. (An Infant)* [1971] AC 682 at 700.
[18] *Biddulph* v. *Vestry of St. George, Hanover Square* (1863) 33 LJ Ch. 411 at 417.
[19] *Dormer* v. *Newcastle upon Tyne Cpn.* [1940] 2 KB 204 at 217.
[20] *Westminster Cpn.* v. *London and North Western Railway* [1905] AC 426 at 433 (Lord Macnaghten).
[21] *Williams* v. *Giddy* [1911] AC 381 (above, p. 352).
[22] *Lee* v. *Department of Education and Science* (1967) 66 LGR 211.
[23] *R.* v. *Hackney LBC ex p. Evenbray Ltd.* (1987) 86 LGR 210.
[24] *R.* v. *Secretary of State for Trade and Industry ex p. Lonrho Plc* [1989] 1 WLR 525 at 539 (Lord Keith).
[25] See the *Padfield* case, below, p. 356.

The Principle of Proportionality[26]

In the law of a number of European countries there is a 'principle of proportionality' which ordains that administrative measures must not be more drastic than is necessary for attaining the desired result.[27] This doctrine has been adopted by the European Court of Justice in Luxembourg[28] and so it has infiltrated British law, since British law must conform to European Union law. More significantly, it is freely applied by the European Court of Human Rights in Strasbourg, and so is taken into account in Britain under the Human Rights Act 1998.[29]

It is clear that the principles of reasonableness and proportionality cover a great deal of common ground. In the case, for example, where the revocation of a market trader's licence was quashed as being an unreasonably severe penalty for a small offence, the decision could have been based on disproportionality as easily as on unreasonableness.[30] As Lord Hoffmann has said, it is not possible to see daylight between them.[31] They will often be assimilated by the 'margin of appreciation' allowed by European law, which gives latitude for administrative decisions by national authorities in a manner similar to the British doctrine.

Nevertheless a clear difference has emerged and has been corroborated by the House of Lords. Proportionality, it is held, requires the court to judge whether the action taken was really needed as well as whether it was within the range of courses of action that could reasonably be followed. Proportionality is therefore a more exacting test in some situations and is to be rejected as requiring the court to substitute its own judgment for that of the proper authority.[32] The House has thus closed the door to proportionality in domestic law for the time being. In the case in question the Home Secretary had issued directives to the BBC and the IBA prohibiting the broadcasting of speech by representatives of proscribed terrorist

[26] See (2001) 60 *CLJ* 301 (Elliott); [2002] *PL* 265 (Leigh); (2001) 117 *LQR* 589 (Craig).

[27] Schwarze, *European Administrative Law*, 680; (1992) 12 *OJLS* 237 (S. Boyron); P. Walker in Supperstone and Goudie (eds.), *Judicial Review*, 2nd edn., 6.41 (a comprehensive discussion).

[28] See e.g. *R.* v. *Intervention Board for Agricultural Produce ex p. E. D. & F. Man (Sugar) Ltd.* [1986] 2 All ER 115 (excessively severe forfeiture).

[29] s. 2(1).

[30] *R.* v. *Barnsley MBC ex p. Hook* [1976] 1 WLR 1052; and see *R.* v. *Brent LBC ex p. Assegai*, The Independent, 12 June 1987 (citizen banned from access to local authority premises: penalty disproportionate to offence) (1987) 151 LG Rev 891; *R.* v. *Secretary of State for Health ex p. Eastside Cheese Co.* [1998] TLR 748 (minister's use of 'draconian power' to prohibit trading in cheese (without compensation) disproportionate when local authority's lesser power (with compensation) would suffice); *Dad* v. *General Dental Council*, [2000] 1 WLR 1538 (PC) (suspension of dentist unduly severe). Contrast *R.* v. *Secretary of State for Health ex p. Eastside Cheese Co.* [1999] COD 321, [1999] 3 CMLR 123 (ban on suspected cheese upheld).

[31] In a lecture quoted in *R.* v. *Chief Constable of Sussex ex p. International Trader's Ferry Ltd.* [1998] QB 477 at 495 (Kennedy LJ). For this lecture, an illuminating discussion of the two tests, see (1997) 32 *IR. Jur.* 49 (the quotation is at p. 58).

[32] *R.* v. *Home Secretary ex p. Brind* [1991] 1 AC 696.

organisations and the applicants, who were journalists involved in broadcasting, unsuccessfully challenged the legality of the directives primarily on the ground of conflict with the European Convention on Human Rights but also as disproportionate in a sense going beyond the established doctrine of unreasonableness.

In a later case the House of Lords was called upon to apply both the rival doctrines in their respective contexts. Shipments of livestock to Europe were violently obstructed at the port by protesting animal rights groups, and required so much police protection that the police could not adequately cover the rest of their area. When the chief constable, accordingly, reduced police cover at the port to two days a week, traders who were unable to make shipments sought judicial review of his decision, alleging both that it was unreasonable and also that it was disproportionate for enforcing the EU Treaty which prohibits quantitative restrictions on exports and measures having equivalent effect, subject to an exception for (*inter alia*) public policy.[33] The challenge failed on both counts, the former under the domestic *Wednesbury* principle and the latter under the public policy exception in the EU Treaty since the police action was proportionate to the problems to be faced, was suitable and necessary, and well within the margin of appreciation.[34] Of the two tests Lord Slynn said that the difference between them was in practice much less than is sometimes suggested, and that whichever test was adopted, the result was in this case the same.[35]

Three distinct doctrines

It has since become clear, that there are important differences, of which three have been identified by Lord Steyn:[36]

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in [the *Smith and Grady* case][37] is not necessarily appropriate to the protection of human rights.

On this analysis there are three standards of review:

(1) the *Wednesbury* test, as long established;
(2) the 'anxious scrutiny' or 'heightened scrutiny' test, as developed in domestic law where fundamental rights are in issue (as explained below); and

[33] Arts. 29, 30 (ex 34, 36).
[34] *R.* v. *Chief Constable of Sussex ex p. International Trader's Ferry Ltd.* [1999] 2 AC 418.
[35] At 439.
[36] *R. (Daly)* v. *Home Secretary* [2001] 2 AC 532 at 547.
[37] For this see below, p. 371.

(3) the proportionality test where European Community or European human rights law is in issue.

Lord Steyn held that there was 'a material difference' between standards (1) and (2) and standard (3). He held also that 'this does not mean that there has been a shift to merits review' under which the court could substitute its own opinion for that of the administrator, or remit the case with instructions so strict as to leave him no option. Yet the distinction is so fine as to be virtually invisible. Factual situations will govern many decisions, since as Lord Steyn also said: 'in law, context is everything'.

There are two concessions, very similar in character, which may mitigate the severity of tests (2) and (3). The Strasbourg court may allow a 'margin of appreciation' to the national authority, as mentioned earlier, where its decision is justified by some special situation or necessity in the Member State.[38] And a national reviewing court may show 'deference' to the decision of a public authority, and refrain from intervening, if it considers that the authority, in some matter such as the allocation of scarce resources or competing individual needs, is in a better position to decide than is the court. This doctrine of deference is illustrated below.

It might now be said that, in some respects at least, the criteria of judicial review are rotating in a circle. The *Wednesbury* doctrine is itself a doctrine of deference in that it respects the public authority's choice among the various reasonable courses of action. Lord Clyde's criteria (2) and (3), when mitigated by deference and the margin of appreciation, may produce the same results as *Wednesbury*. In any case, there will be many situations where all three tests will produce the same results. It must be emphasised that they are flexible doctrines, depending often upon value judgments and factual evidence, having no sharp edges. They cannot, in Lord Slynn's words, be kept in separate compartments.

The interaction of many such factors is illustrated by a case which investigated the policy of the prison service in separating babies from mothers serving prison sentences at the age of 18 months.[39] Two prisoners challenged this policy under Article 8 of the Convention, in one case successfully and the other not. The Court of Appeal made an elaborate review of numerous relevant considerations such as prison policy and discipline, the welfare of the child, the merits of alternative arrangements, the deference due to the Prison Service as the expert body charged with a sensitive public function and the need to make exceptions in occasional special cases. The court's conclusion, 'following the new *Daly* approach',[40] was that the correct balance, as demanded by proportionality, had not been struck in one of the cases, which was remitted for reconsideration by the prison service, but that it would not intervene in the other. It is difficult not to regard these decisions as clear examples of merits review.

[38] Above, p. [166].
[39] *R. (P and Q)* v. *Home Secretary* [2001] 1 WLR 2002.
[40] [2001] 1 WLR at 2022.

Merits review becomes inevitable if the court should hold that the balance tips so heavily one way that only one decision is possible. There is then no room for a discretionary area of judgement and the court must simply substitute it own opinion. The Court of Appeal explained this clearly in the case of a Nigerian woman who had lived for ten years in this country as an illegal immigrant and had raised a family, but whom, with her children, the Home Secretary decided to deport.[41] The balance had then to be struck between the right to respect for family life (Article 8) and the need, repeatedly recognised at Strasbourg, for effect immigration control. Allowing the mother's appeal, the court held 'there really is only room for one view as to how the balance between these competing interests should be stuck', although the Immigration Appeal Tribunal had held the contrary view. The court put strong emphasis on the harm to the children which would be caused by separation from their father, a British citizen, but apparently little on the need for effective immigration control. Simon Brown LJ said that 'the balance struck by the Secretary of State was simply wrong', and 'outside the range of permissible responses'. He quoted from an earlier decision of his own, that where there is room for two views, 'if our view differs from the tribunal's then we are bound to say so and allow the appeal, substituting our decision for theirs'.

It may be observed how similar are the elements of merits review, as illustrated above, to those of *Wednesbury* review, which have for so long been familiar.

Judicial deference

A principle of deference to administrative experience and expertise, which received passing mention in the last-cited case, has become prominent in recent decisions, thus tempering, as already indicated, the stricter criteria of judicial review. It is especially prominent in cases involving foreign affairs, immigration, deportation and prison administration. In substance it adds little to the law which allows a greater or smaller margin of discretion to the executive in such matters, but the term 'deference' has become a symbol for it as a counterweight to the increasingly strict doctrines of judicial review. While the court must decide whether the decision maker has struck the balance fairly, it must allow the decision maker 'a discretionary area of judgement'.[42] As Lord Hoffmann said of the limitations on appeals in deportation cases,

> they arise from the need, in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker.

This was said in a case where a Pakistani national had been admitted to work as a minister of religion.[43] Finding that he had associations with an Islamic terrorist

[41] *Edore* v. *Home Secretary* [2003] 1 WLR 2979.
[42] See the *Ponting* case (below), para. 70.
[43] *Home Secretary* v. *Rehman* [2001] 3 WLR 877.

organisation, the Home Secretary made a deportation order against him on the grounds that his deportation would be 'conducive to the public good in the interests of public security'. His appeal to the Special Immigration Appeals Commission was upheld but an appeal by the Home Secretary succeeded in the Court of Appeal and the House of Lords. Lord Slynn stressed the duty of the Commission to give due weight to the assessment and conclusions of the Secretary of State, who 'is undoubtedly in the best position to judge what national security requires even if his decision is open to revies'. He must have material on which 'proportionately and reasonably' he can assess the threat to national security.

In a comparable case the Home Secretary refused admission to an American citizen who was the leader of a group known as 'the Nation of Islam' and who wished to meet and address his followers in Britain, who had caused some public disorder.[44] His violent anti-semitic speeches were considered by the Home Secretary, in a personal decision, to indicate that his presence would pose a significant threat to community relations and would not be conducive to the public good. His appeal, based on Article 10 of the Convention, succeeded in the High Court but failed in the Court of Appeal (the Court assuming, though not deciding, that the Convention could benefit someone who was neither a national of, nor present in, the country). It was held that the Home Secretary must be allowed a particularly wide margin of discretion: first, because it was an immigration case, in an area where the Strasbourg jurisprudence is particularly favourable, and was based on a concern for public order; secondly, because it was the Home Secretary's own personal and informed decision; thirdly, because 'the Secretary of State is far better placed to reach an informed decision . . . than is the court'; and fourthly, because 'the Secretary of State is democratically accountable for this decision, there being no appeal on the "public good" ground. The legislative scheme required the court "to confer a wide margin of discretion on the minister".' The Home Secretary's decision was legitimate, within the limits of Article 10 and was not disproportionate. He had to evaluate the risk of disorder in the light of the political situation in the Middle East and other information available to him but not to the court.

Deference to the prison service and to the police was shown by the Court of Appeal when a prisoner, asserting his 'right to life' under the Convention, was removed from a 'protected witness unit' in which he had been held after assisting the police in discovering drug-smuggling by fellow-criminals. It was held that the police and the prison service were generally better placed than the court to assess the risk to the claimant's life and that the court would not in such a case substitute its own opinion for theirs, though in fact the court agreed with it.[45] The Court of Appeal later discussed the principles of review and the 'level of deference' in dismissing a prisoner's complaints against the conditions imposed on his use of a

[44] *R. (Farrakhan)* v. *Home Secretary* [2002] 3 WLR 481.
[45] *R. (Bloggs 61)* v. *Home Secretary* [2003] 3 WLR 2724.

computer, and Arden LJ said: 'it is not for the courts to define how the time of prisoners should be spent or the priorities for the allocation of prison resources'.[46]

These cases illustrate the proposition stated earlier by Sir Thomas Bingham MR in a case where homosexuals had been discharged from the navy under the policy of the Ministry of Defence banning such people from the armed forces:

> Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations . . . While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people'.

Showing deference accordingly, the Court of Appeal upheld the Ministry's policy.[47] But the ECtHR rejected it, holding that the intrusion into the claimants' private lives violated Article 8 and could not be justified as 'necessary in a democratic society'.[48]

Goodbye to Wednesbury?

The Wednesbury doctrine is now in terminal decline, but the coup de grace has not yet fallen, despite calls for it from very high authorities. Lord Slynn said in the *Alconbury* case, with reference to proportionality:

> I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.[49]

and in the *Daly* case Lord Cooke said:

> I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corpn* was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation.[50]

Although quoting and sympathising with these weighty opinions, and acknowledging that 'the *Wednesbury* test is moving closer to proportionality', the Court of Appeal has held that 'it is not for this court to perform the burial rites'. That task

[46] *R. (Ponting)* v. *Governor of HMP Whitemoor* [2002] EWCA Civ. 224 para. 114.
[47] *R.* v. *Ministry of Defence ex p. Smith* [1996] QB 517 at 556.
[48] *Smith and Grady* v. *UK* (1999) 29 EHRR 493.
[49] *R. (Alconbury Development Ltd)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1406.
[50] *R. (Daly)* v. *Home Secretary* [2001] 2 AC 532 at 548.

must be left to the House of Lords, and meanwhile the law as laid down by the House in the *Brind* case, in which proportionality was rejected as part of English law, must linger on.[51]

Lord Irvine LC has suggested, in a human rights context, that 'there is a profound difference between the Convention margin of appreciation and the common law test of rationality', and has raised the question, 'how long the courts will restrict their review to a narrow *Wednesbury* approach in non-Convention cases, if used to inquiring more deeply in Convention cases?'[52] The difference that he observes is in substance the same as that detected by the House of Lords, and his question is whether it will be eliminated by 'spill-over effect' from human rights[53] and EU law. This is exactly the kind of convergence which European influences are likely to bring about. It is evident already in the numerous references to proportionality which judges are making freely, and which are paving the way for its general acceptance.

Inconsistency and unfairness. Legitimate expectation

Inconsistency of policy may amount to an abuse of discretion, particularly when undertakings or statements of intent are disregarded unfairly[54] or contrary to the citizen's legitimate expectation.[55] The Privy Council, in holding that the Government of Hong Kong must honour its published undertaking to treat each deportation case on its merits, has applied 'the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty'.[56] The Court of Appeal made strong comments when quashing the refusal of the Home Office to allow a Pakistani, settled in England, to bring in his young nephew with a view to his adoption, since the Home Office had issued a circular specifying the conditions which need to be satisfied but had, by 'grossly unfair administration', refused admission on an altogether different ground. If the

[51] *R. (Association of British Civilian Internees: Far East Region)* v. *Secretary of State for Defence* [2003] QB 1397, where the court reviewed and upheld a non-statutory scheme for ex gratia payments of compensation, rejecting claims based on abuse of power and legitimate expectation.

[52] [1998] *PL* 221 at 234.

[53] See *Smith and Grady* v. *UK* (above).

[54] *R.* v. *Inland Revenue Commissioners ex p. Preston* [1985] AC 835 (complaint not made good).

[55] See the *Hong Kong* and *Ruddock* cases, below. For this development and its European analogies see (1992) 108 *LQR* 79 and [1996] *CLJ* 289 (P. P. Craig); [1988] *CLJ* 238 and [1987] *PL* 375 (Forsyth). Later events have overtaken some of these commentaries. A notable European decision is *Re Civil Service Salaries: EC Commission* v. *EC Council* [1973] CMLR 639 (Council obliged to follow published guidelines).

[56] *Attorney-General of Hong Kong* v. *Ng Yuen Shiu* [1983] 2 AC 629, approving *R.* v. *Liverpool Cpn. ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299. For these and other 'legitimate expectation' cases see below, p. 500.

published policy was to be changed, the applicant should be given 'full and serious consideration whether there is some overriding public interest' justifying the new departure.[57] In another case the court condemned 'Machiavellian and unconscionable' conduct by the immigration authorities in treating an immigrant as an illegal entrant after they had abandoned this charge against him three years earlier.[58] In the same way the Court of Appeal held that a public authority has a duty to act with fairness and consistency in its dealings with the public, and that if it makes inconsistent decisions unfairly or unjustly it misuses its powers. Consequently the Price Commission was declared unable to issue a new ruling contradicting its previous statement that tax payments were a permissible item of costs for the purpose of calculating increases of price by television programme contractors.[59] One element of the unfairness was that the contractors had been led to believe that they could safely act on the ruling given to them. In a case about telephone tapping it was held that the Home Secretary's published criteria for regulating this form of espionage created a legitimate expectation that they would be properly observed and that the court might grant relief if they were violated without any published change of policy.[60] Where a Pakistani boy sought entry clearance with a view to adoption and the Home Secretary had stated the criteria, refusal of admission on an entirely different ground was 'grossly unfair administration' in the absence of an overriding public interest.[61] Where a student from Nigeria was given oral assurances that she would have no difficulty in returning after going home for Christmas, yet was refused leave to enter on returning, the refusal was quashed by the Court of Appeal on the grounds of legitimate expectation and unfairness.[62] An oral[63] assurance that a nursing home would remain the home for life of a severely disabled patient, who would otherwise have suffered acute distress, was held binding in the absence of any overriding public interest, as well as a breach of human rights (respect for the home).[64] A committal for trial

[57] *R.* v. *Home Secretary ex p. Asif Mahmood Khan* [1984] 1 WLR 1337 (Parker LJ). The Home Secretary 'in effect made his own rules, and stated those matters which he regarded as relevant and would consider in reaching his decision' and 'misdirected himself according to his own criteria and acted unreasonably' (Dunn LJ).

[58] *R.* v. *Immigration Appeal Tribunal ex p. Patel*, The Independent, 10 December 1986; but the House of Lords reversed: [1988] AC 910.

[59] *HTV Ltd.* v. *Price Commission* [1976] ICR 170, cited with approval in the *Preston* case (above). Compare *Thames Valley Electric Power Board* v. *NZFP Pulp & Paper Ltd.* [1994] 2 NZLR 641 but contrast *R.* v. *Inland Revenue Commissioners ex p. Matrix-Securities Ltd.* [1994] 1 WLR 334 (HL) (tax clearance validly withdrawn).

[60] *R.* v. *Home Secretary ex p. Ruddock* [1988] 1 WLR 1482. The relief sought (declaration and damages for misfeasance) was refused since no violation was shown. The events took place before the Interception of Communications Act 1985 was in force.

[61] *R.* v. *Home Secretary ex p. Asif Mahmood Khan* [1984] 1 WLR 1337.

[62] *Oloniluyi* v. *Home Secretary* [1989] Imm. AR 135. Contrast *R.* v. *Home Secretary ex p. Patel* (1990) 3 Imm. AR 89; *Comeau's Seafoods Ltd.* v. *Queen* (1997) 142 DLR (4th) 193.

[63] The report is not specific but no mention is made of any writing.

[64] *R.* v. *North and East Devon Health Authority ex p. Coughlan* [1999] COD 340. Contrast the *Servite Houses* case [2001] LGR 55, above, p. 177.

was quashed where the police broke their promise not to prosecute.[65] The abrupt withdrawal of a long-standing tax concession was quashed by the Court of Appeal for unfairness amounting to abuse of power and unreasonableness.[66]

These are revealing decisions. They show that the courts now expect government departments to honour their statements of policy or intention, and that there is a clear link between unreasonableness and unfairness. Lord Scarman made an emphatic statement that unfairness in the purported exercise of power can amount to an abuse or excess of power.[67] Fairness is a powerful ally for the litigant and the unexpressed basis of many rules. Although Lord Browne-Wilkinson has said that there is as yet no general principle allowing the quashing of administrative decisions on the simple ground that they are unfair,[68] Lord Steyn in the same case said that the rule of law enforces minimum standards of fairness, both substantive and procedural.[69] The standard may indeed be higher than a minimum.[70] It may be predicted that fairness will in time become the touchstone of reasonableness, and that it will prevail over older rules about estoppel and misleading advice, and about the non-fettering of discretion which have been criticised in an earlier chapter for operating unfairly.[71]

Although there are now decisions of high authority to show that voluntary statements of policy may sometimes be treated almost as binding restrictions in law,[72] it is obvious, on the other hand, that public authorities must be at liberty to change their policies as the public interest may require from time to time. So where the retirement age for certain civil servants was reduced to 60, their expectation of a longer working life did not avail them.[73] As Lord Diplock said, 'the liberty to make such changes is something that is inherent in our constitutional form of government'. Similarly where the Home Secretary, by a change of prison policy, deferred the date at which certain classes of serious offenders would be considered for release on parole, prisoners disappointed by this change had no legal remedy;[74] and the same was true when the qualifying period for applying for home leave was

[65] *R.* v. *Croydon JJ. ex p. Dean* [1993] QB 769.

[66] *R.* v. *Inland Revenue Commissioners ex p. Unilever* [1996] STC 681, discussed in [1997] *PL* 375 (Forsyth), and noted below, p. 411.

[67] In the *Preston* case, above, at p. 872. In *Woods* v. *Secretary of State for Scotland* 1991 SLT 197 the court rejected the official argument that to discontinue an unfair practice is unfair to others treated unfairly in the past.

[68] *R.* v. *Home Secretary ex p. Pierson* [1998] AC 539 at 575.

[69] Ibid. at 591. New Zealand decisions favour this doctrine: *Northern Roller Milling Co. Ltd.* v. *Commerce Commission* [1994] 2 NZLR 747.

[70] In the *Unilever* case (above) Simon Brown LJ said that public authorities 'are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens'.

[71] Above, pp. 336.

[72] See especially *ex p. Pierson*; (above); *R.* v. *Home Secretary ex p. Urmaza* [1996] COD 479.

[73] *Hughes* v. *Department of Health and Social Security* [1985] AC 776. Compare *R.* v. *Criminal Injuries Compensation Board ex p. P* [1995] 1 WLR 845 (change of policy favourable to claimants but only as from a fixed date; refusal of earlier claims upheld).

[74] *Re Findlay* [1985] AC 318.

increased from one-third to a half of the prisoner's sentence.[75] Where a prisoner had given evidence against co-accused and was told by the police that he could be held in a 'protected witness' unit for his own safety, his claim for such protection failed.[76] In these cases the only legitimate expectation was that cases 'will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt'.[77]

In the nursing home case, which is an outstanding example of a substantive right created by legitimate expectation, the Court of Appeal, in a full analysis, put great emphasis on unfairness as a form of abuse of power, treating an unjustified breach of an undertaking by a public authority as equivalent to a breach of contract for substantive as well as for procedural purposes.[78] Only an 'overriding public interest' will outweigh the obligation of a promise, particularly where it is made to an individual or a small group. The law thus accords with the free standing principle of substantive legitimate expectation as established[79] in EU law. Being firmly rooted in European law it is likely to play a progressively more important part in English law, and all the more so because it is so closely allied to fairness. It is illustrated again later in the context of natural justice.[80] It was in that context that the new doctrine first arose, but since it is impossible to separate 'procedural' from 'substantive' cases entirely, the texts on both heads of expectation should be read together.[81]

Another basis for substantive legitimate expectation may be international obligation. Citing an emphatic decision of the High Court of Australia,[82] Lord Woolf MR has said (in a human rights context) that the entering into a treaty could give rise to a legitimate expectation, on which the public in general could rely, that the Secretary of State would act in accordance with the treaty obligations, and that failure to do so could give rise to a right to relief.[83] Relief was refused in that case, but was granted in a later case where prosecutions of asylum seekers for using false documents were declared wrongful for failure to give effect to the Convention on

[75] *R.* v. *Home Secretary ex p. Hargreaves* [1997] 1 WLR 906. The Court of Appeal's rejection of any doctrine of substantive legitimate expectation in this case is eclipsed by their contrary decision in *ex p. Coughlan*, above, in which it was distinguished but in effect abandoned.

[76] *R. (Bloggs 61)* v. *Home Secretary* [2003] 1 WLR 2724. This was, in any case, a matter for the prison service, not the police. See [2003] JR 215 (Iyengar).

[77] *Re Findlay* (above) at 338 (Lord Scarman). See similarly *R.* v. *Ministry of Defence ex p. Walker* [2000] 1 WLR 806 (HL).

[78] For its procedural origin see below, p. 500.

[79] For EU law see [1996] *CLJ* 289 at 304 (P. P. Craig) and [1987] *PL* at 380 (Forsyth), discussing *Mulder* v. *Minister van Landbauw en Visserij* [1988] ECR 2321 (successful challenge by milk-producer to regulation imposing condition impossible for him to satisfy).

[80] Below, p. 500.

[81] See the discussion at pp. 500.

[82] *Minister of State for Immigration and Ethnic Affairs* v. *Teoh* (1995) 183 CLR 273.

[83] *R.* v. *Home Secretary ex p. Ahmed* [1999] COD 69. Contrast *Thomas* v. *Baptiste* [1999] 3 WLR 249 at 262 (PC) (common law right not to have appeal process frustrated).

the Status of Refugees.[84] Where a housing authority, supposing wrongly (as the House of Lords later held) that they had a legal duty, promised permanent accommodation to families of refugees it was held that this created legitimate expectations, but that for the court to enforce them would conflict with the authority's allocation policy and that it was for the authority to consider the case on the basis that the expectations were legitimate.[85]

An expectation whose fulfilment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. Thus it is inherent in many of the decisions on substantive legitimate expectations,[86] and express in several,[87] that the expectation must be within the powers of the decision-maker.

But the innocent representee misled by an *ultra vires* promise may not be without a remedy. The Human Rights Court has held that an *ultra vires* legitimate expectation—in the context of the lease of real property—was protected as a possession under Article 1 Protocol 1 of the Human Rights Convention; and the victim was entitled to 'just satisfaction', i.e. damages.[88] This result is consistent with the proposal made earlier in this book that innocent representees, even in non-human rights cases, should be compensated.[89] The alternative is either to deny justice to those that have been misled or to invite the judges to weigh 'legal certainty' (the expectation) against 'legality' (the *ultra vires* doctrine) and give judgment according to where that balance falls.[90] This latter, and bold alternative, need not be adopted in the light of the availability of compensation where justice requires.

Ministerial policy

Ministers' decisions on important matters of policy are not on that account sacrosanct against the unreasonableness doctrine, though the court must take special care, for constitutional reasons, not to pass judgment on action which is essentially

[84] *R.* v. *Uxbridge Magistrates' Court ex p. Adimi*, The Times, 12 August 1999. But the Convention is partly incorporated in the immigration rules. [2001] QB 667

[85] *R. (Bibi)* v. *Newham LBC* [2002] 1 WLR 237 (CA).

[86] See *Bloggs 61*, above and *R.* v *Secretary of State for Education ex p. Begbie* [2000] 1 WLR 1115 (CA).

[87] For instance, *Bibi* (Schiemann LJ) and *Al Fayed* v. *Advocate General for Scotland* [2003] SLT 747 (OH). Similarly, Gibson LJ in *Rowland* v. *The Environment Agency* [2003] EWCA Civ. 1885, paras. 67–69 (*ultra vires* statements led adjacent landowner to believe that certain public water was private).

[88] *Stretch* v. *UK* (2004) 38 EHRR 12 (an option to extend lease was beyond the powers of the landlord (a local authority)).

[89] Above, p. 340. For discussion of 'just satisfaction', see p. 747.

[90] This latter alternative, originally put forward by Professor Craig, draws support from the judgment of May LJ in *Rowland*, para. 114–120 who recognises that its adoption would amount to legislation.

political.[91] Examples of justifiable intervention are the *Padfield* and *Congreve* cases already discussed and the *Tameside* case discussed below. Further examples will be found in the context of delegated legislation, since the courts have several times held ministerial regulations to be void for unreasonableness.[92]

A three-judge divisional court provided another striking instance in granting declaratory relief to prisoners serving life sentences whose prospects of release on licence ('parole') were sharply reduced after a change of policy by the Home Secretary.[93] The new policy had first been challenged by other prisoners on the ground that the Parole Board had not been consulted and that the Home Secretary had fettered his discretion, but the House of Lords upheld it.[94] The Home Secretary then decided to make a practice of waiting for three or four years before asking the judge who had passed a life sentence for his opinion on the term of imprisonment which the convict ought to serve. This delay was held to be an unfair restriction on the implementation of the parole policy which in some cases would extend the term of imprisonment unjustly, contrary to what the judge would have advised if consulted at the time of conviction. It was held that a minister could not lawfully maintain a policy when the application of it was, in part at least, shown to give rise to injustice; and that the policy of delayed reference to the judge was unreasonable in the *Wednesbury* sense. The decision is all the more notable in that the unreasonable action was not itself the exercise of a statutory power, as it was in the cases mentioned above, but was merely preparatory to the exercise of the statutory function of referring cases to the Parole Board. The real misdeed, therefore, was the failure to consider whether to take the latter step at the proper time.

A sharply divided House of Lords invalidated the policy of the Home Secretary for setting the 'tariff period' for a prisoner serving a mandatory life sentence.[95] Although none of the various reasons given by the majority judges was expressly based on unreasonableness, they are all related to the abuse of power and the case shows how far the court will now penetrate into the merits of executive policy. The

[91] See *R.* v. *Secretary of State for the Environment ex p. Nottinghamshire CC* [1986] AC 240 (unsuccessful complaint of unreasonably low 'expenditure target' set by Secretary of State); *R.* v. *Secretary of State for the Environment ex p. Hammersmith and Fulham LBC* [1991] 1 AC 521 (unsuccessful challenge to Secretary of State's 'charge-capping' of local authorities); *R.* v. *Home Secretary ex p. Brind* [1991] 1 AC 696 (unsuccessful challenge to directive forbidding BBC to broadcast matter from proscribed terrorist organisation); *R.* v. *Secretary of State for Transport ex p. Richmond-upon-Thames LBC* [1996] 1 WLR 1460 (unsuccessful challenge to policy for control of airport noise at night).

[92] Below, p. 880.

[93] *R.* v. *Home Secretary ex p. Handscomb* (1987) 86 Cr. App. R. 59, partially disapproved on other grounds in *R.* v. *Home Secretary ex p. Doody* [1994] 1 AC 531. See also *R.* v. *Home Secretary ex p. Walsh*, [1992] COD 240 (decision that prisoner should serve 20 years quashed for self-misdirection and unfairness in not disclosing his 'tariff period').

[94] *Re Findlay* [1985] AC 318.

[95] *R.* v. *Home Secretary ex p. Pierson* [1998] AC 539. The tariff period was treated as increased because the Home Secretary had withdrawn some of his reasons for setting it at twenty years. See also *R.* v. *Home Secretary ex p. Norney* [1995] 7 Admin. LR 861 (prolongation of tariff period unreasonable but relief refused).

tariff period for the prisoner, i.e. the minimum period considered by the Home Secretary to be necessary for purposes of punishment ('retribution and deterrence') before his possible release could be considered by the Parole Board, had been fixed at twenty years under the policy which the Home Secretary had himself devised for the exercise of his statutory power, in terms unlimited, for the release of life prisoners. 'The concept of a tariff period is not a statutory one. It is a self-inflicted burden imposed by the Home Secretary on himself by adopting a policy for the exercise of the statutory discretion'.[96] In this case the increased twenty-year tariff was unlawful because the Home Secretary had misconstrued his own policy statement and so erred in law (Lord Goff); and because the Home Secretary, who in fixing terms of imprisonment should act like a judge, had no power to increase a tariff once fixed and communicated to the prisoner (Lord Steyn and Lord Hope). This last reason was strongly contested by the dissenting judges (Lord Browne-Wilkinson and Lord Lloyd) who pointed out that Parliament had given wide discretion to the Home Secretary precisely so that he should exercise it as a minister, responsible to Parliament, rather than as a judge; and as to his misconstruction of his policy statement Lord Browne-Wilkinson said:[97]

> But in my judgment it is not right to adopt such a technical approach to statements made by a minister in Parliament relating to policy matters. If judicial review of executive action is to preserve its legitimacy and utility, it is essential that statements of administrative policy should not be construed as if settled by parliamentary counsel but should be given effect to for what they are, viz. administrative announcements setting out in laymen's language and in broad terms the policies which are to be followed.

The decision of the majority, however, shows how strictly ministers may be held to their statements of policy, rigorously interpreted, and how the rule of law may be invoked to counter anything savouring of retrospective punishment. Tariff-fixing decisions of the Home Secretary have been successfully challenged in a number of other cases for reasons which belong elsewhere in this book.[98]

The present tariff system, however, is due for early abolition, since the European Court of Human Rights has held that the length of a prisoner's detention must be determined by the judiciary and not by the executive.[99] Radical legislation will therefore be necessary.

The policy of banning homosexuals from the armed forces, on which a strong attack was mounted on grounds of unreasonableness and breach of fundamental

[96] Ibid. at 571 (Lord Browne-Wilkinson). For the history of this regime and its successive modifications see the *Pierson* case (above). The Home Secretary is not obliged to accept a recommendation from the Parole Board that a prisoner be released on licence: *R.* v. *Home Secretary ex p. Stafford* [1999] 2 AC 38. See also *R.* v. *Home Secretary ex p. Hindley* [1999] 2 WLR 1253 (tariff of 'whole life' upheld). See above, p. 76 for discussion of changes since these cases.

[97] Ibid. at 327.

[98] See above, p. 331, below, p. 595.

[99] *T and V* v. *United Kingdom*, (2000) 30 EHRR 121 (breach of Art. 6 of the Convention).

rights, was upheld in 1995 by the Court of Appeal[1] (though later condemned by the European Court of Human Rights).[2] Sir Thomas Bingham MR said:

> The greater the policy content of the decision, and the more remote the subject matter of the decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational. That is good law, and like most good law, common sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test itself is sufficiently flexible to cover all situations.

These are apt words to indicate the limits of the *Wednesbury* test and to prevent undue judicial intervention in major areas of policy.

Parliamentary approval

Many ministerial orders and regulations are required to be approved by Parliament either positively by resolution or negatively by the expiry of a time limit.[3] This approval ought not, in constitutional principle, to affect the rules of judicial review, since that can be done only by Act of Parliament.[4] 'Parliamentary supremacy over the judiciary is only exercisable by statute.'[5] But where orders and regulations are required to be approved by one or both Houses of Parliament, judicial sensitivity has set an especially high threshold of unreasonableness, crossed only when the minister's order is 'so absurd that he must have taken leave of his senses'.[6] Challenges attempting to satisfy this test in cases with high political content, involving severe central government action against local authorities, have predictably been dismissed by the House of Lords,[7] as also by the Court of Session in Scotland.[8] These were cases where the minister imposed restrictions on local rates, charges or expenditure where he disapproved of the local authority's policy, or where local government boundaries were to be altered. In such situations the minister's order 'is not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity'.[9] It was in this context that Lord Scarman said: 'Judicial review is a great weapon in the hands of the judges,

[1] *R.* v. *Ministry of Defence ex p. Smith* [1996] QB 517, affirming a notable judgment of Simon Brown LJ. The House of Lords refused leave to appeal

[2] *Smith and Grady* v. *UK* (2000) 29 EHRR 493, holding that the *Wednesbury* test set too high a threshold and excluded the considerations of pressing social need and proportionality.

[3] See below, p. 895.

[4] Above, p. 26.

[5] *M.* v. *Home Office* [1994] 1 AC 377 at 395 (Lord Templeman); and see *R.* v. *Criminal Injuries Compensation Board ex p. P* [1995] 1 WLR 845 at 861 (Evans LJ).

[6] See the *Nottinghamshire* case (above) at 347 (Lord Scarman).

[7] In the *Nottinghamshire* and *Hammersmith* cases, above. Both cases involved positive resolutions of the House of Commons.

[8] In *City of Edinburgh DC* v. *Secretary of State for Scotland* 1985 SLT 551; *East Kilbride DC* v. *Secretary of State for Scotland*, 1995 SLT 1238.

[9] See the *Hammersmith* case (above) at 597 (Lord Bridge).

but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power'.[10]

It is only the criterion of reasonableness that is restricted by this doctrine, and then only in special situations dominated by questions of political judgement. The normal rule is that parliamentary approval does not affect the operation of judicial review, whether for unreasonableness or otherwise. For this the decisions on delegated legislation, which is frequently approved by Parliament, afford ample illustration.[11]

Relevant and irrelevant considerations

There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void. It is impossible to separate these cleanly from other cases of unreasonableness and abuse of power, since the court may use a variety of interchangeable explanations, as was pointed out by Lord Greene.[12] Regarded collectively, these cases show the great importance of strictly correct motives and purposes. They show also how fallacious it is to suppose that powers conferred in unrestricted language confer unrestricted power.

Lord Esher MR stated the 'irrelevant considerations' doctrine in a case where a vestry had mistakenly fixed the pension of a retiring officer on the erroneous assumption that they had no discretion as to the amount:[13]

> But they must fairly consider the application and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the exercise of their discretion, then in the eye of the law they have not exercised their discretion.

The doctrine applies equally to failure to take account of some consideration which is necessarily relevant, such as the respective costs of rival proposals[14] or the availability of more suitable land.[15] Cooke J explained in a New Zealand case that

[10] In the *Nottinghamshire* case (above) at 250.
[11] Below, p. 874.
[12] Above, p. 363. See [1976] *CLJ* 272 (G. D. S. Taylor).
[13] *R.* v. *St Pancras Vestry* (1890) 24 QBD 371 at 375.
[14] *Eckersley* v. *Secretary of State for the Environment* [1977] JPL 580; *Prest* v. *Secretary of State for Wales* (1982) 81 LGR 193; *R.* v. *Brent LBC ex p. Gunning* (1985) 84 LGR 168.
[15] *Brown* v. *Secretary of State for the Environment* (1978) 40 P & CR 285 (provision of land for gipsies). See also *City Cabs (Edinburgh) Ltd.* v. *Edinburgh DC* 1988 SLT 184.

'the more general and the more obviously important the consideration, the readier the court must be to hold that Parliament must have meant it to be taken into account'.[16]

Under many statutes the discretion conferred is extensive, and it is no concern of the court to restrict it artificially by limiting the considerations that are relevant. A minister may be entitled to take account of every factor that may affect the public interest,[17] but it does not follow that he is obliged to do so. In another New Zealand case Cooke J pointed out 'the difference between obligatory considerations (i.e. those which the Act expressly or impliedly requires the Minister to take into account) and permissible considerations (i.e. those which can properly be taken into account but do not have to be)'.[18] Where there is overlap between different areas of policy, for example housing and planning, the court may decline to make a rigid dichotomy between them so as to confine a housing authority to 'housing' considerations only.[19] The court will intervene in two situations. The first is where the authority has acted on grounds which the statute never intended to allow, for example where fees charged for street traders' licences were based upon what the market would bear rather than administration costs.[20] The second is where the authority has failed to take proper account of something that the statute expressly or impliedly required it to consider,[21] even though it may not have been known at the time.[22] But under this second head the implied requirement may be wide. In deciding whether to deport an immigrant the Secretary of State 'on classic *Wednesbury* principles . . . is bound to take account of all relevant considerations', so that an adjudicator misdirects himself in law if he refuses to take account of the immigrant's special value to his own community.[23] A threat by that community to instigate a strike, on the other hand, would be improper and therefore irrelevant.[24]

[16] *CREEDNZ* v. *Governor-General* [1981] 1 NZLR 172, applied in *R.* v. *Hillingdon Health Authority ex p. Goodwin* [1984] ICR 800 (decision to close hospital quashed for failure to take account of doctors' interests).

[17] See, e.g., *Rother Valley Railway Co. Ltd.* v. *Ministry of Transport* [1971] 1 Ch. 515.

[18] *Ashby* v. *Minister of Immigration* [1981] 1 NZLR 222 at 224 (admission of South African rugby football team unsuccessfully challenged).

[19] *Hanks* v. *Minister of Housing and Local Government* [1963] 1 QB 999; see below, p. 384, for this and contrasting cases.

[20] *R.* v. *Manchester CC ex p. King* [1991] COD 422.

[21] *CREEDNZ* v. *Governor-General* (above); and see *Ashby* v. *Minister of Immigration* (above).

[22] *R.* v. *Immigration Appeal Tribunal ex p. Hassanin* [1987] 1 WLR 1448 (cases remitted to appeal tribunals to consider all the relevant circumstances).

[23] *R.* v. *Immigration Appeal Tribunal ex p. Bakhtaur Singh* [1986] 1 WLR 910 (Lord Bridge). See also *R.* v. *Immigration Appeal Tribunal ex p. Bastiampillai* [1983] 2 All ER 844 (failure to take account of immigrant's circumstances); *R.* v. *Immigration Appeal Tribunal ex p. Kumar* [1987] 1 FLR 444 (disregard of husband's proved devotion in alleged marriage of convenience); *R.* v. *Home Secretary ex p. Bugdaycay* [1987] AC 514 (failure to consider danger to asylum-seeker).

[24] *Bakhtaur Singh*'s case (above).

Where discretion is conferred upon a minister of the Crown the range of legitimate considerations is likely to be wider than it would be in the case of a judge, who can consider legal relevance only. As Lord Scarman said of the position of the Home Secretary in deciding whether to release life-sentence prisoners on licence:[25]

> But neither the [Parole] Board nor the judiciary can be as close, or as sensitive, to public opinion as a minister responsible to Parliament and to the electorate. He has to judge the public acceptability of early release and to determine the policies needed to maintain public confidence in the system of criminal justice.

Nevertheless the House of Lords has held that the Home Secretary, in determining periods of imprisonment under his 'tariff' policy for life prisoners, is in a position analogous to that of a judge passing sentence, and may not therefore take account of public petitions or public opinion or campaigns organised by newspapers.[26] In the case of two boy murderers, for whom he had fixed a tariff of fifteen years, he was held to have misdirected himself in taking account of public demands for a whole-life tariff, and his decision was quashed. This was a majority decision and it was opposed by Lord Lloyd, who rejected the judicial analogy and accepted the relevance of public opinion—as seems natural when the discretion is given by Parliament to a politician rather than to a judge.[27]

Examples of the doctrine

A clear case of abuse of power prompted by an irrelevant consideration was where some local authorities refused to provide certain newspapers in their public libraries. Their reason for the ban was that they were politically hostile to the newspapers' proprietors, who had dismissed many of their workers when they went on strike. The ulterior political object of the local authorities was irrelevant to their statutory duty to provide 'a comprehensive and efficient library service'.[28] Another example was where the Secretary of State had power to prescribe 'the appropriate contribution' of local authorities to a fund for financing further education, and prescribed a formula based on the rateable resources of each area, so that the richer local authorities were made to subsidise the poorer. It was held that relative resources were an irrelevant consideration, since a local authority's rate fund should be used for the benefit of its own area and there was nothing in the empowering Act to justify the redistribution of resources.[29]

[25] *Re Findlay* [1985] AC 318 at 333.

[26] *R.* v. *Home Secretary ex p. Venables* [1998] AC 407; and see *R.* v. *Home Secretary ex p. Furber* [1998] 1 All ER 23.

[27] See similarly Lord Lloyd's dissenting speech in *R.* v. *Home Secretary ex p. Pierson* [1998] AC 539, noted above, p. 378.

[28] *R.* v. *Ealing LBC ex p. Times Newspapers Ltd.* (1986) 85 LGR 316.

[29] *R.* v. *Secretary of State for Education and Science ex p. Inner London Education Authority* [1985] 84 LGR 454.

Where the Home Secretary refused to release a discretionary life prisoner, despite repeated recommendations from the Parole Board, his decision was quashed because it should have been based solely on future danger to the public, but was influenced by the irrelevant consideration that the prisoner had attempted to escape.[30]

A group of cases concerns the dismissal of schoolteachers. Where education authorities had power to require the dismissal of teachers 'on educational grounds' they acted ultra vires in requiring dismissals in order to save expenditure[31] or because a teacher took an afternoon off in poignant circumstances.[32] But where they had an unrestricted power of dismissal themselves, they were held entitled to dismiss teachers who were married women on the grounds that housewives were less satisfactory and were less in need of employment than single women.[33] These grounds were not alien or irrelevant to the statutory purpose of maintaining efficient schools. But the dismissal of teachers was ultra vires where the sole ground for it was that the teachers refused to collect money for pupils' meals: for the Education Act 1944 expressly provided that the Minister could not impose this requirement, and it was not therefore a relevant and valid ground of dismissal.[34]

Incessant litigation over planning and compulsory purchase, illustrated more fully below,[35] has produced a meticulous style of review[36] in which the doctrine of relevant and irrelevant considerations is frequently employed. One case carried it to a new point in quashing a decision of the Secretary of State for paying too much regard to a relevant consideration and so misdirecting himself.[37] His error was to regard a long-expired planning permission as a 'vitally material consideration' requiring the granting of a new permission, when in fact that consideration was relevant but not dominant; and so he came to a perverse decision. With somewhat similar reasoning the Court of Appeal quashed a compulsory purchase order because the Secretary of State failed to take account of an offer by the landowner which would have made an alternative site less rather than more expensive.[38] It is in decisions such as these that the courts may be said to employ something like the

[30] *R.* v. *Home Secretary ex p. Benson*, The Times, 21 November 1988. Contrast *R.* v. *Home Secretary ex p. Stafford* [1999] 2 AC 38.

[31] *Hanson* v. *Radcliffe Urban Council* [1922] 2 Ch. 490; *Sadler* v. *Sheffield Cpn.* [1924] 1 Ch. 483; *R.* v. *Liverpool CC ex p. Ferguson*, [1985] IRLR 501.

[32] *Martin* v. *Eccles Cpn.* [1919] 1 Ch. 387.

[33] *Short* v. *Poole Cpn.* [1926] Ch. 66. Cf. *Price* v. *Rhondda Urban Council* [1923] 2 Ch. 372.

[34] *Price* v. *Sunderland Cpn.* [1956] 1 WLR 1253.

[35] Below, p. 404.

[36] Summarised in *Seddon Properties Ltd.* v. *Secretary of State for the Environment* (1978) 42 P & CR 26.

[37] *South Oxfordshire DC* v. *Secretary of State for the Environment* [1981] 1 WLR 1092. Cf. *Westminster Renslade Ltd.* v. *Secretary of State for the Environment* (1983) 48 P & CR 255; *Surrey Heath BC* v. *Secretary of State for the Environment* (1986) 85 LGR 767.

[38] *Prest* v. *Secretary of State for Wales* (1982) 81 LGR 193.

American doctrine of 'hard look review'.[39] But the House of Lords has softened the rigour of this policy by holding that ministerial decision letters may be construed with 'a measure of benevolence'.[40]

Another way of expressing the irrelevant considerations doctrine is to say that a wrong test has been applied. In refusing an application for political asylum on the ground that he was not persuaded that the applicant would be singled out for persecution in his own country the Home Secretary failed to apply the right test, which was whether the applicant had a well-founded fear of being persecuted for the reasons specified in the international convention on the status of refugees.[41] In the same category, perhaps, was the Home Secretary's 'unreasonable and perverse' decision to refuse concessionary television licences to residents in old people's homes, which the court quashed because he imposed a requirement which was irrelevant to the statutory qualifications.[42]

Qualifications and extensions

There are some situations in which the presence of irrelevant motives will not necessarily be fatal. The most obvious are where they do not in fact affect the action taken or where they operate in the complainant's favour,[43] or where they are merely redundant. Thus where the Broadcasting Complaints Commission declined to entertain a complaint by a party leader that his party was given too little broadcasting time, giving a number of good reasons but including the irrelevant reason that the task would be burdensome, their decision was within their lawful discretion.[44] Irrelevant considerations may also be innocuous if the action taken is reasonable in itself. In fixing the level of pay of its employees, which is required by the court to be reasonable, a local authority may act on entirely wrong grounds and yet its payments, if not in themselves excessive, are not unlawful. Of this situation Lord Sumner said:[45]

[39] The hard look doctrine was originally one of judicial restraint, restricting review of decisions of policy provided that the *agency* had taken a hard look at the whole matter, and decided rationally: *Greater Boston Television Corp.* v. *FCC* 444 F 2d 841 (1970). But the same title has been given to an intensive technique of review where the *court* investigates relevance of motives, adequacy of evidence and preparatory studies, and other such factors, as in *Sierra Club* v. *Costle* 657 F 2d 298 (1981) and *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.* 463 US 29 (1983). In the latter case the Supreme Court set aside the revocation of a government order about car seatbelts for failure to consider the available options and lack of rational connection between the facts and the decision.

[40] *Save Britain's Heritage* v. *No. 1 Poultry Ltd.* [1991] 1 WLR 153 at 165 (HL).

[41] *R.* v. *Home Secretary ex p. R.*, The Times, 8 June 1987 (Home Secretary's decision quashed). See similarly *R.* v. *Home Secretary ex p. Bugdaycay*, above, p. 381.

[42] *R.* v. *Home Secretary ex p. Kirklees BC*, The Times, 24 January 1987 (unjustified requirement of exclusive services of housing steward).

[43] *Hanks* v. *MHLG* (above) at 1020.

[44] *R.* v. *Broadcasting Complaints Commission ex p. Owen* [1985] QB 1153. See also *R.* v. *Secretary of State for Social Services ex p. Wellcome Foundation Ltd.* [1987] 1 WLR 1166.

[45] *Roberts* v. *Hopwood* [1925] AC 578 at 604; below, p. 398.

If, having examined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure would not be 'contrary to law' and could not be disallowed.

This therefore appears to be a case where objective and not subjective considerations may prevail. The reasoning was invoked in a later case to justify the payment of children's allowances by way of additional salary.[46]

Objective considerations prevailed also in the Pergau Dam case, where the British government's proposal to grant overseas aid of nearly £70 m. for the building of a dam in Malaysia was held to be unlawful as an abuse of power.[47] Under the relevant Act there was power to grant aid 'for the purpose of promoting the development or maintaining the economy' of another country, and it was held that political and economic considerations might legitimately be taken into account. But since on the evidence the whole project was uneconomic, it was held also that it could not have either of the necessary purposes, and on this strict construction it was invalidated.

In 1975 the government, wishing to enforce a policy of wage control but not wishing to seek legislation, decided to refuse discretionary assistance of various kinds to firms which paid higher wages than they approved.[48] Grants under the Industry Act 1972 and the Export Credits Guarantees Act 1975 and also payments of 'temporary employment subsidy' were among those to be refused. The government compiled a 'blacklist' of offending firms and called upon local authorities, nationalised industries and other bodies (including universities) not to place contracts with them. This policy provoked much political protest, but no litigation reached the courts before the policy collapsed in 1978. The question whether resort to these expedients was an abuse of discretion was therefore never tested. It seems unlikely that the courts would feel able to assert control over the government's freedom to place its contracts as it wishes. But the use of statutory powers for ulterior purposes not contemplated by Parliament might well have provided further material for this chapter.

Relevance of resources

A lack of resources, usually financial, often constrains public authorities in deciding how to exercise their duties and powers. As a general rule, impoverishment may not be treated as a relevant reason for failing to perform a statutory duty expressed

[46] *Re Walker's Decision* [1944] KB 644; below, p. 401.

[47] *R.* v. *Secretary of State for Foreign and Commonwealth Affairs ex p. World Development Movement Ltd.* [1995] 1 WLR 386.

[48] The policy was announced in White Papers of 1975–8, Cmnd. 6151, 6507, 6882, 7293. For the whole affair see [1978] *PL* 333 (G. Ganz). As to the use of contracts for enforcing policies, see above, p. 349 and below, p. 793.

in objective terms which allow no discretion. The House of Lords made this very clear in a case where the statutory duty of a local authority was to arrange for 'suitable full-time or part-time education', defined as 'efficient education' suitable to the pupil's age, ability, aptitude and any special educational needs.[49] When a cut in government funding compelled the local authority to economise they reduced the home tuition for a handicapped girl from five to three hours a week. It was clear from the Act that the standard of suitability was to be determined purely by educational considerations, so that shortage of funds was irrelevant and a matter for Parliament only. Otherwise the court would have 'to downgrade a statutory duty to a discretionary power'.

In a contrasting decision, however, a divided House of Lords accepted underfunding as relevant even in the case of a duty.[50] The Act provided that where a local authority was satisfied that it was 'necessary, in order to meet the needs' of a poor person for (*inter alia*) home help, television or recreational facilities, games, outings, facilities for holidays, or meals, 'it shall be the duty' of the authority to make arrangements for them in accordance with the Act. When the local authority, because of lack of funds, withdrew a disabled person's laundry and cleaning services, its action was upheld on the grounds that, since the Act provided no criterion for 'necessary' and 'needs', and the extensive list of welfare benefits showed that those words bore flexible and relative meanings, it was legitimate to take account of resources in determining what was to be treated as necessary or as a need. The logic of this decision is difficult in view of the objective language of the Act; and the dissentient Lords, agreeing with the Court of Appeal, may be thought to have the better of the argument, desirable though it may be to release local authorities from such painful dilemmas.

Painful dilemmas can equally well arise where an authority has a discretionary power as opposed to a duty, and has to decide how to apportion limited funds in its budget. A local health authority had to decide whether to provide an 11-year-old girl, suffering from acute leukaemia, with very expensive medical treatment which was experimental and had a low chance of success. Concluding that the treatment was not in the girl's best interests, the authority declined to provide it, taking account of its limited resources. The Court of Appeal upheld that decision and Sir Thomas Bingham MR said:[51]

> Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients . . . it would be totally unrealistic to require the authority to come to the court with its accounts and seek to

[49] *R.* v. *East Sussex County Court ex p. Tandy* [1998] AC 714; and see *R.* v. *Sefton MBC ex p. Help the Aged* [1997] 4 All ER 532; *R.* v. *Birmingham CC ex p. Mohammed* [1998] 3 All ER 788; *B.* v. *Harrow LBC*, [2000] 1 WLR 223 (HC).

[50] *R.* v. *Gloucestershire CC ex p. Barry* [1997] AC 584. Contrast *R.* v. *Gloucestershire CC ex p. Mahfood* (1995) 8 Admin. LR 180.

[51] *R.* v. *Cambridge Health Authority ex p. B.* [1995] 1 WLR 898.

demonstrate that if this treatment were provided for B. there would be a patient C. who would have to go without treatment.

In these discretionary situations it is more likely to be unlawful to disregard financial considerations than to take account of them.

The police, likewise, must be allowed a wide margin of discretion in deciding how best to deploy their limited resources of manpower and finance. Where the loading of live animals for export was obstructed at the port by crowds of animal rights activists, necessitating a level of police protection which interfered with the efficient policing of the rest of the county, the chief constable felt compelled by lack of resources to reduce protection from five days a week to two, and to forbid shipments on other days in order to prevent breaches of the peace. The House of Lords upheld these decisions, despite the shippers' complaints of 'a surrender to mob rule' and the failure of the chief constable to seek a special grant (unlikely to be given).[52] Lord Slynn approved the comment that 'there may well be important and sound reasons for a chief constable's decision not to commit all his force's resources to, nor to exercise his full legal powers in, a given dispute or demonstration'.[53] The police had given due weight to all the relevant considerations, and the court should ask no more. This balancing exercise was what was lacking in a contrasting case where local airport and harbour authorities had banned altogether the shipment of live animals because of disruptive protests. A Divisional Court quashed the bans as being a surrender to the dictates of unlawful pressure groups.[54] The authorities had failed to give any thought to 'the awsome implications for the rule of law of doing what they propose', there was no issue of lack of resources, and no complaint of inaction by the police.

A flexible principle

The principle of relevance has a part to play in judicial as well as in administrative decisions. In the time before the enactment of the Human Rights Act 1998, when the European Convention on Human Rights and Fundamental Freedoms had the status of a treaty only and not the force of law, the court would take account of it as a relevant consideration in cases where the law was ambiguous or uncertain. But fundamental rights deserve a special title, which will be found below.

'Irrelevant considerations' as a technique of judicial review provides the court with a weapon of great range and flexibility, which may often approximate to

[52] *R.* v. *Chief Constable of Sussex ex p. International Trader's Ferry Ltd*, above, p. 366. The House also rejected the contention that the police action violated EU law as being measures equivalent to quantitative restrictions on exports, contrary to Article 34 (now 29) of the EU Treaty. It was held justified by the exception for acts of public policy in Article 36 (now 30).

[53] (1997) 60 *MLR* 394 at 409 (C. Barnard and I. Hare).

[54] *R.* v. *Coventry City Council ex p. Phoenix Aviation* [1995] 3 All ER 37 (the quotation is from Simon Brown LJ). See also *K.A. Feakins Ltd.* v. *Dover Harbour Board*, (1998) 10 Admin. LR 665 (similar facts, action for breach of statutory duty failed).

reviewing a decision merely on its merits, undermining the supposedly strict *Wednesbury* principle. Its potentiality is obvious, and equally obvious is the difficulty of reducing it to precise rules. Along with other varieties of unreasonableness it embraces a large area of the ultra vires rule and the decisions are numerous. Many of the best examples can be grouped according to their subject matter under the titles which follow. But these categories must not be regarded as rigid. The courts have many strings to their bow and many of their arguments are interchangeable.[55]

CATEGORIES OF UNREASONABLENESS

Opposition to the policy of Parliament

From time to time public authorities have set their faces against the policy of an Act, and either declined to implement it or else attempted to frustrate it. Needless to say, this is an unlawful motive. In a case under the old poor law, where justices of the peace had discretion to enforce parochial contributions if they 'shall think fit', the justices refused to make an order against one parish because they thought it unfair that, having no paupers, it should be made to contribute, and the justices' order was condemned as arbitrary and illegal.[56] An analogous modern case arose from a London borough council's hostility to the policy of the Rent Act 1957. Certain classes of houses, formerly under requisition, remained in the occupation of tenants whose rents could not be increased 'except so far as the local authority may from time to time determine'; and the local authority had to compensate the owners by paying them the difference between the rent so determined and the rent which would otherwise be payable. The object of the Rent Act 1957 was to allow rents to rise to more realistic levels. Therefore the compensation payable to the owners would be greatly increased unless the local authority approved higher rents for the tenants. The St Pancras borough council refused to do this, being opposed to higher rents generally and wishing to 'protect the tenants from the Rent Act'. Lord Parker CJ held that this policy rendered the council's decision 'purely arbitrary' and disregarded the council's duty to their ratepayers, on whom the cost of the compensation would fall.[57] Their legal duty therefore was to review the rents, taking account of the relevant consideration that rents had been allowed to rise. The district auditor had accordingly been right in disallowing the additional compensation which the council had unlawfully paid. In later proceedings it was held

[55] See e.g. *Wheeler* v. *Leicester City Council* [1985] AC 1054, where arguments based on unfairness, unreasonableness and abuse of power are intermingled. See also [1987] *PL* 368 (J. Jowell and A. Lester) for various facets of the *Wednesbury* doctrine.

[56] *R.* v. *Boteler* (1864) 4 B & S 959.

[57] *Taylor* v. *Munrow* [1960] 1 WLR 151.

that the councillors responsible had acted honestly but unreasonably, and ought not to be relieved from the auditor's surcharges.[58]

A simple and blatant device aimed at nullifying the effect of an Act of Parliament was where a housing authority, determined not to make a general increase of rents as required by the Act, charged the whole of the required increase on to a single vacant house, putting up its weekly rent from £7 to £18,000. The court had no difficulty in holding this an unlawful abuse.[59]

The *Padfield* case,[60] already discussed, shows the 'statutory policy' doctrine as applied to a minister of the Crown. The House of Lords held that in refusing to refer the milk producers' complaint to the statutory committee the minister had acted so as to frustrate the policy of the Act, despite the fact that its words were merely permissive; and that the political and other reasons given were irrelevant and indicative of unlawful motives. It is particularly important to notice how closely the House of Lords scrutinised the minister's reasons, as governing the validity of the action. One of the reasons given in a departmental letter was that the minister would have to consider whether, if he allowed the producers' complaint to be referred to the statutory committee and they upheld it, he would be expected to give effect to the committee's recommendations. Lord Upjohn said:

> This fear of parliamentary trouble (for, in my opinion, this must be the scarcely veiled meaning of this letter) if an inquiry were ordered and its possible results is alone sufficient to vitiate the Minister's decision which, as I have stated earlier, can never validly turn on purely political considerations; he must be prepared to face the music in Parliament. . . .

There could scarcely be a better example of the principle that statutory powers, however permissive, must be used with scrupulous attention to their true purposes and for reasons which are relevant and proper.

The House of Lords also rejected the Crown's argument that the minister need have given no reasons and that therefore such reasons as he volunteered to give could not be criticised. Going still further, the House declared that if in such a case he refused to give any reasons, the court might have to assume that he had no good reasons and was acting arbitrarily.[61] In other words, the minister may not be able to disarm the court by taking refuge in silence. In this way the court would have power to impose, in effect, an obligation to give reasons for discretionary decisions. But the law has not yet reached that point, as explained in a later chapter.[62] Despite the general obligation to act reasonably, a local authority need not give reasons for

[58] *Annison* v. *District Auditor for St. Pancras* [1962] 1 QB 489.

[59] *Backhouse* v. *Lambeth London Borough Council*, The Times, 14 October 1972.

[60] *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] AC 997; above, p. 356.

[61] [1968] AC at 1032, 1053, 1061. See similarly *Secretary of State for Employment* v. *ASLEF* (No. 2) [1972] 2 QB 455 at 493 (Lord Denning MR) and *Minister of National Revenue* v. *Wright's Canadian Ropes Ltd.* [1947] AC 109 at 123 (below, p. 427); and compare *Fiordland Venison Ltd.* v. *Minister of Agriculture* [1978] 2 NZLR 341 (minister's reasons inferred from evidence and held improper; applicant held entitled to licence in the absence of good reasons for refusing it).

[62] Below, p. 522.

evicting a tenant,[63] nor need a minister do so for making orders and giving directions for the protection of trading interests.[64]

A determined ministerial attempt to frustrate the policy of an Act was condemned by the Court of Appeal in the *Laker Airways* case.[65] The company had been granted a licence for a low-cost transatlantic air service by the Civil Aviation Authority, one of whose statutory duties was to secure that at least one independent British airline had opportunities to compete with British Airways. In 1975 the government announced a policy of preventing competition and the Secretary of State issued 'guidance' to the CAA, in terms approved by both Houses of Parliament, requiring them to revoke the company's licence. Under the Civil Aviation Act 1971 the Secretary of State had power to give the CAA guidance in the performance of their functions and the CAA had to obey. But the guidance given in this case clearly conflicted with their functions since one of them was to give opportunities to independent airlines. The guidance was therefore ultra vires and invalid.[66] The Secretary of State had also announced that he would withdraw the company's designation as an approved airline under the agreement with the United States, so that it would not obtain landing rights in America. This step was likewise declared to be unlawful. For its object, again, was to frustrate the express provision of the Act about allowing competition and to render licences properly granted by the CAA worthless. The Act, it was held, by necessary implication prohibited the Crown from pursuing this unlawful object, even though the Crown was acting, as it claimed, under the royal prerogative in the sphere of foreign affairs. Lord Denning MR held further that the Crown was abusing the prerogative, as explained earlier.[67] The use of the doctrine of implied prohibition to restrain action which would normally be beyond the court's control is a particularly striking feature of this decision.

Failure to take account of the policy of Parliament caused the quashing of a local council's refusal to refund rates overpaid. The council had discretionary power under the Act to make repayments, but had refused to exercise it for various bad reasons, without regard to the Act's policy that injustice should be remedied.[68] And there have been other comparable decisions.[69]

In the most controversial of all these cases there was a radical cleavage of judicial

[63] *Cannock Chase DC* v. *Kelly* [1978] 1 WLR 1.

[64] *British Airways Board* v. *Laker Airways Ltd.* [1985] AC 58.

[65] *Laker Airways Ltd.* v. *Department of Trade* [1977] QB 643.

[66] For another mistake by a Secretary of State as to his powers of giving directions see *R.* v. *Secretary of State for Social Services ex p. Lewisham (etc.) LBC*, The Times, 26 February 1980 (default powers misunderstood).

[67] See above, p. 348.

[68] *R.* v. *Tower Hamlets LBC ex p. Chetnik Developments Ltd.* [1988] AC 858, for which see below, p. 800.

[69] See *R.* v. *Burnham Primary and Secondary Committee ex p. Professional Association of Teachers*, The Times, 30 March 1985 (exclusion of teachers' association frustrated policy of Act); *R.* v. *Haberdashers' Aske's Hatcham School Governors ex p. Brunyate and Hunt* [1989] 1 WLR 542 (HL) (policy of Education Acts thwarted).

opinion about the proper relationship between the courts and Parliament. The criminal injuries compensation scheme, operated administratively on a non-statutory basis and making payments from funds voted by Parliament, was to be made statutory by the Criminal Justice Act 1988, but its provisions were to come into force 'on such day as the Secretary of State may by order made by statutory instrument appoint'. Before making any such order the Secretary of State (the Home Secretary) decided to abandon the scheme provided for in the Act and to substitute a different scheme (the 'tariff scheme') with a scale of fixed payments and less generous compensation. The new scheme was to be put into force without legislation, in the same manner as the old scheme; and there would be no commencement order under the Act of 1988, which would be repealed *pro tanto* when convenient. There could hardly be a plainer case of administrative frustration of Parliamentary intention. But the question was, ought the court to intervene, or was it a matter for Parliament only? At the instance of the Fire Brigades Union and others the House of Lords by a bare majority, upholding a majority of the Court of Appeal, held that the Home Secretary had a duty to keep the activation of the statutory scheme under continuous consideration, that the introduction of an inconsistent scheme was unlawful frustration of the provision made by Parliament, that the matter was justiciable by judicial review, and that declaratory relief should be given to the firemen's union.[70] Lords Browne-Wilkinson and Nicholls, in the majority, held that the Secretary of State was attempting to pre-empt Parliament's decision whether to preserve the statutory scheme, and that by introducing the tariff scheme he debarred himself from exercising his power to make a commencement order for the purpose that Parliament intended; and that this was an abuse of power and unlawful. Lord Lloyd, assenting, held that the Home Secretary's power was to give effect to, rather than frustrate, the legislative policy enshrined in the Act and allowed him 'to say when, but not whether' that policy should be fulfilled. Lord Keith, in the minority, held that the decision was 'of a political and administrative character quite unsuitable to be the subject of review by a court of law', which 'would be a most improper intrusion into a field which lies peculiarly within the province of Parliament' and a 'usurpation of the function of Parliament'; and Lord Mustill agreed in substance, though less vehemently, with Lord Keith.[71]

Important constitutional issues underlie the conflicting opinions in this case. The Home Secretary was proceeding, realistically, on the footing that 'the intention of Parliament' was in fact the intention of the executive government, which could obtain from Parliament any authority or dispensation that it wanted at any time. The minority judges considered that the courts should not intrude into this

[70] *R.* v. *Home Secretary ex p. Fire Brigades Union* [1995] 2 AC 513. After this decision the government's preferred scheme was made statutory by the Criminal Injuries Compensation Act 1995.

[71] Compare the dissent of Neill LJ in *R.* v. *Criminal Injuries Compensation Board ex p. P* [1995] 1 WLR 845.

relationship. But a great deal of administrative action has a political character, and may affect proceedings in Parliament, for example when orders are approved by resolutions of both Houses and yet may be quashed.[72] To invalidate administrative action which conflicts with statute is essentially the task of the judiciary. As Lord Lloyd said, quoting this book, 'ministerial responsibility is no substitute for judicial review'.

Infringement of fundamental rights

Two classes of fundamental rights, closely similar and sometimes identical, have to be distinguished. The first class are rights regarded as of special importance by the common law, such as the right of access to the courts.[73] The second class are the rights protected by the European Convention on Human Rights and Fundamental Freedoms, now incorporated into the law by the Human Rights Act 1998. The common law rights affect the operation of the principle of reasonableness since they can be infringed only for especially compelling reasons. Rights under the European Convention, on the other hand, are now statutory rights by virtue of the Act of 1998, with their own independent force. But before the Act those Convention rights would sometimes be taken into account by the courts on the assumption that Parliament would not intend to infringe Convention obligations[74] and this indirect effect may still be important in cases falling outside the Act.

Basic rights such as the right to life, freedom of the person, freedom of speech and the right of access to the courts are protected in the common law by judicial review of special stringency. This may be seen from an important statement by Lord Bridge:[75]

> But I do not accept that this conclusion [the inapplicability of the Convention] means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited,

[72] See the *Laker Airways* case, above.

[73] For this 'vital constitutional right' see *R.* v. *Lord Chancellor ex p. Witham* [1998] QB 575; below, p. 721.

[74] *Ex p. Brind* (below) at 721; *Rantzen* v. *Mirror Group Newspapers Ltd.* [1994] QB 670 at 691.

[75] *R.* v. *Home Secretary ex p. Brind* [1991] 1 AC 696 at 748. See also *R.* v. *Home Secretary ex p. Bugdaycay* [1987] AC 514 at 531. The resulting state of the law is summarised by Neill LJ in *R.* v. *Secretary of State for the Environment ex p. National and Local Government Officers Association* (1992) 5 Admin. LR 785 at 798. See also the discussion by Sir John Laws in Forsyth and Hare (eds.), *The Golden Metwand*, 185. And note the influential 'accurate distillation' of the principles laid down in *ex parte Bugdacay* and *ex parte Brind* put forward by David Pannick QC and adopted by Lord Bingham MR in *R.* v. *Ministry of Defence ex parte Smith* [1996] QB 517 at 554. The distillation notes that the human rights context is important in judging whether the decision-maker has exceeded the range of options open to him. The 'more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable . . .'

in a way which infringes fundamental human rights . . . But again, this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him could reasonably make that primary judgment.

Fundamental rights, accordingly, will be guarded by the law with especial care. This guardianship, according to Lord Bridge, is exercised through the principle of reasonableness; and in the same vein the Court of Appeal has held that the threshold of unreasonableness is lowered and the standard of review becomes more stringent when the right to life is in question.[76] Wide general powers must make way for fundamental rights, for example where it is held that the Home Secretary's wide powers of administration over prisons do not empower prison governors to obstruct prisoners' correspondence with their legal advisers or their access to the courts of law[77] or their interviews with journalists for the purpose of challenging the justice of their convictions,[78] since it is part of their right of access to justice that they should have access to investigative journalism, by which miscarriages of justice have often been exposed. In the latter context Lord Steyn identified 'a fundamental or basic right' bringing into play 'a presumption of general application operating as a constitutional principle'.[79] And Lord Hoffmann said:[80]

Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process . . . In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

The House of Lords is evidently laying the foundations of a more deep-seated doctrine than that of reasonableness,[81] giving effect in the common law to a culture of human rights independent of the Act of 1998.

[76] *R.* v. *Lord Saville of Newdigate ex p. A* [1999] 4 All ER 860 (order of statutory tribunal of inquiry denying anonymity to soldier witnesses who fired shots in 'Bloody Sunday' riots of 1972 quashed because identification would endanger their lives).

[77] *R.* v. *Home Secretary ex p. Leech* (No. 2) [1994] QB 198; *Raymond* v. *Honey* [1983] 1 AC 1.

[78] *R.* v. *Home Secretary ex p. Simms* [1999] 3 WLR 328. The House of Lords held that the right was restricted to that purpose only, invalidating (*pro tanto*) a Home Office policy that journalists must undertake not to use the information professionally.

[79] Ibid. at 390.

[80] Ibid. at 341.

[81] Lord Hobhouse however spoke in terms of reasonableness.

The statutory rights secured by the Human Rights Act 1998 have already been generally explained.[82] But there may be cases not covered by the Act, for example where the complainant is not a 'victim' within the Act or the Convention but nevertheless has a 'sufficient interest' to seek judicial review.[83] In such cases the court is likely to fall back upon its practice developed before the Act, whereby it would have regard to the Convention principles in cases where the common law was uncertain or a statute was obscure or ambiguous or merely general in its terms.[84]

In a leading example the Court of Appeal, faced with conflicting precedents, held that the right of free expression secured by the Convention entailed that a local authority could not sue for libel when vehemently criticised for bad government—although the House of Lords affirmed the decision on the common law alone, without needing to invoke the Convention.[85] In a case already cited in the context of proportionality the Home Secretary had issued directives forbidding the BBC and the IBA from broadcasting words spoken by members of organisations proscribed under emergency legislation in Northern Ireland. These directives were challenged by journalists as violating the Convention right of free speech (as well as being disproportionate) but the House of Lords upheld them, finding that the law was clear and that there was no room for the Convention.[86] Room was found for it, however, by the Court of Appeal while the Human Rights Bill was still before Parliament, when the Convention right of privacy was construed as if it were already part of English law, though without affecting the result.[87] But the House of Lords later gave a check to these tendencies, holding that the Act had shown a clear statutory intent to postpone the coming into operation of its central provisions.[88]

Penalising the innocent

One element in the abuse of power condemned by the Court of Appeal in the television licences case, already encountered, was the penalising of licence-holders for doing something quite lawful, namely taking out new licences at any time they

[82] Above, p. 161.
[83] See above, p. 169.
[84] For full discussion and survey of the pre-Act position see Murray Hunt, *Using Human Rights Law in English Courts.*
[85] *Derbyshire CC* v. *Times Newspapers Ltd.* [1993] AC 534.
[86] *Ex p. Brind* (above).
[87] *R.* v. *Home Secretary ex p. Hargreaves* [1997] 1 WLR 906; *R.* v. *Chief Constable of the North Wales Police ex p. AB* [1999] QB 396.
[88] See also *R.* v. *Director of Public Prosecutions ex p. Kebilene* [1999] 3 WLR 972 (HL), where the House reversed an imaginative decision of a Divisional Court based on an alleged violation of the presumption of innocence protected by Article 6 of the Convention. For this case see below, p. 633.

might wish.[89] The House of Lords emphasised the same point in a later case where a city council had refused, contrary to its previous practice, to allow a local rugby football club to use the city's sports ground because three of its members had played in South Africa.[90] The House held that it was unreasonable thus to punish the club for not conforming to the council's political attitudes, and Lord Templeman said:

> A private individual or a private organisation cannot be obliged to display zeal in the pursuit of an object sought by a public authority and cannot be obliged to publish views dictated by a public authority. . . . The council could not properly seek to use its statutory powers of management or any other statutory powers for the purposes of punishing the club when the club had done no wrong.

The council's decision was therefore quashed, with provision for declaratory or injunctive relief if necessary, thus in effect compelling the council to allow the club to use its sports ground. In a similar case a London borough adopted a policy of boycotting the products of an oil company because it did business in South Africa, and since this was not an unlawful activity the council's resolution was quashed and its enforcement restrained by injunction.[91] The same occurred when, for purely vindictive reasons, a council withdrew all advertising from a newspaper with which it was in dispute.[92] A council's ban on political parties taking part in a community festival was likewise unlawful.[93]

Financial motives

A laudable desire to save public money has led many authorities into the error of using their powers for financial profit when that is not a legitimate purpose. This misdeed may be illustrated by the case of the planning condition which wrongfully required the applicant to provide a strip of roadway at his own expense.[94] Similarly a local authority was not entitled, as a condition of approving building plans, to stipulate that the applicant should provide and pay for sewers outside his own property: this, said Lord Russell CJ, was 'utterly unreasonable'.[95] An education authority which has power to require the dismissal of teachers on 'educational grounds' may not do so merely to save money.[96] Nor may a local authority for reasons of economy restrict the time to be spent on each case by guardians ad litem.[97]

[89] Above, p. 362. See likewise *Roncarelli* v. *Duplessis*, above, p. 361.
[90] *Wheeler* v. *Leicester City Council* [1985] AC 1054.
[91] *R.* v. *Lewisham LBC ex p. Shell UK Ltd.* [1988] 1 All ER 938.
[92] *R.* v. *Derbyshire CC ex p. Times Supplements Ltd.* (1990) 3 Admin. LR 241.
[93] *R.* v. *Barnet LBC ex p. Johnstone* (1989) 88 LGR 73.
[94] *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240; below, p. 404.
[95] *R.* v. *Tynemouth District Council* [1896] 2 QB 219.
[96] *Sadler* v. *Sheffield Cpn.* [1924] 1 Ch. 483; above, p. 383.
[97] *R.* v. *Cornwall CC ex p. Cornwall Guardians Ad Litem Panel* [1992] 1 WLR 427.

The city of Sydney exceeded its powers of acquiring land for 'carrying out improvements in or remodelling any portion of the city' when it made a compulsory purchase order for land merely in order to obtain the rise in value which the extension of a street would bring about, without any intention of improving or remodelling.[98] In another Australian case a statutory committee was given wide wartime powers to ensure adequate supplies of vegetable seeds, and was also empowered to trade in seeds. It was held that orders prohibiting merchants from dealing in certain seeds would be ultra vires if made primarily for the purpose of improving the profitability of the committee's trading operations rather than for ensuring supplies.[99]

Two liquor licensing cases firmly underline the same point. In one, the licensing justices required the applicant to pay £1,000, which they intended to use to reduce the rates or for some other public purpose. The court had no difficulty in holding that the justices had taken illegitimate factors into account in a wholly unjustifiable way.[1] In the other case an elaborate system had been set up by the statutory licensing planning committee in Birmingham to deal with the licences relating to the many public houses destroyed in the Second World War. With Home Office approval and for some twenty years they had refused to approve applications unless the applicant purchased outstanding licences sufficient to cover his estimated sales. The main object of the policy was to relieve the city of the cost of compensating the holders of the outstanding licences. At the current market price of these licences the proprietors of a large new hotel would have had to pay over £14,000. At their instance the Court of Appeal condemned the whole system as unreasonable.[2] Lord Denning MR said:

> I think it is unreasonable for a licensing planning committee to tell an applicant: 'We know that your hotel is needed in Birmingham and that it is well placed to have an on-licence, but we will not allow you to have a licence unless you buy out the brewers.' They are taking into account a payment to the brewers which is a thing they ought not to take into account.

The condition was therefore 'bad because it is unreasonable'.

In this class also is to be included the television licence case, already recounted, in which the Court of Appeal held that the Home Secretary could not lawfully exercise his power to revoke a licence for the purpose of compelling the licensee to

[98] *Sydney Municipal Council* v. *Campbell* [1925] AC 338. Compare *Denman & Co. Ltd.* v. *Westminster Cpn.* [1906] 1 Ch. 464 at 476.

[99] *Yates (Arthur) & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (1945) 72 CLR 37. Cf. *Bailey* v. *Conole* (1931) 34 WALR 18 (regulations prescribing bus routes invalid since object was to protect state-owned trains from competition).

[1] *R.* v. *Bowman* [1898] 1 QB 663. See similarly *R.* v. *Sheffield Justices ex p. Rawson* (1927) 44 TLR 43 (offer to pay £1,250 to compensation fund). Cf. *Marshall Shipping Co.* v. *R.* (1925) 41 TLR 285; *R.* v. *LCC* [1931] 2 KB 215 at 232. Contrast *Becker* v. *Home Office* [1972] 2 QB 407 (above, p. 222).

[2] *R.* v. *Birmingham Licensing Planning Committee ex p. Kennedy* [1972] 2 QB 140.

pay an additional fee which had not been authorised by Parliament.[3] The revocation was invalid not only on general grounds of unreasonableness but also because it was an attempt to levy money for the use of the Crown without the authority of Parliament, contrary to the Bill of Rights 1688.

The Crown is not subject to this branch of the doctrine of unreasonableness when using its ordinary powers as an owner of land. Accordingly there can be no objection to the demand by an official in Hong Kong, acting as land agent for the Crown, for the payment of a high premium as the price of waiving restrictions in a lease of Crown land.[4]

Indiscriminate action

The indiscriminate or excessive use of power is illustrated by the case of a London borough council which made it a rule to refer to the rent tribunal all the tenancies in any block of flats where two or more reductions of rent had been awarded.[5] Although the Act contained no express restriction on the council's power to refer tenancies, it was held that it was an abuse to make a single block reference of over three hundred tenancies without any consideration of the individual cases and without any specific complaint against the landlord. The disputed reference in fact contained so many inaccuracies that it was not a genuine exercise of the power, and furthermore the council had taken account of the irrelevant consideration that the flats were allegedly below the highest building standards. This decision was distinguished in a later case where another London council had considered each case with care in a reference of twenty-two tenancies, and where the only complaint was that most of the tenants themselves did not wish the reference to be made.[6] The council here was plainly acting responsibly and intra vires, within the bounds of its discretion. But the Court of Appeal went out of their way to say that the doctrine of relevant and irrelevant considerations ought not to apply at all to a decision which does not itself infringe rights and merely causes something to be investigated. This novel proposition was probably not intended to make a breach in the long-settled rules of judicial review, since the court appears to have assumed that the 'relevant considerations' doctrine was violated whenever anything which might be thought relevant was not considered or any sort of mistake was made. In reality that doctrine applies only where the relevant considerations neglected or the irrelevant considerations adopted are so serious as to put the decision outside the powers of the statute.[7] The problem disappears if it is understood that the

[3] *Congreve* v. *Home Office* [1976] QB 629; above, p. 362.

[4] *Hang Wah Chong Investment Co. Ltd.* v. *A.-G. of Hong Kong* [1981] 1 WLR 1141.

[5] *R.* v. *Paddington etc. Rent Tribunal ex p. Bell London and Provincial Properties Ltd.* [1949] 1 KB 666. Compare *R.* v. *British Coal Corporation ex p. Vardy* [1993] ICR 720 (pit closures unreasonable for lack of independent scrutiny).

[6] *R.* v. *Barnet etc. Rent Tribunal ex p. Frey Investments Ltd.* [1972] 2 QB 342.

[7] See *R.* v. *St Pancras Vestry* (1890) 24 QBD 371.

'relevant considerations' doctrine is necessarily a species of the genus 'ultra vires', and cannot be used to impugn a proper and reasonable decision.

Misplaced philanthropy

Statutory authorities have sometimes made use of their wide general powers in order to confer social or economic benefits on particular sections of the community. In several such cases they have gone beyond the true limits of their powers. The policy of the courts is in general hostile to the use of public funds, such as rates, for new social experiments. Local authorities are subject to a fiduciary duty to use their revenues with due restraint.

A classic case in this group is *Roberts* v. *Hopwood*.[8] A minimum weekly wage of £4 for men and women equally was established in 1920 by the Poplar Borough Council, representing themselves as 'model socialist employers'. This in itself was very substantially above the previous rates, and soon became relatively higher still due to a sharp fall in the cost of living and in wages. But the council insisted on continuing the £4 rate, maintaining that this was within their power to pay their servants 'such salaries and wages as (they) may think fit'. In due course the district auditor disallowed the wage payments, in so far as they exceeded current market rates, as being 'contrary to law', and surcharged the councillors personally. A long struggle over the surcharges began, in the course of which the auditor's ruling was unanimously upheld by the House of Lords, and an order of the Minister of Health, purporting to free the councillors from liability, was held invalid by the High Court. Ultimately, when the surcharges had accumulated far beyond the councillors' personal means, they were remitted by Act of Parliament.[9]

The basis of the decision of the House of Lords, as already noted, was that the wages paid were excessive and unreasonable in such a degree that they were beyond the council's powers. The council's philanthropic purposes were not in law relevant considerations: their duty was not to give their ratepayers' money away in what were in substance gifts, but to take due account of the relevant factor of current market rates. They had misled themselves by 'eccentric principles of socialistic philanthropy'.[10]

Despite remarks such as the last, and despite criticisms from literal-minded people, there is no doubt that this decision was fully in accord with the settled policy of limiting discretionary powers. It was followed where councillors of

[8] [1925] AC 578. Contrast *Pickwell* v. *Camden LBC* [1983] QB 962 (payment of wages above national level; auditor's challenge failed).

[9] Audit (Local Authorities) Act 1927, s. 2(6). For a good account of the whole contest and its political background, including the imprisonment of thirty councillors for failing to levy rates, see [1962] *PL* 52 (B. Keith-Lucas); N. Branson, *Poplarism*. See above, p. 122 for the current system of audit.

[10] At 594 (Lord Atkinson).

another London borough were surcharged for failing to increase rents in an attempt to resist the policy of the Rent Act 1957, as already explained.[11] It was also accepted by the Court of Appeal as supporting their decision in the *Birmingham* case, discussed below. It had also been foreshadowed earlier when Farwell LJ had said:[12]

> The auditor does not claim . . . to exercise any control over questions of policy; but he does claim the right to check and challenge all items of administration. It is not easy to draw the line between policy and administration, or to give a definition except by way of example, but in my opinion the establishment of a works committee would be a question of policy into which the auditor could not go, but the payment of abnormally high wages to the workmen employed by such committee would be a matter of administration.

Another restrictive decision comes from the general strike of 1926. After the strike, when the poor law guardians had been empowered to give relief to miners' families by way of loan, the Tynemouth guardians resolved to cancel the outstanding debts.[13] This was held to be ultra vires since the guardians, unlike a private creditor, had no power to remit debts,[14] and because, in any case, it was unreasonable to do so where there was no evidence of inability to repay. The idea that runs through these cases is that public money must be administered with responsibility and without extravagance. This appears to mean that it is not available for charity.

The generosity of local authorities, in particular, is restrained by the doctrine that they owe a fiduciary duty to their ratepayers analogous to that of trustees. This means that, in deciding upon their expenditure, they must hold a balance fairly between the recipients of the benefit and the ratepayers who have to bear the cost. The courts have given two notable illustrations of this doctrine. In the first, the Court of Appeal invalidated the Birmingham City Council's concession to old-age pensioners, by which if resident in the city they could travel free of charge on the corporation's buses and trams.[15] These services were operated under Acts of Parliament which empowered the corporation to impose 'such fares and charges as they may think fit'. They were already run at a loss, and the additional cost of the concession was some £90,000 a year. At the instance of a ratepayer the court granted a declaration that the concession was illegal. The corporation's fiduciary duty to its ratepayers meant that it was not free to saddle them with the cost of subsidising one particular class of the community. Philanthropy was no part of the management of a transport undertaking which the corporation ought to operate 'substantially on business lines'. This would not necessarily exclude free or cheap travel for children, which might well be commercially justifiable. But it did exclude

[11] *Taylor* v. *Munrow* [1960] 1 WLR 151; above, p. 388.

[12] *R.* v. *Roberts* [1908] 1 KB 407 at 435 (unsuccessful appeal by the same auditor who played a leading part in *Roberts* v. *Hopwood*).

[13] *A.-G.* v. *Tynemouth Union* [1930] 1 Ch. 616, also following *Roberts* v. *Hopwood*.

[14] See above, p. 355.

[15] *Prescott* v. *Birmingham Cpn.* [1955] Ch. 210.

concessions made merely 'on benevolent or philanthropic grounds'. Ultimately, however, local authorities were given power to allow free travel to certain specified classes of the community by the Travel Concessions Act 1964.[16]

The second illustration was the invalidation by the House of Lords of the supplementary rate levied by the Greater London Council for the purpose of financing a 25 per cent cut in the London bus and underground fares.[17] This cut was made in fulfilment of electoral promises. But it had to be paid for by all the ratepayers of Greater London, for whom it was exceptionally expensive since it involved a loss of government grant which approximately doubled the rate. In deciding to fulfil its election promises without regard to the exceptional burden thrown upon the ratepayers the GLC was held to have neglected its fiduciary duty to hold the balance fairly, as well as to have failed in its statutory duties. It had power to subsidise the transport services, but it also had a duty to encourage their economic operation rather than to drive them into loss deliberately, leaving the ratepayers to foot the bill.

A paternal concern for human welfare motivated a caravan site licensing authority's requirements that there should be rent control, security of tenure, and no restrictions on the tenants' liberty to shop where they wanted or to form tenants' associations. It will later be seen how the House of Lords invalidated these conditions as being unreasonably remote from the purposes of the Act controlling the use of land for caravan sites.[18]

Permissible philanthropy

One form of social assistance which the law has allowed is the charging of differential rents to tenants of local authorities.[19] This is held to be reasonably incidental to their managerial powers over their houses. They may therefore adjust rents according to the means of individual tenants, either by granting rebates or by adding surcharges to a low basic rent. This is clearly philanthropy, but it is philanthropy authorised by Parliament. For the underlying policy of the housing legislation, which empowers the authorities to make 'such reasonable charges . . . as they may determine', is to provide houses for those who cannot afford economic rents, but not to subsidise those who can afford them.[20] This policy was prayed in aid by one tenant of a council house who challenged the legality of a uniform increase of

[16] Concessions already in operation had been legitimated by the Public Service Vehicles (Travel Concessions) Act 1955.

[17] *Bromley LBC* v. *Greater London Council* [1983] 1 AC 768.

[18] *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] AC 735; below, p. 404.

[19] *Leeds Cpn.* v. *Jenkinson* [1935] 1 KB 168; *Smith* v. *Cardiff Cpn.* (No. 2) [1955] Ch. 159; *Summerfield* v. *Hampstead Borough Council* [1957] 1 WLR 167.

[20] See *Smith* v. *Cardiff Cpn.* (above) at 170.

rents on the ground that the council was *not* operating a differential scheme, and did not consider the means of each of its tenants. The court had no difficulty in upholding the council.[21] Here is one field where a wide range of differing social policies is within the bounds of the discretion conferred, and where the court will not (as elsewhere it may)[22] seize upon the word 'reasonable' as importing a rigid legal standard.

Children's allowances have also been held to be a legitimate element in wages paid by local authorities.[23] Following the lead of *Roberts* v. *Hopwood*, the district auditor for Birmingham disallowed the payments and surcharged the councillors, holding that the size of an employee's family was an irrelevant consideration in determining his salary. But the Court of Appeal quashed these orders, on the ground that children's allowances were a recognised benefit which many employers had reasonably paid, and which therefore were within the council's powers. The strength of the council's case was that, instead of increasing all salaries to the pre-war level in terms of real values, they were increasing them selectively in order to benefit the class which suffered most. Since all the salaries were therefore within the range of what the council might reasonably pay, the allowances for children were intra vires. In *Roberts* v. *Hopwood* Lord Sumner had said that even where the motive was improper the expenditure would be lawful if there was no excess over what was reasonable.[24] Here therefore the council's discretion was wide enough to allow some scope for philanthropy.

Improper licensing decisions

Miscellaneous licensing powers are very numerous, and are often conferred in widely permissive terms. The courts are vigilant to restrict the discretion of licensing authorities to the true purposes of the empowering Act, and to disallow arbitrary or oppressive refusals or revocations or improper conditions. In licensing there is naturally wide scope for the question of relevant and irrelevant considerations. A century ago, for example, a local authority might not withhold approval of building plans on the ground that the building was unsuitable for the neighbourhood.[25] Today this has become a highly relevant consideration for the refusal

[21] *Luby* v. *Newcastle-under-Lyme Cpn.* [1964] 2 QB 64.
[22] See below, p. 429.
[23] *Re Walker's Decision* [1944] KB 644.
[24] [1925] AC 578 at 604, quoted above, p. 384.
[25] *R.* v. *Newcastle on Tyne Cpn. ex p. Veitch* (1889) 60 LT 963. Cf. *Marshall* v. *Blackpool Cpn.* [1935] AC 16 (power to approve plans for access across footpaths to street does not empower refusal of approval of proper plans because access might impede traffic; Act not intended to restrict owner's right of access); *Davies* v. *Bromley Cpn.* [1908] 1 KB 170 (plans allegedly rejected out of spite).

of planning permission, although in both cases alike the Acts merely give power to grant or withhold consent.

Among the many examples of the abuse of licensing powers pride of place is claimed by the three cases, one Canadian and two English, in which ministers have attempted to procure the cancellation of licences for improper reasons. These have already been related.[26] The Court of Appeal quashed the revocation of a market trader's licence on the ground that to deprive him of his livelihood was an excessive penalty in relation to his offence, which was aggravated by abusive language.[27] The similarity with the principle of proportionality in European law has already been noticed.[28]

In the long history of liquor licensing the courts have quashed many decisions of licensing justices and examples have already been given.[29] It has been held irrelevant for the justices, when considering whether the applicant is a fit and proper person, to take account of the way he proposed to do business, the terms agreed between him and the brewery company, and the price of the beer to be supplied.[30] In considering an application for enlarging licensed premises it is an irrelevant ground of refusal that the licensee will obtain a valuable addition to his trade without paying the levy for monopoly value;[31] but this factor is relevant on an application for transfer of the licence to superior premises, since it is then reasonable to insist on a new application.[32] To require the surrender of some other licence as a condition of the grant of a licence is illegitimate.[33] And so is to require a payment.[34] Licensing justices must also pursue a consistent policy and may not refuse renewal of a licence unless their new policy is justified by a genuine change of circumstances.[35] Where a refreshment licence was refused to a theatre which had enjoyed it for over fifty years, on the ground that it should be treated equally with a new theatre where an application had been refused, and because there were other facilities nearby, the licensing committee were held to have given too little weight to the fifty years' enjoyment and too much to rigid consistency.[36] In this case the court was virtually acting as a court of appeal and reversing a decision with which it disagreed. It could not be said that the committee had failed to take into account the rival considerations, each of which was relevant: they had assessed

[26] Above, p. 361.
[27] *R.* v. *Barnsley MBC ex p. Hook* [1976] 1 WLR 1052.
[28] Above, p. 366.
[29] Above, p. 395.
[30] *R.* v. *Hyde Justices* [1912] 1 KB 645.
[31] *R.* v. *Wandsworth Licensing Justices ex p. Whitbread & Co. Ltd.* [1921] 3 KB 487 (this levy represents the difference in value between licensed and unlicensed premises and is payable to the exchequer).
[32] *R.* v. *Southampton County Confirming Committee ex p. Slade* [1929] 1 KB 645 (not citing the *Wandsworth* case, above).
[33] *R.* v. *Wandsworth Licensing Justices* (above).
[34] See above, p. 395.
[35] *R.* v. *Windsor Licensing Justices ex p. Hodes* [1983] 1 WLR 685.
[36] *R.* v. *Flintshire County Licensing Committee ex p. Barrett* [1957] 1 QB 350.

them carefully, but the court assessed them otherwise. Nor could it be said that the decision was so unreasonable as to be beyond the committee's powers.

In other cases the courts have allowed a considerable freedom of discretion to licensing justices, when satisfied that they were acting bona fide for the true purposes of the Licensing Acts.[37] But they abuse their discretion if they require a licensee to enter into a binding undertaking restricting his licence in a case where they are not themselves empowered to impose conditions.[38]

Complication has been caused by the introduction of licensing planning committees from whom a certificate of non-objection must be obtained before application for a justices' liquor licence may be made. The committees have to consider an area as a whole, with reference to the number, nature and distribution of licensed premises and the accommodation and facilities provided in them.[39] It has been held that they may not legitimately insist on a bingo club requiring membership for 24 rather than 48 hours before supplying liquor,[40] nor may they object to mobile trolley bars being used in cinemas,[41] since these are matters of detail for the licensing justices and irrelevant for the committee's purposes.

Cinema licensing is a field where the courts are reluctant to interfere, since the disputed questions are usually well within the range of the local authority's discretion. Conditions barring children, even when accompanied by adults, from cinemas on Sundays[42] or barring Sunday opening altogether,[43] have been upheld as not unreasonable. The general principles stated by Lord Greene MR in the leading case have already been quoted.[44] He criticised an earlier decision in which the court had disallowed conditions restricting children from attending cinemas after certain hours, and had held that concern for the health and welfare of children generally was not a relevant factor.[45] The 'irrelevant considerations' argument was also rejected in an earlier wartime case where a licence was refused because the cinema company was controlled by enemy aliens.[46] But the Court of Appeal upheld a complaint that the Greater London Council was using an unduly permissive test of obscenity and licensing indecent films, thereby misusing their licensing power.[47]

A good example of irrelevant grounds was where the commissioner of police

[37] e.g. *Sharp* v. *Wakefield* [1891] AC 173; *Leeds Corporation* v. *Ryder* [1907] AC 420.
[38] *R.* v. *Edmonton Licensing Justices ex p. Baker* [1983] 1 WLR 1000.
[39] Licensing Act 1964, s. 119, replacing earlier Acts.
[40] *Fletcher* v. *London (Metropolis) Licensing Planning Committee* [1976] AC 150.
[41] *R.* v. *London (Metropolis) Licensing Planning Committee ex p. Maynard*, The Times, 11 May 1976.
[42] *Harman* v. *Butt* [1944] KB 491; *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Cpn.* [1948] 1 KB 223.
[43] *London County Council* v. *Bermondsey Bioscope Ltd.* [1911] 1 KB 445.
[44] Above, p. 363.
[45] *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill* [1915] 2 KB 49.
[46] *R.* v. *London County Council ex p. London & Provincial Electric Theatres Ltd.* [1915] 1 KB 446.
[47] *R.* v. *Greater London Council ex p. Blackburn* [1976] 1 WLR 550.

refused cab licences to all proprietors whose vehicles were on hire-purchase.[48] Another was where a river authority refused to renew a salmon fishery licence because it was in dispute with the owner.[49] In New Zealand the court has condemned a refusal of foreign investment facilities when the motives of the authorities were outside the purposes of the Act.[50]

The planning cases discussed next might also be considered to illustrate illegitimate licensing decisions.

Unreasonable planning decisions

The importance of the statutory background and context is well illustrated by a group of planning cases. A local planning authority may grant permission 'subject to such conditions as they think fit',[51] and the court is disposed to construe such conditions benevolently.[52] But it has been repeatedly held that such conditions are invalid unless they 'fairly and reasonably relate to the permitted development'.[53] Many planning conditions have been condemned by the application of this test. The House of Lords similarly invalidated conditions imposed by a caravan site licensing authority, although it had power to grant licences 'subject to such conditions as the authority may think it necessary or desirable to impose'.[54] Among numerous conditions were: that site rents should be agreed with the authority, that there should be security of tenure comparable to that in rent-controlled houses, that no premium should be charged for a site, and that there should be no restrictions on commercial or political activity. These conditions, designed to benefit the tenants personally rather than to control the use made of the land, were held to be 'a gratuitous interference with the rights of the occupier' and 'wholly unnecessary for the good governance of the site', and therefore ultra vires. Lord Upjohn, who used these words, stressed the principle that conditions such as these must be reasonable.

Planning conditions are likewise unreasonable if, instead of relating to the

[48] *R.* v. *Metropolitan Police Commissioner ex p. Randall* (1911) 27 TLR 505; cf. *R.* v. *Brighton Cpn. ex p. Thomas Tilling Ltd.* (1916) 85 LJKB 1552.

[49] *R.* v. *National Rivers Authority ex p. Haughey* (1996) 8 Admin. LR 567.

[50] *Rowling* v. *Takaro Properties Ltd.* [1975] 2 NZLR 62 (doubted by the Privy Council in the sequel case: [1988] AC 473 at 510).

[51] Town and Country Planning Act 1990, s. 70(1) (repeating earlier Acts).

[52] *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] AC 636 at 679; *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240. A condition is not invalid because it depends on events beyond the applicant's control: *Grampian Regional Council* v. *Aberdeen DC* (1983) 47 P & CR 633 (House of Lords upheld condition requiring that a public road should first be closed).

[53] *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 QB 544 at 572 (Lord Denning), affirmed [1960] AC 260.

[54] *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] AC 735. Compare *Attorney-General's Reference (No. 2 of 1988)* [1990] 1 QB 77 (excessively wide anti-nuisance condition in waste disposal licence).

permitted development, they attempt to restrict the owner's existing use rights in his land; for it is the policy of the legislation to preserve these rights and to give compensation for restriction of them. The House of Lords therefore held a planning condition to be ultra vires and void because it allowed only six caravans to be stationed on the site:[55] for although there had been only six previously, the existing use right included the right to increase the number up to the point where there would be a material change of use. But the principle of this case is confined, it seems, to situations where the owner is given nothing in exchange. If he is given permission for some new development over and above his existing use rights, there may be valid conditions restricting his existing use rights on other land or requiring him to remove buildings on other land. So where British Railways were given permission to rebuild a station subject to a condition that part of the land should always be used as a car park, this condition was valid although it restricted existing use rights in the land in question.[56] A condition requiring the removal of buildings, however, is likely to be void if attached to a permission for their use in some particular way.

Planning conditions sometimes require new buildings to be used for particular purposes.[57] A condition restricting the occupants of new cottages to persons employed in agriculture or forestry was upheld by the House of Lords as being within the policy of the Act.[58] But a Divisional Court held it unreasonable and ultra vires to require a builder to let his houses to persons on the local authority's housing waiting list, for then he was being asked to undertake part of their own duties as housing authority.[59]

A striking example of an invalid planning condition was one which required the landowners to construct a strip of roadway along their entire frontage and to give public right of passage over it.[60] The Court of Appeal invalidated this as an attempt to secure a widening of the adjacent road at the landowners' expense, so as to avoid using the powers of the Highways Act 1959 (now 1980), which would require compensation to be paid. The object, i.e. to widen the road, was held to be

[55] *Hartnell* v. *Minister of Housing and Local Government* [1965] AC 1134, holding the minister's confirming order to be 'unreasonable and ultra vires' (Lord Wilberforce at 1173). See similarly *Allnat London Properties Ltd.* v. *Middlesex County Council* [1964] 62 LGR 304 (factory site wrongly restricted); *British Airports Authority* v. *Secretary of State for Scotland* 1979 SLT 197 (unreasonable restrictions on flying).

[56] *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 WLR 1549. See also the *British Airports Authority* case, above.

[57] *Newbury District Council* v. *Secretary of State for the Environment* [1981] AC 578 (condition requiring removal of warehouses after ten years void).

[58] *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] AC 636.

[59] *R.* v. *Hillingdon London Borough Council ex p. Royco Homes Ltd.* [1974] QB 720. See similarly *Lowe (David) & Sons Ltd.* v. *Musselburgh Cpn.* 1974 SLT 5; *Westminster Renslade Ltd.* v. *Secretary of State for the Environment* (1983) 48 P & CR 255.

[60] *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240. See similarly *Medina BC* v. *Proberun Ltd.* (1990) 61 P & CR 77 (condition required provision of access on land outside developer's control: held abuse of power and unlawful).

perfectly reasonable in itself, but the conditions which attempted to put the expense onto the landowner by the use of planning powers were 'so unreasonable that they must be held to be ultra vires'.[61] This decision has several times been approved,[62] though it must not be taken to establish a principle that, where there are two alternative procedures, the more expensive one must be followed.[63] It shows that on the question of reasonableness it is not enough to consider merely the context and purposes of the statute conferring the disputed power: there may be other statutes such as the Highways Act which lay down procedures or confer rights for specific purposes which merely general powers ought not to be capable of overriding, on the principle *generalia specialibus non derogant*. Interaction with other statutes thus imposes still further limits on the indefinite discretionary powers with which statutes are so freely strewn.

The Court may quash the Secretary of State's decision of a planning appeal if it is one which on the evidence he could not reasonably make, as where he refused permission for the continuance of office use in a residential area, when the only reasonable conclusion was that conversion of the premises for residential use was unjustifiably expensive.[64] Where his decision to reopen a planning inquiry can only be described as perverse, that will be quashed likewise.[65] So will be his order for stopping up a road if he fails to take account of the financial loss so inflicted on a restaurant.[66] A local planning authority's decision may be quashed as an abuse of power if it conceals relevant facts or documents.[67]

A way of escape from the strictness of judicial control in this area has been found by many local planning authorities in the device of planning agreements, which they have statutory power to make. An applicant for planning permission will often be willing to agree to give the local authority some benefit, such as land for street widening or office accommodation, if given to understand that he is unlikely to obtain permission otherwise. The legality of this evasive practice has however been questioned.[68]

[61] At 251 (Willmer LJ). See similarly *Bradford Metropolitan Council* v. *Secretary of State for the Environment* (1986) 53 P & CR 55 (Secretary of State rightly disallowed condition requiring road-widening as manifestly unreasonable).

[62] By Lord Wilberforce in *Hartnell's* case (above), where similar reasoning was used; by Lord Widgery CJ in the *Hillingdon* case (above); and see *Hoveringham Gravels Ltd.* v. *Secretary of State for the Environment* [1975] 1 QB 754 (Orr LJ).

[63] See below (overlapping powers).

[64] *Niarchos* v. *Secretary of State for the Environment* (1977) 76 LGR 480; and see *Forkhurst* v. *Secretary of State for the Environment* (1982) 46 P & CR 89 (inspector's decision quashed as unreasonable); *R.* v. *Secretary of State for the Environment ex p. Fielder Estates (Canvey) Ltd.*, (1989) 57 P & CR 424 (order for new inquiry without consulting parties quashed as irrational).

[65] *Niarchos (London) Ltd.* v. *Secretary of State for the Environment* (1980) 79 LGR 264.

[66] *Vasiliou* v. *Secretary of State for Transport* [1991] 2 All ER 77.

[67] *R.* v. *Welwyn Hatfield DC ex p. Slough Estates Plc* [1991] COD 510.

[68] See below, p. 793.

Overlapping powers and compensation

Another feature of planning law is that the very wide powers of planning authorities may overlap more specific powers, and that the choice of power may affect the right to compensation. This problem arose where a borough council, as planning authority, persistently refused planning permission for building alongside a road, because, in its capacity of highway authority, it had nebulous plans for widening the road in the future. Meanwhile the land suffered prolonged 'planning blight'. As highway authority the council had power to prescribe an improvement line under the Highways Act 1959 (now 1980). But the council did not invoke that power, since the Highways Act required compensation to be paid for the blight inflicted, and the Ministry of Transport's policy was to refuse grants towards such compensation since the same result could be attained free of charge by the use of planning powers. Was it lawful for the council to use its general planning powers, which taken by themselves were sufficient, when Parliament had provided a different procedure for this specific purpose and had given a right to compensation? The House of Lords[69] found the solution in a provision that planning powers may be freely exercised despite any other legislation regulating development which was in force before the original planning Act of 1947,[70] which they interpreted so as to include provisions repealing and re-enacting such legislation (as did the Highways Act 1959 as regards improvement lines). But they also gave clear indications that there was no legal objection to the use of planning powers in preference to more specific powers requiring compensation.[71] In a later case Lord Denning MR said, perhaps too broadly, that the House of Lords had held that where there were two such alternative courses of action, a public authority might adopt the one which did not give rise to compensation.[72]

A local planning authority was similarly held to be entitled to grant permission for residential development in an industrial area, with the probability that existing industrial use would become impossible because of the nuisance to future residents, when it had the bona fide intention of making the area residential and at the same time was glad to save the compensation which it would have had to pay if it had made discontinuance orders against the industries.[73] Provided that the planning authority genuinely decided according to their judgment of the public interest, it was immaterial that a substantial part of their motivation was to avoid

[69] *Westminster Bank Ltd.* v. *Beverley Borough Council* [1971] AC 508, upholding the refusal of planning permission by the local authority and the minister.

[70] Town and Country Planning Act 1962, s. 220, now replaced by s. 335 of the Act of 1990. This provision was not cited in the courts below, nor in *Hall & Co.'s* case (above).

[71] See especially at 530 (Lord Reid). Similar is *Portion 675 Zandfontein CC* v. *Sandton CC* 1995 (4) SA 826.

[72] *Hoveringham Gravels Ltd.* v. *Secretary of State for the Environment* [1975] QB 754 at 763. Orr and Scarman LJJ confined their remarks to the planning legislation.

[73] *R.* v. *Exeter City Council ex p. J. L. Thomas & Co. Ltd.* [1991] 1 QB 471.

payment of compensation. The more economical course was justified, also, where the leader of the council sought judicial review of the council's own decision in a planning case, as being vitiated by bias, so saving the making of a revocation order and payment of compensation.[74]

It must be remembered that the planning legislation of 1947 introduced a new philosophy of uncompensated control, so that it may be logical to make this prevail over earlier legislation which paid more respect to rights of property.[75] This reasoning may not necessarily conflict with that adopted by the Court of Appeal in the *Shoreham* case.[76] The basis of the latter may be that a condition requiring a developer to present the public with a free roadway is something quite extraneous to the permitted development and also an unjustifiable demand that he should give up his existing rights of ownership.[77]

Compulsory purchase of land

Wrong or irrelevant purposes have often vitiated compulsory purchase orders or schemes depending upon them, as has already been shown in other contexts.[78] In several cases the illegal element was some bargain with the owner or a third party for putting the land to some use outside the powers of the Act[79] or some plan for disposing of it when the Act required it to be redeveloped.[80] The motives behind a compulsory purchase order made by the Central Land Board were canvassed in a case where, although the House of Lords ultimately upheld the order, a forceful dissenting judgment made out a strong case against it.[81] Under the law then in force persons granted planning permission had to pay a 'development charge', representing the value of the permission, so that development rights were in effect expropriated. Compulsory purchase for public purposes was accordingly effected at 'existing use value' and it was intended that land should change hands at this value. In fact it did not, since the Act did not impose price control, and demand drove up prices. The Central Land Board, empowered to acquire land compulsorily for permitted development, made an order for the acquisition of land which the intending developer was unable to obtain except at a high price. It was suspected that the Board's object was to make an example and to use its powers *in terrorem*

[74] *R.* v. *Bassetlaw DC ex p. Oxby*, [1998] PLCR 283.
[75] See the *Westminster Bank* case (above) at 529, 535.
[76] *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* (above).
[77] This distinction is taken by Orr LJ in the *Hoveringham Gravels* case (above) at 765.
[78] Above, p. 396.
[79] *Denman & Co. Ltd.* v. *Westminster Cpn.* [1906] 1 Ch. 464; *London & Westcliff Properties Ltd.* v. *Minister of Housing and Local Government* [1961] 1 WLR 519.
[80] *R.* v. *Minister of Health ex p. Davis* [1929] 1 KB 619.
[81] *Fitzwilliam (Earl)'s Wentworth Estates Co.* v. *Minister of Town and Country Planning* [1952] AC 362.

for a purpose not authorised by the Act, i.e. to enforce price control.[82] Denning LJ held this to be a usurpation of the legislative powers of Parliament, having a purpose for which Parliament had deliberately refrained from legislating. He said:[83]

> But there is a principle at stake which is far more important than the stopping of one particular piece of profiteering. The principle is that the legislative power in this country resides in Parliament and not in the government departments. [Powers] must not be used for an ulterior object which is not authorised by law, however desirable that object may seem to them to be in the public interest.

But the House of Lords held that the powers conferred were wide enough to cover the Board's objectives.

In another compulsory purchase case the court declined to make a sharp distinction between 'housing' and 'planning' considerations, holding that a housing authority might legitimately take account of factors which were also relevant for the planning authority.[84] In these fields it is obvious that many relevant factors will overlap. On the other hand, a local authority may not use its housing powers merely for the purpose of obtaining a highway;[85] and a caravan site licensing authority, which is concerned with the use of the particular site, cannot lawfully take account of 'pure planning' considerations, such as that the site is in the green belt.[86] There are however numerous aspects such as amenity, transport, schools and shopping facilities which are relevant both to planning and to site licensing, so that here again there is a wide area of common ground.[87]

A compulsory purchase order, when confirmed by the minister, authorises the purchase for the particular purpose then specified. If later the purpose changes, the authority no longer holds good. Where, accordingly, a local authority obtained an order for the purpose of road widening and building a market hall, they were unable to enforce it for other purposes after abandoning their earlier plans.[88] But a mere change of circumstances rendering the attainment of the objective more remote will not necessarily have this effect.[89]

Powers of compulsory purchase, like other powers, must be exercised reasonably, and all the more so because they expropriate an owner against his will. An order

[82] [1951] 2 KB 284 at 300.

[83] [1951] 2 KB at 311.

[84] *Hanks* v. *Minister of Housing and Local Government* [1963] 1 QB 999.

[85] *Meravale Builders Ltd.* v. *Secretary of State for the Environment* (1978) 77 LGR 365.

[86] *Esdell Caravan Parks Ltd.* v. *Hemel Hempstead Rural District Council* [1966] 1 QB 895 (CA).

[87] Same case at 925 (Lord Denning MR).

[88] *Grice* v. *Dudley Cpn.* [1958] Ch. 329 (declarations that notice to treat and compulsory purchase order were no longer effective).

[89] *Simpsons Motor Sales Ltd.* v. *Hendon Cpn.* [1964] AC 1088 (Lord Evershed at 1126–27 curiously refers to the court's jurisdiction as if it were a branch of equity in the technical sense).

may be quashed as unreasonable if the authority making it already possesses, or can acquire by agreement, other land which is equally suitable for its purposes.[90]

The acquiring authority is usually empowered to take as much land as it judges to be necessary for the statutory purpose. But where it takes more than could reasonably be considered necessary, it acts ultra vires. It cannot therefore take the whole of the site where it requires no more than a few feet for street widening.[91] The Court of Appeal quashed a compulsory purchase order made ostensibly for a sea-wall but including a large piece of land said to be required for coast protection purposes but in fact intended for a paved access way which was to be a sort of promenade and was not in fact needed for coast protection at all.[92]

Tax concessions

Judges have often criticised the practice of the Commissioners of Inland Revenue in making extra-statutory concessions to taxpayers, thereby discriminating between them in their free discretion but without any legal basis.[93] Some of these concessions are made regularly according to published rules;[94] for example, money paid to coalminers in lieu of their entitlement of free coal is, by concession, not assessed to tax. One concession, strongly criticised in the House of Lords, was made under a statute which had been held to make each of a number of joint beneficiaries under a family settlement severally liable for the whole of the tax on the whole income of the fund. Instead of taking steps to amend the law, the tax authorities tempered its application by concession, assessing each taxpayer with his own proportion only. Lord Wilberforce stigmatised this state of affairs as arbitrary, unjust and unconstitutional; for, as Walton J had said at first instance, 'one should be taxed by law, and not be untaxed by concession'. Since the House of Lords held that the oppressive interpretation of the taxing Act was wrong, it was unnecessary to decide whether taxation by administrative discretion was unlawful.[95] But Lord Wilberforce said that unless it was expressly authorised by Act of Parliament 'the courts, acting on constitutional principles, not only should not but cannot validate it'.

[90] *Brown* v. *Secretary of State for the Environment* (1978) 40 P & CR 285; *Prest* v. *Secretary of State for Wales* (1982) 81 LGR 193.

[91] *Gard* v. *Commissioners of Sewers of City of London* (1885) 28 Ch. D 486; *Denman & Co. Ltd.* v. *Westminster Cpn.* [1906] 1 Ch. 464; *Bartrum* v. *Manurewa Borough* [1962] NZLR 21 (acquisition for benefit of neighbouring owner rather than for public benefit).

[92] *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755.

[93] See the opinions of Lord Wilberforce, Lord Edmund-Davies and Walton J in the *Vestey* case (below).

[94] The Inland Revenue publish a booklet on them with annual supplements. But they are not legally enforceable: *R.* v. *HM Inspector of Taxes, Hull, ex p. Brumfield* [1989] STC 151. See also *R.* v. *Customs & Excise Commissioners ex p. Cook* [1970] 1 WLR 450; below, p. 687.

[95] *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1148.

In another case, however, the House upheld concessions by which workers in the printing industry were exonerated from liability for arrears of tax on casual earnings, which had been evaded on a large scale for some years. The tax authorities made a concession to the workers under which the arrears would be discharged if proper tax returns were made for the future. Despite evidence that the concession might have been motivated by fear of a printers' strike, it was held to have been made under an arrangement which was within the managerial powers and discretion of the authorities.[96] At the same time it was said that improper concessions might be the subject of intervention by the court. That indeed occurred in a later case where the tax authorities accepted a valuation 'which no reasonable authority properly directing itself could reach', so that it was declared unlawful by the Court of Appeal.[97]

Ultimately the wheel turned full circle when the Court of Appeal, so far from criticising an extra-legal tax concession, enforced it. For more than twenty years the Inland Revenue had accepted late applications by a large company, whose affairs were exceptionally complicated, for allowances for losses which by statute had to be claimed within two years. In 1992 the Revenue suddenly refused a claim for £17 m. made late in the customary manner, and insisted on the two-year time limit. This abrupt change of policy was held to be so unfair and unreasonable as to be an abuse of power—although no legal power was involved.[98] The case is a remarkable example of legitimate expectation enforced for the sake of fairness, as discussed earlier in this chapter,[99] and in defiance of an Act of Parliament.

Selective prosecution of tax offenders by the Inland Revenue has passed the test of reasonableness.[1]

Unreasonable regulations

The principle of reasonableness applies just as much to the making of rules and regulations as it does to other administrative action. This is explained in the chapter on delegated legislation, where some striking examples will be found.

Miscellaneous cases; aliens; prisoners; undue delay

No list of categories will cover all cases, since the possibilities of abuse are infinite.

[96] *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617. See also *R.* v. *Inspector of Taxes, Reading, ex p. Fulford-Dobson* [1987] QB 978.

[97] *R.* v. *Attorney-General ex p. Imperial Chemical Industries Plc* (1986) 60 TC 1 (undervaluation of ethane gas).

[98] *R.* v. *Inland Revenue Commissioners ex p. Unilever* [1996] STC 681. See [1997] *PL* 375 (Forsyth).

[99] Above, p. 373.

[1] *R.* v. *Commissioners of Inland Revenue ex p. Mead* [1993] 1 All ER 772.

The courts are always disposed to intervene where the action is arbitrary or oppressive. If the Commission for Racial Equality uses its drastic powers to make a roving investigation without having reasonable grounds for suspecting racial discrimination, its proceedings may be condemned as unreasonable and vexatious.[2] If an investors' compensation scheme rules out claims on behalf of deceased investors, that rule must be quashed as absurd.[3]

The Home Secretary's formidable discretionary powers in respect of prison administration and immigration, deportation and extradition, are, as already illustrated from leading cases,[4] subject to strict judicial review. Where there had been a delay of ten years in an extradition case and other circumstances making an extradition order unjust and oppressive the court quashed it as one which no reasonable minister could make.[5] Where a convicted murderer, released on licence subject to good behaviour, was returned to prison with a postponed release date on account of minor offences the Home Secretary's decision was quashed as perverse and unreasonable.[6] His decisions refusing claims to asylum have been quashed for inadequate reasoning,[7] and for self-misdirection.[8]

The Lord Chancellor's selection of a judge to conduct a particular trial is reviewable for unreasonableness, but the only challenge so far reported has failed.[9]

Where a health authority was opposed to the policy of a ministerial circular about provision of drugs and refused to implement it, the court ordered it to change its policy.[10] This should perhaps be classed as a case of perversity.

A clear instance of 'collateral purpose' was where a chief constable had retired on pension because of infirmity and lived abroad to avoid his creditors. The police authority called him up for medical examination, and when he did not attend, cancelled his pension. It was proved that their object was not to obtain medical information but to bring him within reach of his creditors and he was granted mandamus to restore his pension.[11] An alien may challenge the legality of his deportation on the ground that its real purpose is to comply with a request from his country of origin, so that it is extradition in disguise.[12]

Delay in performing a legal duty may also amount to an abuse which the law will remedy. Where a British 'patrial' was entitled by statute to enter the country

[2] *R.* v. *Commission for Racial Equality ex p. Hillingdon LBC* [1982] QB 276.
[3] *R.* v. *Investor Compensation Scheme Ltd. ex p. Bowden* [1993] COD 278.
[4] See above, pp. 372, 377.
[5] *R.* v. *Home Secretary ex p. Sinclair* [1992] Imm. AR 293.
[6] *R.* v. *Home Secretary ex p. Cox* (1993) 5 Admin. LR 17.
[7] *R.* v. *Home Secretary ex p. Chahal* [1992] COD 214.
[8] *R.* v. *Home Secretary ex p. P.* [1992] COD 295.
[9] *R.* v. *Lord Chancellor ex p. Maxwell* [1997] 1 WLR 104.
[10] *R.* v. *North Derbyshire Health Authority ex p. Fisher*, (1998) 10 Admin. LR 27.
[11] *R.* v. *Leigh (Lord)* [1897] 1 QB 132. Similarly a local authority may not use its power to acquire land, even by agreement, where its real object is to remove gipsies from it: *Costello* v. *Dacorum DC* (1980) 79 LGR 133.
[12] *R.* v. *Brixton Prison Governor ex p. Soblen* [1963] 2 QB 243 at 302. For this case see below, p. 415.

'without let or hindrance', but the Home Office refused her the necessary certificate of patriality except by an administrative procedure which would have made her wait for over a year,[13] the Court of Appeal held that the certificate could not be arbitrarily refused or delayed and ordered its issue, citing Magna Carta 1215: 'to no one will we delay right or justice'.[14] Where police officers were not given the formal notice of complaints made against them for over two years, this excessive delay invalidated the disciplinary proceedings.[15] Where the Advisory, Conciliation and Arbitration Service deferred proceeding with inquiries into a recognition issue at the instance of a trade union, the House of Lords held that excessive deferment, amounting to abdication of the Service's functions, would be unlawful; but the majority also held that the deferment was not excessive in the circumstances.[16] Likewise the House has held that delay by the tax authorities may, if unfair, amount to abuse of power; but again the complaint failed on the facts.[17]

It may be possible for total inactivity to amount to abuse of discretion. The Privy Council has suggested that this would be the case if the Malaysian head of state failed to revoke a proclamation of emergency once he no longer considered it necessary for its proper purpose.[18] That is another way of saying that in those circumstances he would become subject to a legal duty to proclaim the end of the emergency.

MIXED MOTIVES

Duality of purpose

Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers. There is a clear distinction between this situation and its opposite, where the permitted purpose is a mere pretext and a dominant purpose is ultra vires.

[13] *R.* v. *Home Secretary ex p. Phansopkar* [1976] QB 606. See also *R.* v. *Durham Prison Governor ex p. Hardial Singh* [1984] 1 WLR 704 (delay in effecting deportation).
[14] Magna Carta 1215, c. 29.
[15] *R.* v. *Merseyside Chief Constable ex p. Calveley* [1986] QB 424.
[16] *Engineers' and Managers' Association* v. *ACAS* [1980] 1 WLR 302.
[17] *R.* v. *Inland Revenue Cmrs. ex p. Preston* [1985] AC 835.
[18] *Teh Cheng Poh* v. *Public Prosecutor, Malaysia* [1980] AC 458 (suggesting that mandamus might lie against members of the cabinet on whose advice he would act).

A leading example is the decision of the House of Lords upholding the legality of the subway crossing the foot of Whitehall in London.[19] The Westminster Corporation had no power to construct subways, but they had power to construct public conveniences. They located the conveniences under the street with access from both sides, so that a subway naturally resulted. The House of Lords had no doubt that the 'primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom'.[20] Accordingly 'that the public may use it for a purpose beyond what the statute contemplated is nothing to the purpose'.[21] Distinguishing the opposite situation, Lord Halsbury said:

> I quite agree that if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the Legislature for one purpose could not be used for another.

And Lord Macnaghten said:

> In order to make out a case of bad faith it must be shown that the corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place.

The Court of Appeal closely followed these statements in upholding the power of a city corporation to make and improve a roadway even though their immediate motive was to attract speed trials of motor cars.[22] The speed trials indeed provided the occasion for the work being done at the particular time; but that was no reason why the corporation could not use its road-making powers for an improvement which was shown to be genuine and desirable in its own right, and which could not be said to be a merely pretended purpose for the sake of a different and unlawful objective. By contrast, the Inner London Education Authority acted unlawfully in launching an expensive publicity campaign in protest against cuts in its expenditure imposed by the government. The ILEA had power to publish information on local government affairs, but 'a, if not the, major purpose' of their campaign was to persuade the public that they were being hardly treated, and this purpose was unauthorised.[23]

The same distinction was made by the Court of Appeal where an order for the deportation of an alien to the United States was challenged on the ground that the Home Secretary was in fact motivated by a request from the United States for the surrender of the alien. Since the offence with which the alien was charged was

[19] *Westminster Cpn.* v. *London and North Western Railway* [1905] AC 426.
[20] At 433 (Lord Macnaghten).
[21] At 428 (Lord Halsbury).
[22] *R.* v. *Brighton Cpn. ex p. Shoosmith* (1907) 96 LT 762.
[23] *R.* v. *Inner London Education Authority ex p. Westminster CC* [1986] 1 WLR 28. See similarly *R.* v. *Greater London Council ex p. Westminster CC*, The Times, 27 December 1984; *R.* v. *Lewisham LBC ex p. Shell UK Ltd.* [1988] 1 All ER 938.

not a legal ground of extradition, it was argued that the Home Secretary's real object was unlawful extradition, and that the deportation order was a mere disguise. Lord Denning MR said that everything depended upon the purpose with which the act was done.[24]

> If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence here to be not conducive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or no.

On the facts the court found that there was every reason to suppose that the Home Secretary was acting from proper 'deportation' motives. His power to deport, and his power to prescribe the country of destination, was in no way diminished by the fact that he was at the same time assisting the United States government, and might indeed be glad to do so.

Overlapping motives

Cases where the dominant motive is improper are, of course, cases of ultra vires, and a number of them have been cited in the context of wrong purposes and irrelevant considerations. Examples are the case of the caravan site licensing authority which wrongly attempted to act as a planning authority in order to protect the green belt,[25] and the case of the town council which compulsorily acquired land ostensibly for coast protection but in reality for public amenity.[26] Similarly the High Court of Australia invalidated a local authority's scheme for the resumption (acquisition) of land for road improvement, since a substantial part of the land was to be sold off and not therefore acquired for 'the improvement and embellishment of the area'.[27] The High Court said:[28]

> But the evidence establishes that one purpose at least of the Council in attempting to acquire the land now required to construct the new road is to appropriate the betterments

[24] *R.* v. *Brixton Prison Governor ex p. Soblen* [1963] 2 QB 302; and see *R.* v. *Bow Street Magistrates ex p. Mackeson* (1981) 75 Crim. App. R. 24, where the court quashed charges on account of 'disguised extradition' by way of deportation from Zimbabwe.

[25] *Esdell Caravan Parks Ltd.* v. *Hemel Hempstead Rural District Council* [1966] 1 QB 895; above, p. 409.

[26] *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755; above, p. 410.

[27] *Thompson* v. *Randwick Cpn.* (1950) 81 CLR 87; cf. *Hanks* v. *Minister of Housing and Local Government* [1963] 1 QB 999.

[28] At 106.

arising from its construction. In *Municipal Council of Sydney* v. *Campbell*[29] this was the sole purpose. But in our opinion it is still an abuse of the Council's powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale.

Where schoolteachers can be dismissed only on 'educational grounds' it has been said that this means educational grounds only, so that if the grounds are both educational and non-educational, the power is not well exercised.[30] But if in fact there were sufficient educational grounds, and these supplied the true motive, it seems unlikely that additional non-educational grounds would vitiate the dismissal.

An alternative criterion may be found by invoking the doctrine of irrelevant considerations. If the decision has been materially influenced by an unauthorised purpose, it can be said that an irrelevant consideration has been taken into account, so that the decision cannot stand.[31]

GOOD FAITH

Bad faith not dishonesty

The judgments discussed in the last few pages are freely embellished with references to good and bad faith. These add very little to the true sense, and are hardly ever used to mean more than that some action is found to have a lawful or unlawful purpose. It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' means merely 'for legitimate reasons'. Contrary to the natural sense of the words, they impute no moral obliquity.

A pithy statement of Lord Macnaghten to this effect has already been quoted.[32] Lord Sumner made another in *Roberts* v. *Hopwood*,[33] dealing with the power of a local board to pay 'such wages as they think fit':

[29] [1925] AC 338; above, p. 396.
[30] *Sadler* v. *Sheffield Cpn.* [1924] 1 Ch. 483 at 504. For other such cases see above, p. 383.
[31] *Hanks* v. *Minister of Housing and Local Government* (above); *R.* v. *Inner London Education Authority ex p. Westminster CC* (above); and see *R.* v. *Home Secretary ex p. Yiadom*, [1998] INLR 489 (relevant reasons not vitiated by one irrelevant reason).
[32] Above, p. 352.
[33] [1925] AC 578 at 603.

Firstly, the final words of the section are not absolute, but are subject to an implied qualification of good faith—'as the board may bona fide think fit.' . . . Bona fide here cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is bona fide a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. It must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards the public, whose money and local business they administer.

Still more pithily, Vaughan Williams LJ had said in an earlier case:[34]

You are acting mala fide if you are seeking to acquire land for a purpose not authorised by the Act.

And Lord Greene MR, in the passage already quoted, treated bad faith as interchangeable with unreasonableness and extraneous considerations.[35] Bad faith therefore scarcely has an independent existence as a distinct ground of invalidity. Any attempt to discuss it as such would merely lead back over the ground already surveyed. But a few examples will illustrate it in its customary conjunction with unreasonableness and improper purposes.

If a local authority were to use its power to erect urinals in order to place one 'in front of any gentleman's house', then 'it would be impossible to hold that to be a bona fide exercise of the powers given by the statute'.[36] If they wish to acquire land, their powers are 'to be used bona fide for the statutory purpose and for none other'.[37] If they refer numerous cases en masse to a rent tribunal without proper consideration, this is not 'a valid and bona fide exercise of the powers'.[38] If a liquor licence is cancelled for political reasons, the minister who brought this about is guilty of 'a departure from good faith'.[39] Such instances could be multiplied indefinitely. Cases of misfeasance in public office, where the misfeasor knows that he is acting outside his powers, could be added to the collection.

Motives and malice; abuse of process

The courts no less frequently use the words 'good faith' in their ordinary sense, implying personal honesty and good intentions. In the licensing cases where the authorities wrongly demanded a money payment or the buying-in of suspended licences, the court in each case emphasised that the unlawful conditions were

[34] *Westminster Cpn.* v. *London and North Western Railway Co.* [1904] 1 Ch. 759 at 767, followed in *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755 at 784.

[35] Above, p. 363.

[36] *Biddulph* v. *Vestry of St George, Hanover Square* (1863) 33 LJ Ch. 411; above, p. 365.

[37] *Denman* v. *Westminster Cpn.* [1906] 1 Ch. 464 at 476; above, p. 408.

[38] *R.* v. *Paddington (etc.) Rent Tribunal ex p. Bell London & Provincial Properties Ltd.* [1949] 1 KB 666; above, p. 398.

[39] *Roncarelli* v. *Duplessis* (1959) 6 DLR (2d) 689 at 707; above, p. 361.

imposed in perfectly good faith, i.e. in what was genuinely thought to be in the public interest.[40] The same words were freely used in both senses in a decision condemning a district council's compulsory purchase order for land allegedly required for coast protection: at first instance the order was held to be 'an abuse of power and a flagrant invasion of private rights which the council has tried to cover up by means which do them no credit'.[41] But the Court of Appeal decided that it was not necessary to go so far as to hold the council 'guilty of bad faith'.[42] Elsewhere in this case 'mala fide' was used merely to mean 'for an unauthorised purpose'.[43] Such opprobrious terms would be more suitably restricted to the rare cases of actual dishonesty, as Megaw LJ has advocated:[44]

> I would stress—for it seems to me that an unfortunate tendency has developed of looseness of language in this respect—that bad faith, or, as it is sometimes put, 'lack of good faith', means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be a treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant.

It is a pity that this good advice is not more generally accepted. The various categories of ultra vires can more fittingly be described by words which do not impute dishonesty.

Where actions for damages are brought, bad faith may be described as malice, as is shown by the cases of misfeasance in public office.[45] An unsuccessful plaintiff alleged that a borough corporation had rejected his building plans out of malice, because he had previously been in litigation with them.[46] The cancellation of a liquor licence on political grounds, mentioned above, was held to be malicious and therefore actionable under the law of Quebec.[47] Rand J said:

> What could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Alcoholic Liquor Act?

Allegations of fraud played a leading part in a decision of the House of Lords about a compulsory purchase order.[48] The question at issue was whether judicial remedies were wholly barred by statute,[49] but the House assumed that the effect of

[40] *R.* v. *Bowman* [1898] 1 QB 663 at 667; *R.* v. *Birmingham Licensing Planning Committee ex p. Kennedy* [1972] 2 QB 140 at 147.
[41] *Webb* v. *Minister of Housing and Local Government* [1964] 1 WLR 1295 at 1305.
[42] [1965] 1 WLR 755 at 777.
[43] At 784.
[44] *Cannock Chase DC* v. *Kelly* [1978] 1 WLR 1. See the Court of Appeal's similar protest against this 'debasement of the currency of language' in *Western Fish Products Ltd.* v. *Penwith DC* (1978) 38 P & CR 7 at 22, [1981] 2 All ER 204 at 215.
[45] See below, p. 783.
[46] *Davis* v. *Bromley Cpn.* [1908] 1 KB 170.
[47] *Roncarelli* v. *Duplessis*, above, p. 361.
[48] *Smith* v. *East Elloe Rural District Council* [1956] AC 736.
[49] For this see below, p. 730.

fraud (which was not in fact proved)[50] would normally be to vitiate any act or order. It was said that fraud or corruption were covered by the phrase mala fides, but that 'its effects have happily remained in the region of hypothetical cases'.[51] In a different context Denning LJ has said:[52]

> No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.

But in administrative law there is a dearth of material to illustrate this statement.

Where a prisoner wanted in England was unlawfully returned by the South African police and extradition procedures were ignored the House of Lords stayed the prosecution on grounds of abuse of process and violation of the rule of law.[53]

It is clear that the court cannot question the validity of an Act of Parliament on the ground that it was obtained by misrepresentation or fraud.[54]

SUBJECTIVE LANGUAGE

A favourite device

Words such as 'if the minister is satisfied that . . . ' or 'if it appears to the board that . . .' are a very common feature of statutory powers. They have an important bearing on jurisdictional questions.[55] Their evident intention is to make the minister or the board the sole judge of the existence of the conditions which make the power exercisable. They indicate that instead of judging objectively whether the conditions in fact exist, the court is merely to judge subjectively whether the requisite state of mind exists in the minister or the board. But courts have an ingrained repugnance to legislative devices for making public authorities judges of the extent of their own powers, or for exempting them from judicial control.[56] Although a number of decisions have given to such expressions a very nearly literal meaning, a number of others have developed lines of attack which have been able to penetrate behind the ostensible 'satisfaction' or 'appearance' and deal with the realities.

There is a subjective element in all discretion, and expressions such as 'if the minister is satisfied' differ only in degree from a power to act 'as he thinks fit'.

[50] *Smith* v. *Pywell*, The Times, 29 April 1959.
[51] [1956] AC at p. 770 (Lord Somervell).
[52] *Lazarus Estates Ltd.* v. *Beasley* [1956] 1 QB 702 at 712.
[53] *R.* v. *Horseferry Road Magistrates' Court ex p. Bennett* [1994] 1 AC 42.
[54] *Pickin* v. *British Railways Board* [1974] AC 765.
[55] See above, p. 250.
[56] See below, p. 263.

The limits of that type of power have already been explained: the minister must act reasonably and in good faith, and upon proper grounds. In principle the same limits should operate however subjective the language, in order that the courts may always afford protection against an abuse of power such as the Act cannot have been supposed to authorise. But in some of the situations where such words are employed it is plain not only from the language but also from the context that the discretion granted is exceptionally wide. The most obvious example is that of emergency powers, particularly in time of war.

Emergency powers

The Emergency Powers (Defence) Act 1939 empowered His Majesty by Order in Council to make such defence regulations 'as appear to him to be necessary or expedient for securing the public safety ... and for maintaining supplies and services essential to the life of the community'. Plainly the courts were not to sit in judgment on the question of necessity or expediency or on the government's motives.[57] But if it could have been shown that a defence regulation was made for some quite extraneous purpose, for example to punish a political party which was no threat to public safety, the court in principle should have been able to intervene. Such challenges as were made fell far short of this improbable example and consequently failed. But in one case under the corresponding Canadian legislation the Privy Council held that the court could intervene in a hypothetical case of bad faith or of unauthorised purposes.[58] Lord Radcliffe said:[59]

> Parliament has chosen to say explicitly that [the Governor] shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the Act in this way.

The Privy Council applied this test in judging the validity of emergency regulations made in Cyprus for imposing collective fines on communities which harboured terrorists, finding that the regulations were clearly related to the prescribed purposes of securing public safety and public order for which the Governor might make 'such Regulations as appear to him to be necessary or expedient'.[60] The

[57] *R.* v. *Comptroller-General of Patents ex p. Bayer Products Ltd.* [1941] 2 KB 306; *Progressive Supply Co.* v. *Dalton* [1943] Ch. 54; *Point of Ayr Collieries Ltd.* v. *Lloyd-George* [1943] 2 All ER 547; *Carltona Ltd.* v. *Commissioners of Works* [1943] 2 All ER 560; *Demetriades* v. *Glasgow Cpn.* [1951] 1 All ER 457; *Hackett* v. *Lander* [1917] NZLR 947. See the discussion of emergency powers by Turner J in *Reade* v. *Smith* [1959] NZLR 996 at 1000.

[58] *A.-G. for Canada* v. *Hallett & Carey Ltd.* [1952] AC 427 at 444. See similarly *Lipton Ltd.* v. *Ford* [1917] 2 KB 647.

[59] At 450.

[60] *Ross-Clunis* v. *Papadopoullos* [1958] 1 WLR 546.

regulations themselves required the Commissioner to 'satisfy himself' as to certain facts. The argument that his own declaration was conclusive was rejected, since it was open to a party to show that there was no ground on which he could be satisfied. But in fact it was held that he had ample grounds.

In wartime or grave emergency it is unlikely that this theoretical judicial control will be able to come into play, since the ingredient of policy is so large by comparison with the ingredient of ascertainable and relevant fact.[61] There is some truth in the thesis of another Canadian case, that when Parliament delegates virtually unlimited powers to the executive in wartime, the powers are as large as those of Parliament itself, and scarcely more open to question in the courts; and that whatever is done must therefore be deemed to be 'necessary and advisable' for the purpose of the war.[62]

The literal approach

In ordinary legislation the requirement that the authority shall be 'satisfied' as to certain things is one of the commonest devices for conferring wide discretion. There have been times when the courts have taken it at face value and held that the authority has merely to declare itself to be satisfied in order to be free of all legal control. But this was when judicial control was at an exceptionally low ebb, so that the decisions of that time—as in the case of so many other fundamental rules—cannot be treated as sound.[63] Both before and since the courts have, more characteristically, refused to allow themselves to be disarmed, and for various reasons have held that the requisite 'satisfaction' cannot exist.

Of the less characteristic cases the leading example is the Court of Appeal's decision about the restoration of war damage at Plymouth.[64] The minister had made an order for the compulsory purchase of a badly damaged area of the city under an Act which empowered him to do so 'where the Minister . . . is satisfied that it is requisite, for the purpose of dealing satisfactorily with extensive war damage, in the area of the local planning authority, that a part or parts of their area . . . should be laid out afresh and redeveloped as a whole'. Owners objected that what was in fact proposed was merely restoration and repair, not redesign and redevelopment, and that 'the minister can only be "satisfied" if at the time of the order he has before him evidence sufficient in law to entitle him to be so

[61] In *Liversidge* v. *Anderson* [1942] AC 206 at 237 Lord Atkin commented that if the Defence Regulation had merely required the Secretary of State to be satisfied, instead of requiring him to have reasonable cause, he would have had complete discretion.

[62] *Re Chemicals Regulations (Reference as to Validity)* [1943] 1 DLR 248 at 255.

[63] See above, p. 16.

[64] *Robinson* v. *Minister of Town and Country Planning* [1947] KB 702. For similarly worded powers see *Franklin* v. *Minister of Town and Country Planning* [1948] AC 87; *Re Trunk Roads Act 1936* [1939] 2 KB 515.

"satisfied"'. This, said the court, 'imports an objective test into a matter to which such a test is entirely inappropriate'.[65] Lord Greene MR said:[66]

> How can this minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts bona fide (as he must be assumed to do in the absence of evidence of the contrary), be called upon to justify his decision by proving that he had before him materials sufficient to support it?

Somervell LJ entered the caveat that if the application to the minister showed on its face that the area had suffered little or no war damage, the minister's order might be successfully attacked, quite apart from the usual exception for bad faith.[67] But the uniform tenor of the cases of this period was that attempts to dispute the minister's right to be 'satisfied' must be rejected.[68]

The objective approach

Many decisions reject the literal approach, and show that the court, more characteristically, is not content to relinquish control. An ordinance in Singapore provided machinery for the demolition of houses without compensation 'whenever it appears to the Board that . . . a dwelling place . . . is in such a condition as to be unfit for human habitation'. By using an English housing standard which was not a standard of unfitness for habitation the board were held by the Privy Council to have applied a wrong and inadmissible test and to have acted beyond their powers.[69] Where a minister had power to confirm a compulsory purchase notice 'if he is satisfied that the conditions specified' in the Act are fulfilled, the court quashed his confirmation order because his stated grounds were that the land was substantially diminished in value, whereas the Act required him to be satisfied that the land was incapable of reasonably beneficial use.[70] A compulsory purchase order which could be made 'where it appears to the authority' that compulsory powers were necessary was quashed by the Court of Appeal where it was shown that it did not so appear.[71] The Privy Council similarly set aside a minister's order

[65] At 714.
[66] At 717.
[67] At 724.
[68] e.g. *R.* v. *Ludlow ex p. Barnsley Cpn.* [1947] KB 634; *Re Beck and Pollitzer's Application* [1948] 2 KB 339; *Land Realisation Co. Ltd.* v. *Postmaster-General* [1950] Ch. 435.
[69] *Estate and Trust Agencies (1927) Ltd.* v. *Singapore Improvement Trust* [1937] AC 898 (prohibition granted).
[70] *R.* v. *Minister of Housing and Local Government ex p. Chichester Rural District Council* [1960] 1 WLR 587. See similarly *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers Local 796* (1970) 11 DLR (3d) 336 ('If the Board is satisfied' as to membership of trade union: wrong test of membership and wrong question determined); *R.* v. *Australian Stevedoring Industry Board* (1953) 88 CLR 100 ('Where the Board is satisfied' that a port employer is unfit to be registered: no basis for such finding and determination vitiated by irrelevant motive).
[71] *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755.

under an Act which empowered him to take over the management of schools in Ceylon 'where the minister is satisfied' that a school 'is being administered in contravention of any of the provisions of this Act'.[72] The minister had based his order on a past default which had been made good, whereas the Act required him to be satisfied that there was maladministration existing at the time of the order. 'There was therefore no ground on which the minister could be "satisfied" at the time of making the Order' and 'he failed to consider the right question.'

An impressive instance of subjective language being swept aside on grounds of unreasonableness was the case where purchase tax regulations were condemned by the High Court.[73] Regulations could be made by the Commissioners of Customs and Excise 'for any matter for which provision appears to them to be necessary' for the administration of the tax. The offending regulation provided that in default of a proper return they might themselves determine the tax due, and that the taxpayer should have only seven days to dispute it. This was held invalid as wholly unreasonable and wholly unprotected by the subjective words. Language of this kind is merely one of many devices for disarming the courts. It was described in this case as a 'drafting mechanism' employed for the exclusion of the jurisdiction of the court on the footing that 'modern drafting technique is to use words which do not exclude jurisdiction in terms but positively repose arbitrary power in a named authority'.[74] The hardening judicial attitude to this device may be compared with the attitude to clauses which oust the jurisdiction of the courts directly, which has changed similarly during the same period of time.[75]

Yet another pointer in the same direction was the statement by Lord Denning MR in a Housing Act case where there was power to modify a clearance order 'if the Minister is of opinion' that any land should not have been included. The minister's order was upheld, but Lord Denning said that the court could quash it if the minister had acted on no evidence or unreasonably or had gone wrong in law.[76] Similarly where the Act said 'Where it appears to the Secretary of State . . . that there are reasons for doubting' whether workers wished to take part in a strike, the Court of Appeal held that those words did not put his decision beyond scrutiny by the court and that it would be invalid in law if it were not one which he could reasonably reach on the facts before him—as was not, however, established in the case itself.[77] There is an obvious affinity between this class of decisions and those which have introduced the 'no evidence' principle discussed in Chapter 9.

[72] *Maradana Mosque Trustees* v. *Mahmud* [1967] 1 AC 13.

[73] *Commissioners of Customs and Excise* v. *Cure & Deeley Ltd.* [1962] 1 QB 340; below, p. 882.

[74] At 364 (Sachs J).

[75] Below, p. 717.

[76] *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 WLR 1320 at 1326, quoted above, p. 275.

[77] *Secretary of State for Employment* v. *ASLEF* (No. 2) [1972] 2 QB 455.

The Tameside *case*

The tendency just described was powerfully reinforced by the House of Lords, unanimously upholding a unanimous Court of Appeal, in the case of the Tameside schools.[78] After a local election the new council proceeded to reverse their predecessors' scheme, already in an advanced stage of execution, for introducing comprehensive schools. The Secretary of State, who favoured comprehensive schools, issued a statutory direction to the new council to carry out the original scheme. The Act empowered him to issue directions if he was 'satisfied . . . that any local authority . . . have acted or are proposing to act unreasonably' in their statutory functions.[79] When the new council resisted he applied for an order of mandamus to force them to comply. This was refused by the Court of Appeal and the House of Lords on the ground that he must have misdirected himself in law and misunderstood the meaning of 'unreasonable' in the Act. It was not enough that he should personally disagree with the council's policy, or even that he should genuinely think that it was unreasonable. There had to be evidence that the council was acting in a way in which no reasonable council would act.[80] Since the real issue was a disagreement over policy, and the administrative difficulties were shown to be easily soluble, the Secretary of State was not legally entitled to be satisfied as the Act required, and his directions were invalid. Lord Wilberforce said:[81]

> The section is framed in a 'subjective' form—if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account.

Little authority was cited for this objective approach, but the House adopted it unanimously. The Privy Council has since held that an emergency power of detention exercisable 'if the Governor is satisfied' as to acts prejudicial to public safety etc., requires that the Governor should be able to show reasonable grounds, though here there was a helpful constitutional context.[82]

It does not follow that words such as 'if the minister is satisfied' are now of little significance. For it may be material whether the question for the minister is 'a

[78] *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] AC 1014.

[79] Education Act 1944, s. 68. The Education Act 1976, passed after the *Tameside* case, gave wider compulsory powers to the Secretary of State.

[80] See above, p. 364.

[81] At 1047.

[82] *A.-G. of St Christopher* v. *Reynolds* [1980] AC 637.

matter of pure judgment', as Lord Wilberforce put it, or a matter which can be established objectively by accepted legal standards, as can unreasonableness. Lord Denning MR expressed the same thought in the Court of Appeal:[83]

> Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that someone has been guilty of some discreditable or unworthy or unreasonable conduct, that is another.

The minister may therefore be a free agent to the extent that, in the words of Lord Greene MR, 'no objective test is possible'.[84] And even where it is a question of discreditable or unreasonable conduct the court may hold that the facts supporting the exercise of discretion are not open to review because of the nature of the legislation. The Department of Trade may investigate a company's affairs 'if it appears' to them that there are circumstances suggesting malpractice, but the department will not be put to proof of these circumstances, since summary powers are a quid pro quo for the legal privileges which limited companies enjoy.[85]

Nevertheless the *Tameside* case is undoubtedly a landmark, manifesting the same judicial resistance to statutes which attempt to confer arbitrary power as appears in the *Anisminic* case[86] and elsewhere.

Other examples

In two immigration cases where the law gave a right of entry to a Commonwealth citizen 'who satisfies an immigration officer' that he has means of support or comes for a course of study, the court treated these questions as purely objective: it quashed or upheld the immigration officer's ruling according to its own view of the law and the facts,[87] at the same time stating that it was not a court of appeal, but had to see that the Act had been administered fairly and properly construed.[88] Similarly a local authority could not lawfully be 'satisfied' that a homeless person was not 'vulnerable' when they misconstrued the latter word as requiring some substantial disability.[89]

[83] [1977] AC at 1025.

[84] *Robinson* v. *Minister of Town and Country Planning* [1947] KB 702 at 713. See also *Thornloe & Clarkson Ltd.* v. *Board of Trade* [1950] 2 All ER 245; *Adegbenro* v. *Akintola* [1963] AC 614.

[85] *Norwest Holst Ltd.* v. *Secretary of State for Trade* [1978] Ch. 201.

[86] Below, p. 718.

[87] *R.* v. *Chief Immigration Officer Lympne Airport ex p. Amrik Singh* [1969] 1 QB 333 (quashed); *R.* v. *Immigration Appeals Adjudicator ex p. Khan* [1972] 1 WLR 1058 (upheld). See similarly *R.* v. *Diggines ex p. Rahmani* [1986] AC 475 (quashed).

[88] *Amrik Singh's* case (above) at 342.

[89] *R.* v. *Waveney DC ex p. Bowers* [1983] QB 238; and see *Kelly* v. *Monklands DC* 1986 SLT 169.

In a case where the minister had to be satisfied by medical certificates that a person was a defective, Lord Denning said that 'satisfied' meant 'reasonably satisfied', and that if no reasonable person would have been satisfied, the minister's order would be liable to be quashed.[90] This in fact was done where a minister had power to dispense with a public inquiry into a road scheme if he was satisfied that it was unnecessary. It was held that a reasonable minister could not have been so satisfied since there were numerous objections and strongly conflicting interests.[91] These were not the first cases in which the duty to act reasonably was brought to bear upon subjective discretionary power: the same qualification had been suggested in a Housing Act case a quarter of a century earlier.[92]

The court is always likely to disregard subjective language if there is any indication that the action taken is outside the scope of the statute. Thus a council's highway order was quashed on the ground that the highway was already partly a street, although they were empowered to make the order 'where it appears to the appropriate authority that an existing highway should be converted into a new street'.[93] Where a new street already existed they were without power, and the wide subjective language could not give them final authority over 'fundamental matters such as this'. Nor will such language afford protection where the excess of power is founded on a mistake of law. A rent tribunal's rent-fixing order was accordingly quashed in so far as it was based on a premium not in fact paid by the tenant.[94] There was power to reduce the rent 'where . . . it appears to the tribunal that . . . a premium has been paid', but the payment had been made in consideration of work done by the landlord and was therefore not in law a premium, i.e. a payment in consideration of the grant of a lease. No court confronted with so patent an error is likely to allow it to stand.

Tax cases

Tax authorities are commonly invested with very wide powers, freely embellished with subjective language. Sometimes, moreover, they assume them without statutory authority, as in the case of extra-statutory concessions, already discussed.[95] Their powers of search and seizure may also be very extensive.[96] Here may be mentioned some of their more ordinary powers, as where they are empowered to

[90] *Director of Public Prosecutions* v. *Head* [1959] AC 83 at 110; cf. *Reade* v. *Smith* [1959] NZLR 996, below.

[91] *R.* v. *Secretary of State for the Environment ex p. Binney*, The Times, 8 October 1983.

[92] *Re Bowman* [1932] 2 KB 621 at 634 (hypothetical case where no material, information or representation before local authority to justify clearance order).

[93] *Relton & Sons (Contracts) Ltd.* v. *Whitstable UDC* (1967) 201 EG 955.

[94] *R.* v. *Fulham etc. Rent Tribunal ex p. Philippe* [1950] 2 All ER 211.

[95] Above, p. 410.

[96] See the *Rossminster* case, below, p. 432.

call for 'such particulars as they think necessary' for specified purposes. In principle these powers are subject to the control of the court in case they may be exercised unreasonably or oppressively,[97] but in their nature they are so wide that attempts to challenge them will often fail.

Taxing Acts sometimes give the revenue authorities arbitrary powers of assessment, and the courts naturally strive to impose some control upon these. A striking example was the case where purchase tax regulations were held invalid because they allowed the taxpayer no adequate opportunity to dispute the assessment, as explained above.[98] In some cases it has been held that, however subjectively the power is worded, the authorities must at least act on evidence which could reasonably justify their assessment. A Canadian minister was empowered to disallow for tax purposes 'any expense which he in his discretion may determine to be in excess of what is reasonable or normal'. On appeal the Privy Council held that the Act made the minister 'the sole judge of the fact of reasonableness or normalcy [*sic*]' and that the court was not at liberty to substitute their opinion for his.[99] But they went on to refer to the familiar rule of judicial review requiring reasonableness. Although the case was in fact an appeal, the Privy Council applied the 'review' standard of reasonableness, and they set aside the minister's ruling because no evidence was produced which would reasonably justify it. They said:

> The court is, in their Lordships' opinion, always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are in the opinion of the court insufficient in law to support it, the determination cannot stand. In such a case the determination can only have been an arbitrary one.

This case is a remarkable contrast to *Liversidge* v. *Anderson*, discussed below.[1]

Another Privy Council case from Guyana, also on appeal, concerned a tax assessment which could be made only 'where . . . the Commissioner is of opinion that the person is liable to pay tax'. It was held that on the facts he could have formed no reasonable opinion to this effect, and the assessment was annulled.[2]

The Crown

Certain Australian decisions have suggested an exception in favour of the Crown's representatives, i.e. the Governor-General and State Governors.[3] According to

[97] *Royal Bank of Canada* v. *Inland Revenue Commissioners* [1972] Ch. 665; *Clinch* v. *Inland Revenue Commissioners* [1974] QB 76; *Wilover Nominees Ltd.* v. *Inland Revenue Commissioners* [1974] 1 WLR 1342.

[98] *Customs & Excise Commissioners* v. *Cure & Deeley Ltd.* [1962] 1 QB 340 (above, p. 423).

[99] *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* [1947] AC 109.

[1] p. 430.

[2] *Argosy Co. Ltd.* v. *Inland Revenue Commissioner* [1971] 1 WLR 514.

[3] See *Australian Communist Party* v. *The Commonwealth* (1951) 83 CLR 1 at 179–80 (Dixon J); *R.* v. *Martin* (1967) 67 SR (NSW) 404.

this, subjective language of the 'if satisfied' or 'if of opinion' type would render the Crown representative's action immune from judicial review on the basis of bad faith, irrelevant considerations, misconception of the meaning of the matters to be considered, or 'some other miscarriage'. No such exception is recognised by the Privy Council, as has already been seen;[4] nor is it recognised in New Zealand. In the leading New Zealand case the Supreme Court condemned a regulation made by the Governor-General which authorised the compulsory transfer of pupils between schools and which was held to be in conflict with the principle of parental choice on which the Act was founded.[5] The Act empowered regulations which 'in the opinion of the Governor-General' were required 'for any purpose which he thinks necessary in order to secure the due administration of this Act'. The Court held that it could always inquire whether the Governor-General could reasonably have formed the necessary opinion, and whether he had acted on an untenable view of a question of law.

The suggested exception seems to be contrary to principle and unlikely to be followed. In a later decision the High Court of Australia has decided that the powers of the Crown's representatives are reviewable on normal principles.[6] The distinction which needs to be made has nothing to do with the empowered authority's position in the administrative hierarchy: it should be based on the nature of the matters on which it must satisfy itself. In time of war or grave emergency these are likely to be so wide and difficult of proof that it can hardly be supposed that the court will be in a position to question them.[7] In other contexts the principles of judicial review should have their normal operation. As Turner J said in the New Zealand case:[8]

> Cases dealing with war regulations promulgated in time of great national danger must, in my opinion, be carefully examined before being used too hastily as a touchstone for the validity of regulations made under more normal conditions.

No case could better illustrate this truth than the decision of the House of Lords in *Liversidge* v. *Anderson*,[9] discussed below.

Formalities

It does not appear that it is essential to recite the minister's satisfaction or opinion, as the case may be, in the text of the order, since the court is sometimes prepared to

[4] *A.-G. for Canada* v. *Hallett & Carey Ltd.* [1952] AC 427 at 444; above, p. 420.
[5] *Reade* v. *Smith* [1959] NZLR 996.
[6] *R.* v. *Toohey ex p. Northen Lands Council* (1982) 151 CLR 170; *FAI Insurances Ltd.* v. *Winneke* (1982) 41 ALR 1; *Minister for Arts* v. *Peko-Wallsend* (1987) 75 ALR 218.
[7] See *Re Chemicals Regulations* [1943] 1 DLR 248; above, p. 421.
[8] *Reade* v. *Smith* (above) at 1000.
[9] [1942] AC 206; below, p. 430.

assume it or to accept a subsequent statement.[10] In former times a full recital was required, in accordance with the old rule, now obsolete, that the order of an inferior tribunal or authority must show on its face the facts necessary to give it jurisdiction.[11] Good practice of course requires that the proper recital should be made. The House of Lords confirmed this where a judge granted warrants of search and seizure to tax officials under an Act authorising him to grant them 'if . . . satisfied' that there was reasonable ground for suspicion. The warrants did not recite that he was so satisfied, but it was held that this recital, though desirable, was not essential to their validity.[12]

STATUTORY REASONABLENESS

Objective conditions

A condition requiring some degree of reasonableness will often be prescribed by statute. If the language is objective, the authority will have to be prepared to show that the condition is fulfilled in a way which satisfies the court. If a sound building may be included in a clearance area if that is 'reasonably necessary', a minister's decision to include it will be quashed if there is no evidence of any necessity.[13] If a licensing authority has power to revoke a trader's licence if it has 'reasonable cause to believe' that the licensee has committed malpractices, the authority must show causes which the court judges to be reasonable.[14] This is simply the ordinary doctrine that empowers the court to judge whether statutory conditions are satisfied. The case is of course different if the power is worded subjectively, as where a legal aid committee may refuse aid 'if it appears unreasonable' to grant it in any case.[15] Such a subjective formula may restrict the court's control—though, as has been seen, it may be rash to count on the court accepting it at face value.[16]

In the ordinary case where the court is the judge, the standard will be the familiar legal standard of the reasonable man. But it by no means follows, because

[10] *R.* v. *Comptroller-General of Patents ex p. Bayer Products Ltd.* [1941] 2 KB 306 at 314 (but the sense is doubtful); *Land Realisation Co. Ltd.* v. *Postmaster-General* [1950] Ch. 435; *Thornloe & Clarkson Ltd.* v. *Board of Trade* [1950] 2 All ER 245; *Union Motors Ltd.* v. *Motor Spirits Licensing Authority* [1964] NZLR 146. See also *Liversidge* v. *Anderson* (below) at 224. Contrast *R.* v. *Martin* (above).

[11] Rubinstein, *Jurisdiction and Illegality*, 170, citing *R.* v. *Whittles* (1849) 13 QB 248.

[12] *R.* v. *Inland Revenue Commissioners ex p. Rossminster Ltd.* [1980] AC 952 (Lord Salmon dissenting). No decisions on this point were mentioned in the speeches.

[13] *Coleen Properties Ltd.* v. *Minister of Housing and Local Government* [1971] 1 WLR 443.

[14] *Nakkuda Ali* v. *Jayaratne* [1951] AC 66.

[15] *R.* v. *Legal Aid Committee No. 1 (London) Legal Aid Area ex p. Rondel* [1967] 2 QB 482.

[16] Above, p. 421.

the standard of reasonableness is objective, that it is also rigid. There may be a broad band of different decisions or policies all of which fall within the range of reasonableness, and two opposite policies may be equally reasonable. Under the Housing Act 1985 housing authorities 'may make such reasonable charges for the tenancy or occupation of the houses as they may determine',[17] but this leaves them at liberty either to fix their rents at flat rates which make no allowance for the tenant's personal circumstances[18] or, alternatively, to impose a scheme of differential rents which subsidises the poorer tenants at the expense of the ratepayers.[19] In the same way the authority may fix rents at overall rates which take no account of the differing costs of construction of different houses.[20] Of none of these different courses could it be said that it was 'manifestly unjust' or 'could find no justification in the minds of reasonable men' within the *Wednesbury* test previously explained.[21] The housing authority was 'applying what is, in effect, a social policy upon which reasonable men may hold different views'.[22] The degree of objectivity in the test of reasonableness can therefore vary widely with the statutory context and purpose.

'Reasonable cause to believe'

Objectivity may be reduced to vanishing point if the circumstances are strong enough—or, at least, this happened in *Liversidge* v. *Anderson*, a case of emergency powers in wartime. The Defence (General) Regulations 1939 provided: 'If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . . he may make an order against that person directing that he be detained'. By all accepted canons of interpretation this language required the Secretary of State to show cause which the court would adjudge to be reasonable.[23] If the Secretary of State had been intended to be the sole judge of the grounds of detention, the Regulation should have used a subjective formula such as 'the Secretary of State, if satisfied . . .'. And indeed those very words had been used in the original form of the Regulation,[24] which had been criticised in Parliament and amended into the objective form. Nevertheless, when a detainee challenged the Secretary of State's grounds, all the courts held that in the circumstances of the war

[17] s. 24.
[18] *Luby* v. *Newcastle-under-Lyme Cpn.* [1964] 2 QB 64.
[19] *Smith* v. *Cardiff Cpn.* (No. 2) [1955] Ch. 159.
[20] *Summerfield* v. *Hampstead Borough Council* [1957] 1 WLR 167.
[21] See *Luby* (as above) at 71.
[22] *Luby* (as above) at 72. An obvious case of illegal abuse was *Backhouse* v. *Lambeth Borough Council*, above, p. 389.
[23] Above, p. 250.
[24] SR & O 1939 No. 978. See *Liversidge* v. *Anderson* [1942] AC 206 at 237.

there could be no judicial review of the reasonableness of the Secretary of State's grounds of belief.[25]

Viscount Maugham said that despite the prima facie meaning of the vital words, they might have a different and subjective meaning where the thing to be believed was essentially something within the knowledge of the Secretary of State and a matter for his exclusive discretion. This proposition was vehemently denied by Lord Atkin in his lone dissenting speech,[26] in which he contended that 'the words have only one meaning' and 'have never been used in the sense now imputed to them'. He protested against 'a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister', and denied that the words 'if a man has' could ever mean 'if a man thinks he has'. His caustic remarks about judges, who 'show themselves more executive minded than the executive', arguments which 'might have been addressed acceptably to the Court of King's Bench in the time of Charles I' and Humpty Dumpty's use of a word to mean 'just what I choose it to mean' gave rise to some unusual public controversy.[27] Legal opinion was for the most part on Lord Atkin's side on the question of construction.[28] When a similar form of words came before the Privy Council in a post-war case, where the statute gave power to cancel a textile dealer's licence 'where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer', the Judicial Committee held that the 'reasonable grounds' formula bore its usual objective sense, so that the Controller was required to show that his grounds were reasonable in the eyes of the court.[29] Lord Radcliffe said that it would be a very unfortunate thing if *Liversidge's* case were regarded as laying down any general rule. He added that the formula must be intended to limit an otherwise arbitrary power, but that if it was to be conclusively interpreted by the man who wielded the power, the value of the intended restraint was in effect nothing.

In 1963 Lord Reid referred dismissively to 'the very peculiar decision of this House in *Liversidge* v. *Anderson*'[30] and by then it was already clear that the decision was regarded as an aberration. It remained for Lord Diplock to say in 1979:[31]

> For my part I think the time has come to acknowledge openly that the majority of this House in *Liversidge* v. *Anderson* were expediently and, at that time, perhaps, excusably wrong and the dissenting speech of Lord Atkin was right.

[25] *Liversidge* v. *Anderson* [1942] AC 206 (action for false imprisonment); and see *Greene* v. *Home Secretary* [1942] AC 284 (habeas corpus).

[26] Another lone dissent was that of Stable J in *R.* v. *Home Secretary ex p. Budd* [1941] 2 All ER 749, affirmed [1942] 1 All ER 373.

[27] For an account of this and for the case generally see (1970) 86 *LQR* 33, (1971) 87 *LQR* 161 (R. F. V. Heuston) and A. W. B Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (1992).

[28] Professor Heuston's articles (above) give a good survey.

[29] *Nakkuda Ali* v. *Jayaratne* [1951] AC 66, followed in *Registrar of Restrictive Trading Agreements* v. *W. H. Smith & Son Ltd.* [1969] 1 WLR 1460.

[30] *Ridge* v. *Baldwin* [1964] AC 40 at 73.

[31] In the *Rossminster* case (below) at 1011.

And Lord Scarman said in the same case that the ghost of that decision need no longer haunt the law.

It will not always be the case, however, that the governmental authority can at once be put to proof of the reasonableness of its grounds. For if criminal proceedings are in prospect, the information will be protected by 'public interest immunity'[32] until the proceedings are concluded or a reasonable time has elapsed without proceedings being brought. This was the position, as the House of Lords held, where officers of the Inland Revenue had carried out an elaborate and drastic raid on the homes and offices of two tax consultants and had seized large quantities of papers. They had obtained search warrants authorising them to seize and remove anything which they had reasonable cause to believe might be required for the purposes of legal proceedings for tax offences involving fraud. Since many of the papers had been seized and removed without scrutiny, the Court of Appeal held that the tax officers could not have had reasonable cause to believe that they might be required. But the House of Lords held that this was not proved and that the issue could be litigated only after criminal proceedings were either concluded or abandoned.[33]

Statutory unreasonableness

As well as prescribing conditions in terms of reasonableness, statutes may prescribe them in terms of unreasonableness. The objective legal standard of reasonableness, as already explained, is then again the criterion, though in the negative sense. In the Tameside comprehensive school case,[34] where the Secretary of State was required to be satisfied that the local authority had acted unreasonably, the House of Lords disallowed his intervention because he had evidently misdirected himself as to the meaning of 'unreasonably': the evidence showed that the local authority's plan to restore grammar schools, though it raised difficulties, was not so impracticable that no reasonable authority could have adopted it.

Objectivity forsaken and restored

Scarcely had the House of Lords completed the obsequies of *Liversidge* v. *Anderson* when they held in an immigration case that objective words might be interpreted subjectively so as to give a minister an area of discretionary power. This serious lapse and its prompt correction have been noted already,[35] but they deserve to be

[32] Explained below, p. 847.
[33] *R.* v. *Inland Revenue Commissioners ex p. Rossminster Ltd.* [1980] AC 952.
[34] Above, p. 424.
[35] Above, p. 232.

put alongside *Liversidge* v. *Anderson* as another example of the House of Lords forsaking the principle of objectivity and later eating its words.

Under the Immigration Act 1971 an immigration officer may detain an 'illegal entrant' who may then be removed from the country by the Home Secretary. An 'illegal entrant' is defined in the Act as a person entering or seeking to enter unlawfully.[36] The question whether his entry was or was not unlawful ought therefore to be decided upon the objective facts. But the House of Lords held that 'the whole scheme of the Act' indicated the contrary, and that the court could intervene only if the Home Secretary was acting on no evidence or in a way in which no reasonable person could do.[37] It was said that, although there were no words such as 'in the opinion of the Secretary of State', such a formula was not necessary; and that the nature and process of the powers conferred upon immigration officers was incompatible with any requirement for the establishment of precedent objective facts which the court could verify. In less than three years, fortunately, the House reversed itself in a closely similar case, holding that 'illegal entrant' was a precedent or jurisdictional fact to be determined on all the evidence by the court, and that on the facts the Home Secretary had failed to show that one of the appellant immigrants was an illegal entrant.[38] The House restored the principle that the court must be the final judge of objectively stated facts. Why it was ever denied is even harder to understand than in *Liversidge* v. *Anderson*, since there was no situation of emergency. The explanation may be that the rapid expansion of judicial review had led judges to suppose that its rules for the review of discretionary decisions were the only operative restraints on the executive,[39] forgetting the independent and more fundamental principle of objectivity.[40]

Ambiguous language; 'Required'; 'Regulate'

Many words take their colour from their context, and this may make the difference between objective and subjective construction. One such word is 'required'. If a public authority is empowered to take land 'required' for certain purposes, does it have to show to the court that there is a real need or is it the sole judge of the need itself? Can 'required' mean merely 'desired'? The decisions show that there is no rigid rule, even on similar words in similar Acts. Thus in one case where the

[36] For the precise meaning see *R.* v. *Naillie* [1993] AC 674; *R.* v. *Secretary of State for the Environment ex p. Tower Hamlets LBC* [1993] QB 632.

[37] *R.* v. *Home Secretary ex p. Zamir* [1980] AC 930. The only reasoned speech was that of Lord Wilberforce. The House approved *R.* v. *Home Secretary ex p. Hussain* [1978] 1 WLR 700. See similarly *R.* v. *Home Secretary ex p. Choudhary* [1978] 1 WLR 1177, but contrast the cases cited above, p. 425.

[38] *R.* v. *Home Secretary ex p. Khawaja* [1984] AC 74 (above, p. 292). See also *R.* v. *Home Secretary ex p. Bugdaycay* [1987] AC 514.

[39] This seems probable from some unsound statements made in the lower courts and reviewed in the speech of Lord Wilberforce in *Khawaja*.

[40] For which see above, p. 250.

question was whether a local authority was obliged to dispose of land as 'not required' for a sewage works, the judge held on the evidence that the land was likely to be required in the future and so should be retained.[41] Clearly he regarded the words as objective. And 'requisite' has been interpreted similarly.[42] But in another case it was held that it was solely for the local authority to decide whether land was 'not required' for its original purpose, so that it could be appropriated to other purposes.[43] The Court of Appeal, though not without some reluctance,[44] has declared itself in favour of the latter interpretation.[45] Russell LJ construed 'not required' as meaning 'not needed in the public interest of the locality', and said that 'the local authority is better qualified than the court to judge, assuming it to be acting bona fide and not upon a view that no reasonable local authority could possibly take'.

But just as this permissive interpretation is subject to the usual requirements of good faith and reasonableness, so it must also be subject to the rule about illegitimate purposes.[46] The Court of Appeal accordingly condemned a compulsory purchase order made by a district council for land 'required by them' for coast protection work when it appeared that a substantial part of the land was to be used for purposes of public amenity and was not needed for coast protection.[47] At first instance the order was quashed on the ground of bad faith, but on appeal the council was absolved from that charge. 'Required' was held to mean 'properly required' for the correct purpose, and since in fact the land was required for a different purpose, the order could not stand. The difference between this and the cases mentioned in the preceding paragraph is clear. The former cases are concerned only with whether land is or is not needed for an admittedly valid purpose. In this last case there is the additional feature of an illegitimate purpose, outside the powers of the Act in question. The case then becomes one of ultra vires which no court is likely to condone.

Another ambiguous word, common in administrative law, is 'regulate'. It has several times been decided that a power to regulate does not extend to a power to prohibit, the assumption being that a power to regulate implies the continued existence of what is to be regulated.[48] But the contrary has also been held where the context was suitable,[49] as it was when the House of Lords held that the Railways Board were entitled to impose a general ban on smoking in trains under

[41] *A.-G.* v. *Teddington Urban District Council* [1898] 1 Ch. 66. And see *Stocker* v. *Minister of Health* [1938] 1 KB 655 at 663.

[42] *R.* v. *Secretary of State for the Environment ex p. Powis* [1981] 1 WLR 584.

[43] *A.-G.* v. *Manchester Cpn.* [1931] 1 Ch. 254.

[44] *Per* Buckley and Lawton LJJ. *Webb's* case (below) was not cited.

[45] *Dowty Boulton Paul Ltd.* v. *Wolverhampton Cpn.* (No. 2) [1976] Ch. 13.

[46] Above, p. 361.

[47] *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755.

[48] *Toronto Cpn.* v. *Virgo* [1896] AC 88; *Birmingham and Midland Omnibus Co.* v. *Worcestershire CC* [1967] 1 WLR 409; *Tarr* v. *Tarr* [1973] AC 254.

[49] *R.* v. *British Airports Authority ex p. Wheatley* (1983) 81 LGR 794 (control of taxicabs at airport).

their power to regulate 'the use and working of, and travel on, their railways'.[50] Power to prohibit, furthermore, may include power to regulate, as by making some activity subject to the grant of permission.[51]

[50] *Boddington* v. *British Railways Board* [1999] 2 AC 143.
[51] *Foley* v. *Padley* (1984) 54 ALR 609.